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Relating Contract and Regulation in Global Value Chains

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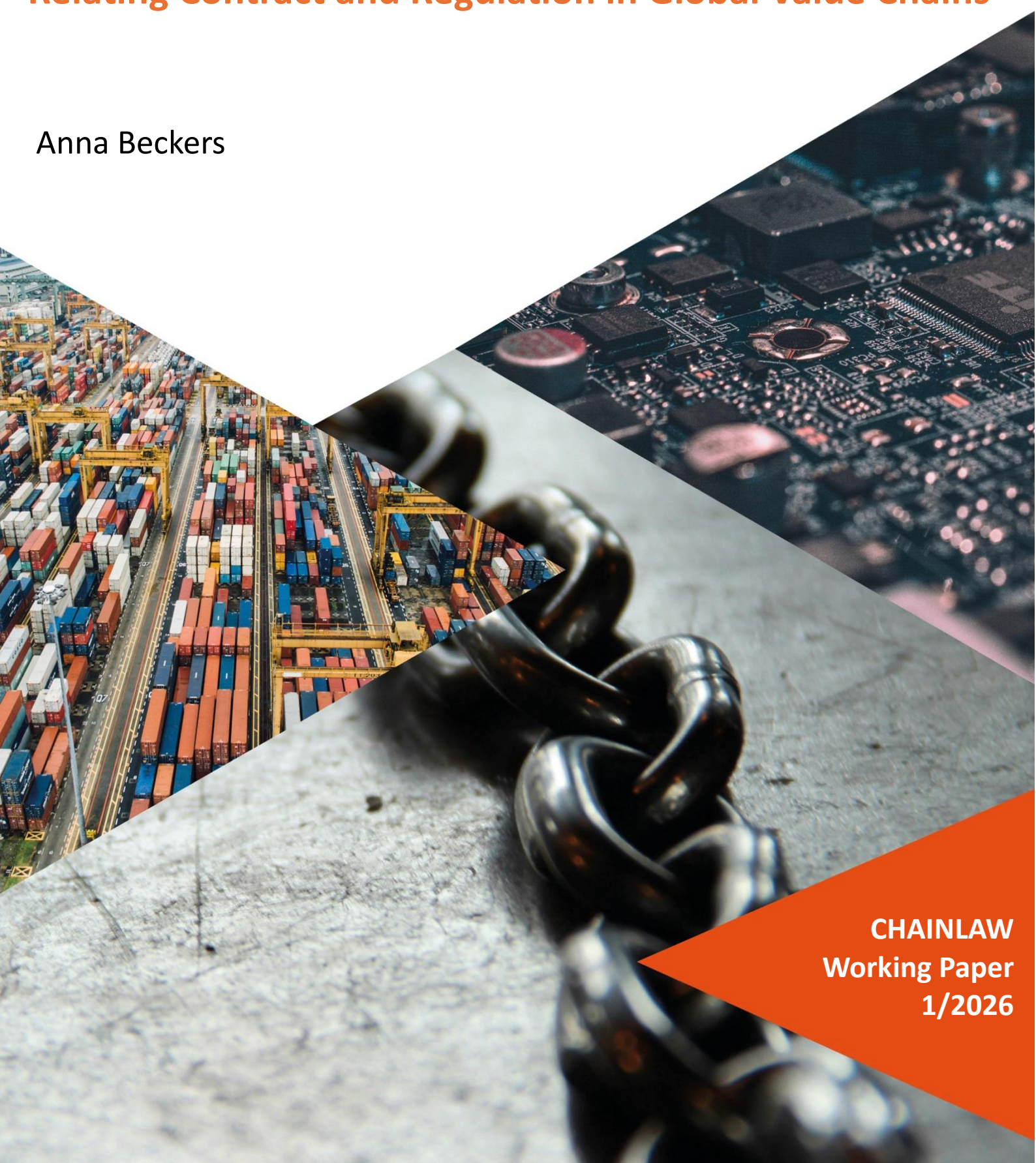

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Relating Contract and Regulation in Global Value Chains

*Anna Beckers**

This contribution centres on the relation between contract and regulation in the context of Global Value Chains (GVCs). At the core, it suggests that this very relation, as addressed widely in this handbook, needs to be rethought for the specific political economy of GVC capitalism. More specifically, the contribution argues that there are three dimensions of contract/regulation present in the current operation of GVCs: regulation of, by and through contract. Regulation of contracts denotes the increased use of law - contract law or other areas of law - to intervene regulatorily into GVC contracts for public policy objectives. This would mainly fall under the category of regulatory contract law as understood in this handbook. The objectives pursued with such regulatory contract law can be different and partly conflicting, but in the context of GVCs, they generally relate to sustainability, social responsibility, fairness and geopolitics.
In contrast, regulation by contract is the evident use of contracts in GVCs by private parties, corporations and wider societal actors, as an instrument to regulate chain-wide operations. Finally, regulation through contracts is a recently observable tendency by public actors to connect regulation of and by contract. By piggybacking on private regulation by contract, public regulators do not intervene in but make use of private regulation to extend the regulatory influence beyond their territorial sovereignty. It is a hybrid arrangement in which public actors deploy private actors to export their policies and gain global influence. The contribution discusses these three dimensions of the contract/regulation spectrum in the specific context of GVCs and argues that the political economy of supply-chain capitalism – that is different from the liberal political economy depicted as the basis for the handbook – makes it possible to have those three dimensions present at the same time.

I. Introduction

The relation between regulation and contracts can be described very differently. In this handbook, a core feature is to start from an exercise of juxtaposition: The starting point is contracts that are based on party autonomy, which, in turn, is secured by a formal private

law system. The principle of freedom of contract is understood to have a long-standing heritage dating back to the industrial revolution and has survived as a core principle that underpins contract law. As the two handbook editors state: "Contractual freedom came to represent the core of the liberal paradigm of individual freedom. The 19th century, often referred to as 'the years of contract,' was characterised by the belief that adherence to laissez-faire principles would not diminish individual freedom or dignity but would instead promote social justice through self-responsibility." (Atamer and Hellgardt forthcoming, 1) Regulation, in contrast, is understood as the other side of the spectrum with the rules that intervene into such contractual autonomy for various (public) objectives or values. In that sense, regulation represents the body of law that challenges the success of self-responsibility and the invisible hand of the market and assumes the need for law to interfere with markets for the sake of public goals. Hence, regulatory contract law is understood as an inquiry into the rules that interfere with contractual freedom. Following this understanding, one needs to place contract and regulation on opposing ends between the private (market) and public (legal) spheres. One consequence of this understanding is that freedom of contract and thus contracts become the natural starting point and regulation the legal intervention into such freedom that requires justification. To again quote the editors: "We understand regulatory contract law as the body of rules that limits freedom of contract in order to pursue value-driven objectives." (Atamer and Hellgardt forthcoming, 2).

This contribution starts from the premise that there are phenomena in which this reading of contract vs. regulation or freedom of contract vs. legal intervention and natural freedom vs. justifiable intervention may not hold, or where it may not be helpful to capture the whole picture. One of these phenomena is Global Value Chains (in the following GVCs), the topic that this contribution is asked to focus on. This phenomenon requires us to think very differently about the relation of contract and regulation than starting from freedom of contract and understanding regulation as an intervention requiring justification. The central reason underlying this understanding relates to the political economy. The editors place their theoretical underpinning on contract vs. regulation within the framework of "classical political economy", which they relate to Adam Smith. This understanding of political economy is, however, different from the political economy in which GVCs operate: GVCs differ from the classical understanding of liberal market economy in which markets operate through exchange, and regulation is only needed in case of imbalances or other publicly justified reasons. Instead, GVCs represent a political economy in which regulation is not only linked to the state intervening (through public law or contract law rules) but also an instrument used by powerful private actors themselves. A characteristic of GVCs is their inherent (and legally stabilised) power asymmetry, allowing certain actors in the chain to engage in regulatory activity. Moreover, there is another dimension that is specific to GVCs: Recent laws addressing GVCs show a new tendency by which states use such private regulation rather than constraining it. Against this background, my central claim in this contribution is to argue for a threefold understanding of the relation between contract and regulation in the specific context of GVCs: Regulation appears as regulation of contracts (part of what, in this book, would qualify as regulatory contract law) as well as regulation by contract and, recently, as regulation through contract.

Before discussing these three dimensions of regulation of, by and through GVC contracting, the contribution should explain why GVCs, their legal underpinnings and the

political economy they operate in are important for discussing contract and regulation. One obvious answer is to look at the numbers and the sheer size in which GVCs shape global trade. Estimates from international organisations range from half to two third of global trade taking place in GVCs, which makes it a determining feature in the global economy.[1] In addition GVCs can be seen as a particular evolution of the capitalist system, what has become to be called supply-chain capitalism (Tsing 2009, at 149; Danielsen 2021, section I; Ruggie 2021). If the underlying idea of this handbook is to relate the relation between contract and regulation to the underlying political economy (as explained in the introduction) then GVCs are relevant to include precisely because they arguably represent a different stage in the evolution of the capitalist political economy. An important premise here is that GVCs are neither located entirely on the market nor on the regulation side; instead, GVCs are a different form of global economic organisation that forces us to reconsider the relation between market and regulation, with both being present at the same time in different shapes. The character of GVCs and their relation to political economy are explained in Section 2. In this context, GVCs exhibit three specific characteristics of regulation and contract: GVCs are based on contract, supported by a facilitative contract law, where the same contract law is discussed as to its regulatory potential, i.e. regulation *of* contracts through contract law. Currently, this regulation of GVC contracts is mainly discussed with a view to formal contract law rules, but also specific GVC laws (Beckers 2023) that have a significant regulatory impact on contract law (section 3). In this regard, we can see how contract law doctrine can be used by courts, through legislation or by strategic litigators to transform GVCs from within, specifically by changing the underlying power asymmetry. Second, because of their contractual underpinnings that are used for governance and regulatory purposes, GVCs are a prime example for regulation *by* contract, i.e. (public) regulatory objectives being furthered by contracting practices with the result of elevating the contracting parties to take over regulatory functions (section 4). Third, we see – mainly in the above-mentioned specific GVC laws – how public legislators deploy GVCs and their contractual underpinnings as an instrument for (global) regulation: Rather than focusing on regulating contracts, public authorities rely – what I would call piggyback – on regulation by contract to extend their authority beyond the territory. They regulate *through* contracts (section 5). This contribution seeks to show how these three dimensions are essential for making sense of specifically GVCs when it comes to understanding the role of contract, contract law, and regulation.

II. The political economy of GVCs, contract law, and regulation

As is natural for every research endeavour, the debate on contract and regulation makes certain assumptions about the relation between contracts, markets and the states, and the present handbook is no exception in that regard. Some of those assumptions are hidden, some are more explicitly discussed. One of the explicitly discussed assumption is the embedding of regulatory contract law in the liberal (of the editors of the handbook qualify it as "classical") political economy approach of how markets are organised and

[1] The exact numbers vary but range from 70% of global trade (OECD, 2025 https://www.oecd.org/en/topics/global-value-and-supply-chains.html) to 80% (UNCTAD although those numbers are from 2013, https://unctad.org/press-material/80-trade-takes-place-value-chains-linked-transnational-corporations-unctad-report) and more conservative calculation with 30-50% (World Bank 2021/2025, https://documents1.worldbank.org/curated/en/476361632831927312/pdf/Economic-Consequences-of-Trade-and-Global-Value-Chain-Integration-A-Measurement-Perspective.pdf).

what the role of the state and the law is (Atamer and Hellgardt forthcoming). But, of course, this liberal understanding of political economy with party autonomy and freedom of contract as central pillars can be contested. As ordoliberalism has taught us, private activity on markets requires stabilising through an overarching constitutional order that ensures such autonomy and the functioning of competitive markets (Böhm 1989). Public laws, such as strong competition laws, need to be in place to counter market power; there needs to be an economic constitution. In addition, private law itself needs to be equipped to stabilise the core of the economic order (Mestmäcker 1991) It is those legal rules that form the prerequisite for the creation of markets and thus the guarantee for contracts. Applying this understanding to GVCs, we would equally argue that they are constructs not operating on free markets as a given, but a form of organisation that runs smoothly precisely because of the support of complex legal arrangements. Even though there are many reasons why GVCs were able to grow (think of technological developments and mobility) (Baldwin 2016), it is also and specifically facilitated by private law institutions, such as freedom of contract but also property, mechanisms of dispute resolution: These legal mechanisms allowed GVCs to flourish and develop in their governance structure as they are because parties could rely on enforcement, they were thus constitutive for (GVC) capitalism (Hodgson 2015; on financial capitalism with a similar argument Deakin et al 2017, Pistor 2019); and public law, specifically international economic law, supported their growth through elimination of trade barriers and the liberalisation of markets (Koskenniemi 2025). Adopting this understanding, one can read most of the private law rules as regulatory precisely because they constitute the global trade in GVCs (Basedow 2024, 515.)

1. The political economy of supply-chain capitalism

However, this picture of GVCs as part of market liberalisation and constituted through private and public law is still incomplete to understand the political economy of GVCs. It still ignores that GVCs, while being a consequence of the "classical" liberal political economy and its supporting law, have evolved into a different, particular form of capitalist economy. The interdisciplinary literature on GVCs, specifically international political economy, has aptly documented that GVCs are a specific evolution in the international political economy that cannot be equated with the liberal understanding of a free market. Although based on contracts (Eller 2021; Eller and Salminen 2020.) and deriving from the liberalisation of trade, a characteristic of GVCs is the evolution of their governance structure in-between market and hierarchy (Gereffi, Humphrey et al. 2005.). GVCs are neither fully integrated nor are they arm's length exchanges on a market; instead, their governance architecture is determined by internal power structures, specifically the power of so-called lead firms, that can impose their rules, standards or relational leverage onto the chain. As a result, contracting in GVCs is neither a matter of freedom of contract and party autonomy between equals nor a top-down regulation by chain leaders, but rather a complex mixture of the two. GVCs are characterised by bilateral power asymmetries that shape relations between individual actors, but also systemic imbalances between compartments of the GVCs as well as the distinction between inside and outside (Dallas, Ponte et al. 2019).

To account for the options of actors participating in the chain, the GVC literature developed the concept "upgrading" to determine within the architecture of a chain the chances of different actors, such as suppliers, to move up to a higher level in the chain

(Humphrey 2004). Systemically, the GVC literature has also shown how, beyond the individual contractual relation, systemic power arrangements, such as institutionalised trading practices or proprietary standards govern the chain and influence the chances of different function-specific roles to transform or "upgrade". Moreover, as to the inside/outside distinction, the GVC literature accepts that joining a GVC is different from entering a market or building new GVCs, precisely because of the specific governance mechanisms present in GVCs (Baldwin 2011). In that respect, the economic geography literature on GVCs, such as the Global Production Networks (GPN) theory (Coe and Yeung 2015.), underlines the importance of embedding GVCs within the geographical spaces. Participation and upgrading in GVCs is not only of a question for private actors that seek to enter a market or engage in a specific form of trade; it is also determined by the connection of states and entire regions to specific GVCs with economic, geographical and infrastructural conditions playing a significant role. GVCs are thus embedded within the world system and patterns of economic development (Hopkins and Wallerstein 1977). In that context, the GPN literature also emphasises that states are neither entities that uniformly support the global political economy of GVCs and constitute them through law nor are they actors that mainly intervene regulatorily; instead, the differences between state approaches to GVCs and states' own stakes for economic development makes public regulation in GVCs a complex, often ambiguous but very influential element between facilitation, intervention and own economic power (Horner and Alford 2019).

2. The role of law in supply-chain capitalism

What, then, is the role of law, here understood as law deriving from the state or a public actor, in this specific political economy of GVCs? In a widely noted early manifesto on the law on GVCs, an interdisciplinary group of scholars argued convincingly that there is a lack of research on the role of the law for GVC capitalism (IGLP Law and Production Working Group 2016). While the socio-economic GVC literature focused mainly on governance of GVCs, the underlying economic forces driving them and the power structures, it has viewed law as an exogenous factor to their organisation. To counter this, the group argues that law should be seen as constitutive for the organisation of GVCs IGLP Law and Production Working Group 2016, 61). In this regard, one core insight is, indeed, that contract law rules premised upon party autonomy and freedom of contract become a mechanism facilitating the capability of powerful actors in the chain to exercise their governance functions (Bakan 2015, specifically on GVCs and workers Liukkunen 2024, 246 ff). Contracts, as other private law institutions as well, are thus constitutive for GVCs including for their (unequal) governance structure and the regulatory ability of certain actors. As regards states, there is so far not one overarching regulatory intervention into GVCs by states. Neither is there a consistent approach to regulating GVC contracts systematically, for instance, as networks (Muir Watt 2015; For some first attempts: Salminen 2016), nor a coherent addressing of the protection of structurally weaker parties (Cafaggi and Iamiceli 2019) or a regulation for public policy goals (Tjon Soei Len 2020; Poncibò 2016; Affolder 2018). Consequently, analysis on the law related to GVCs started by discussing the constitutive role of central private law institutions, including contract law, for the proliferation of GVCs. In that context, the emphasis was also put on how this constitutive role of the law – through the mechanisms of freedom of contract and party autonomy in contract law – has supported private actors to act as regulators.

However, the ten years following the manifesto have also seen the rise (and recent fall) of supply-chain legislation that ambiguously supports and intervenes in GVCs through law as well as significant strategic litigation. In the following sections, I will discuss related literature to show how contract law and GVC laws are discussed as to their regulatory character (what I discuss later as regulation of contract or regulatory contract law proper) as well as new forms of law-making by which states exploit the private regulatory potential inherent in GVCs (what I discuss later as regulation through contract).

III. Regulation of contract: Regulatory contract law in GVCs

As stated in the introduction, GVCs are primarily based on contract and thus legally governed by the law of contract. Which precise national or transnational law this is depends on the choices made in the contract, as well as what law the applicable rules regarding conflict of laws point to. However, without going into detail on the specifics of each national law, there are some commonalities among contract laws that are currently discussed in the literature on how they could be used for regulating GVCs.

In general, GVCs are mainly based on contracts, but the mode of contracting in GVCs is different from what is commonly associated with classical contract law. Because of their embedding within a broader governance structure, contracts in GVCs break with the principle of the privity of contracts (Salminen 2020). Private law scholarship interested in GVCs thus begins to think not only about what doctrines could be used to regulate GVCs but also how this may alter, quite fundamentally, our understandings of contract law itself. By now, there is a plethora of approaches to use existing contract law mechanisms – originally meant to pay respect to party autonomy and enforce contractual agreements – and turn them into mechanisms for regulating GVCs. Among the most visible attempts, to be discussed below, are 1) the rules on contract interpretation, 2) the relation between privity and third-party rights and benefits and 3) new forms of remedies. Those discussions take place primarily with a view to contract law rules, but they also feature within specific GVC laws that are at the intersection between private and public law. And while most of the regulatory interventions into GVCs through law are mainly discussed with a view to the public policy objectives of sustainability and social responsibility, there are also such regulatory interventions for the purpose of resilience, strategic autonomy and the new geopolitics.

1. Contact Interpretation and control of terms

On contract interpretation, the most visible strands can be found in the voices that advocate for a different interpretation of contractual obligations within GVCs. Departing from party intention or objective construction of contract terms, suggestions are to reconstruct the core contractual obligations considering the overall externalities that a contract causes within a broader chain structure. An example for such is the suggestion to interpret consumer contracts in light of the sweatshop conditions that are caused in the production of such goods and consider contracts that do not follow social and environmental justice considerations as void or invalid due to a breach of the law or good morals (Tjon Soei Len 2017. see also Bagchi 2015; Collins 2014 and, early on: Study Group on Social Justice in European Contract Law 2004). In relation to sustainability, we also find attempts to use the existing instruments in contract law on interpretation to read into supply-chain contracts public objectives related to sustainability. Examples are, for

instance, the use of the doctrine of implied terms to read sustainability objectives into the contract (Poncibò 2016, 338 ff.). There are other, quite similar approaches, that argue for treating sustainability as a general principle of contract law for the purpose of interpreting contracts (Zuloaga Ríos and Vial Undurraga 2025). This notion of relying on existing principles in contract law to read regulatory objectives of social protection and sustainability for entire GVCs into existing contract law has had, so far, relatively little resonance in practice and case law, apart maybe from consumer litigation, specifically the Dieselgate litigation (Grundmann 2025, 8). However, one notable exception to this is the Dutch case *Vert Asia Ltd.* v *G-Star*[2] in which the Court of Amsterdam relied on existing Dutch rules on contract interpretation (notably good faith) to read into the contract a principle of fair contracting in GVCs to then construct the duties of the parties accordingly. More specifically, even though the contractual relation was not constructed as a typical long-term contract exchange, the court constructed a duty of the parties to cooperate in the course of the pandemic that deemed the exercise of termination (cancelling orders) by the Dutch retailer a breach of contract because of the systemic dependence of the supplier in the context of the textile GVC.[3] A pretty similar approach is currently discussed in some GVC laws, specifically regarding sustainability due diligence. Starting as an academic debate on responsible contracting practices (Snyder, Maslow et al. 2021), a specific interpretation of GVC contracts found its way into the legal text that constructed due diligence as a shared duty of the contracting parties in case of the participation of small and medium-sized enterprises (Dadush, Schönfelder et al. 2024).[4] Even though the Due Diligence Directive has been significantly amended with the Omnibus Directive[5], the feature of shared responsibility in contracting has remained unaffected with the position of smaller companies within GVCs of large companies having been even strengthened. Thus, the CSDDD even after Omnibus remains an example where the shared responsibilities of parties in GVCs and protection of smaller parties remains the case (Schönfelder and Streibelt 2025).

There are other laws to regulate GVC contracts for public objectives. One currently obvious approach used to regulate GVC contracts is reliance on unfair contract terms rules. For contracting practices in the agrifood chain, the EU adopted a Directive – mixing elements from competition law, unfair commercial practices and contract law – to regulate business-to-business relations with significant power imbalances to remedy unfair practices and power imbalances in the chain.

While this piece of legislation does indeed intervene regulatorily into contracts within GVCs for the sake of weaker party protection (Yesim Atamer, in this handbook), it has simultaneously been criticised precisely for being limited to covering relational power asymmetries only and for failing to consider the systemic dimension of GVCs beyond the

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[2] *Vert Asia Ltd and Vert Fashion Company Ltd* v *G-Star Raw C.V., Stichting Bluebox Beheer, G-Star Production Intelligence Center*, Rechtbank Amsterdam, 22 November 2023, ECLI:NL:RBMAS:2023:7299, no appeal, case closed.

[3] *Ibid., para 3.64, 3.90.*

[4] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Sustainability Due Diligence Directive, CSDDD), OJ L 1760, 5 July 2024, Art. 10 (5); see explicitly about the interpretation of this text, Dadush & Schönfelder et al. 2024.

[5] Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements, OJ L 2026/470, 26 February 2026.

bilateral contractual relations (Cafaggi and Iamiceli 2019). In addition, the literature also discusses whether systemic power imbalances in the chain resulting in imposition of terms onto one contracting party should be counterbalanced by relying, more generally, on the rules on unfair contract terms to assess such contract clause (Ulfbeck and Hansen 2020). In that context, it is also shown how the different regulatory objectives pursued by using unfair contract terms rules – weaker party protection and sustainability – may be conflicting.

Finally, another example of regulating through contract – mainly used for the regulatory objective of sustainability – is the use of product conformity rules. This is a debate taken up by Beate Gsell (in this handbook) in her contribution which is why it is referred to this contribution for further elaboration and normative assessment

In relation to all those approaches, one can see how core doctrines in contract law become debated as instruments to pay respect to the public dimension of contracting in GVCs. Contract law should make visible, on the one hand, the potentially public objectives pursued through sustainability/CSR clauses in contracts, and, on the other hand, contract law's regulatory intervention into the pursuit of such public objectives through contracts. The justification behind intervention is the need for balancing power asymmetries in GVCs (such as the UTP-Directive), but also the transformation of GVCs to become sustainable or socially more equal (such as through due diligence rules on contract management). To that end, one can see how legal research on GVCs sees the contract increasingly as an institution in which private objectives are balanced with public objectives through the notion of determining the contractual obligations.

2. Third-party rights

Another inroad of regulatory objectives within contract law mechanisms in the debate is the concept of third-party rights or, more broadly, the opening of the privity of contracts to account for the externalities of the chain and, conversely, allow such actors to participate in and direct claims towards GVCs. Concerning social responsibility, authors have put forward the argument to change the doctrine of third-party rights from an exception to a general rule within GVC contracts to account more appropriately for the inside/outside distinction in the chain. Specifically, the suggestion is to allow those outside the system of production but affected by it – local communities, workers, etc – to enforce the obligations in the chain that are directed towards them (Beckers 2015; Peterkova Mitkidis 2015; Rühmkorf 2015). An even broader idea is to re-consider private law doctrines, such as third-party rights to become avenues for participation and engagement of affected stakeholders in the chain (Bose forthcoming). The idea of using third-party rights for regulatory objectives has equally been tried in strategic litigation targeting GVCs. Early on, it featured in U.S. case law as one of the theories to allow specifically workers negatively affected by GVC operations to hold lead firms liable.[6] Similarly, other common law jurisdictions were tried[7] as were civil law jurisdictions.[8] However, while all of those cases were unsuccessful from the perspective of third-party claimants, rulings in the UK and the

[6] First documented cases in that direction *Doe* v *Wal-Mart Stores* No. 08-55706, US Court of Appeals for the 9th Circuit, 2009 (US), later in the Rana Plaza tragedy: *Abdur Rahaman* v *JC Penny Corporation et al*, Superior Court of Delaware, CA-No N15C-07-174 MMJ, 4 May 2016.

[7] *Das* v *George Weston, Loblaws et al*, 2017 ONSC 4129.

[8] *Jabir* v *KiK*, case dismissed at the Regional Court Dortmund, 10 January 2019, Case No. 7 O 95/15 (Germany).

Netherlands based on tort rather than contract[9] pointed to negligence rather than contract law to become the primary avenue for pursuing the regulatory objectives of upholding workplace standards, human rights and environmental protection. Hence, contract law and its doctrines on third-party rights and third-party beneficiaries, while discussed quite intensively in the academic debate, have proven to be less relevant in the practice of strategic litigation compared to tort law. However, the very debate on third-party rights as an avenue for participation and enforcement in relation to GVC externalities shows, again, how the very core of contract law, the relation between privity and third-parties becomes transformed and "publicised" with third-party rights advancing a regulatory understanding of contract law that is targeted at identifying the democratic and participatory public potential of contracts (Eller 2021, p. 530).

3. Remedies

A third inroad for regulatory objectives within contract law is the focus on remedies in GVCs. Such regulation through the remedial architecture is also discussed in GVCs. In relation to general contract law, a discussion has taken place about how to construct and hierarchise the remedies for breach of contract in the light of the overall effects on the chain (Cafaggi and Imiaceli 2015). The discussion surrounds primarily the change of remedies from a primacy of damages under most contract laws to forward-looking and cooperation-oriented measures. Hence, we see a development towards a new remedial architecture for contracts in current issue-specific rules for GVCs. The most visible example is certainly the Corporate Sustainability Due Diligence Directive. To foster sustainability and respect for human rights throughout corporate value chains, the Directive contains detailed rules for companies on how to form and manage their contracts. Ranging from content-related duties that impose an obligation to include compliance clauses into the contract to rules on the use of contractual remedies, the CSDDD piggybacks on and changes existing contract law rules on remedies to realise sustainability within contracts throughout the supply-chain.[10] This interference into the remedies has survived the Omnibus with the exception of changing the termination of contract as last resort ("disengagement") with the less strict notion of "suspension".[11]; yet, even with the back wiring of sustainability due diligence, there remains substantial interference into contract law. Using the example of the CISG, Atamer and Wittum have accordingly analysed how the specific set-up of due diligence obligations in the CSDDD would be reflected in the structure of contractual remedies and may lead to new non-good-centred remedies (Atamer and Wittum 2025, 302ff.).

In addition, such regulation of GVC contracts through contract law is also in place in relation to other public policy objectives that are used to regulate GVCs. Recently, and with experiences of first the pandemic and later supply shortages due to the war in Ukraine, GVCs have also become much under scrutiny from the perspective of resilience

[9] *Lungowe* v *Vedanta Resources*, [2019] UKSC 20; *Okpabi et al* v *Royal Dutch Shell*, [2021] UKSC 3*, Four Nigerian Farmers and Milieudefensie* v *Royal Dutch Shell*, Court of Appeal The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:132, :133, :134.

[10] See Art. 10 (6) CSDDD, and Art. 11 CSDDD, which contain extensive rules on the remediation of adverse impact through contracts, including rules limiting the use of termination of contracts.

[11] Art. 4 (8) Omnibus Directive 2026/470, amending Art. 10 (6) CSDDD.

and strategic autonomy. The image of empty shelves in supermarkets and the scarcity of much-wanted materials, such as critical minerals, needed for the green transition and defence stability, has become iconic to show how dependent regions and individual states are on the functioning of GVCs. One regulatory intervention into GVCs for this purpose is the EU package on the resilience of the internal market that focuses on companies[12], materials[13] and supply-chain governance[14]. One notable example of direct interference with contract remedies in supply chains is the latter regulation on supply-chain resilience. According to Art. 29 (6) of the Single Market Emergency and Resilience Act, a company that has accepted a priority order request by the European Commission and thus accepts to source materials needed in an emergency is exempt from liability for a breach of contract resulting from compliance with the priority order. Although this interference is limited to specific crisis modes, it amounts to one of the most significant interventions into the general rules on breach of contract.[15]

4. Criticism

The above-mentioned are some of the most important, currently debated, proposals on how to use contract law categories for regulatory intervention into GVCs. The purposes of such interventions range from sustainability or resilience to greater fairness within contractual relations in GVCs. However, while relevant, this re-purposing of contract law rules is also met with criticism in the literature. Can contract law rules really achieve all those regulatory objectives through the central doctrines? Several arguments against using contract law for regulatory purposes are discussed in other contributions to this handbook, most notably by Beate Gsell and by Yesim Atamer and Alexander Hellgardt in their introduction.[16] These are all arguments that point to the need for safeguarding the liberal understanding of contract law and its freeing from political objectives, including an insistence on the public/private divide.

However, specifically for the regulation of GVCs through contract law, there are also notable critical voices from a strand that would generally accept the need for regulatory intervention into GVC capitalism. One of those voices is Roy Kreitner, who sees contract law and theory overburdened with the massive task of regulating supply-chain capitalism.

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[12] Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (Critical Entities Directive).

[13] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (Critical Raw Materials Act).

[14] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act).

[15] This approach seems similar to developments in the EU after the financial crisis where classical contract law rules, including remedial architecture, were adapted to ensure investor protection as desired by financial regulation following the crisis experience, e.g. Andenas, Mats and Federico delle Negra. 2017. "Between Contract Law and Financial Regulation: Towards the Europeanisation of General Contract Law " *European Business Law Review* 28 no. 4: 499-521.

[16] Gsell presents the following arguments: Traditional public law / private law divide, Powerful narrative of a liberal, apolitical private law, Lack of effectiveness of private law / contract law in achieving sustainability goals, need for global multilateral solutions under international law rather than regional or national approaches, to combat climate change, fair distribution of sustainability costs is not guaranteed. These are also addressed in the introductory chapter.

Going deeply into the economic and contract law underpinnings of GVCs, he argues that contract law is a too narrow frame to accommodate the vast terrain of value contestation (between efficiency and social benefits) that takes place in GVCs (Kreitner 2026). Following up on this thought, there is – on a much deeper level – debate among GVC scholars from sociology, economics and law, to broaden the frame considerably and develop alternative ways of using the legal doctrines in GVCs (Zumbansen 2022). Not merely by expanding and re-reading contract law doctrines in the narrow sense but by reconsidering the role of contract law in GVCs in its entirety. However, a significant controversy remains as to whether this alternative mapping can and should happen within or outside (contract) law. In his contribution on prefiguration and contract law, Martijn Hesselink relies on the outside, on revolutionising contract law to accommodate a fundamentally different economic reality rather than just an interventionist regulatory tool (Hesselink 2025). Others, among which I would picture myself, see pathways within contract law to reconfigure from within to accommodate broader societal objectives and transform GVCs internally (Beckers 2022). Regulation of contracts through the law – contract law in particular – would then still take place within the central legal doctrines as described above. However, it would need to rest on a fundamentally different understanding of what these doctrines are about. We would need to consider the contract as a central institution of the economy and, consequently, contract law as a much more internally conflicting mechanism in which always both sides, the private and the public, the internal GVC power and the externalities, economic exploitation and social utopia are present simultaneously. It is only when we accept this premise that we can understand contract law as a proper regulation in the transformation of the global political economy of GVC capitalism. For this to happen, we would, however, need to look beyond contract law to the regulatory forces within the institution of contract itself and adapt contract law categories accordingly. This directly leads us to the second dimension of contract and regulation: The investigation of the regulation by contract and thus the societal basis of contract law.

IV. Regulation by contract in GVCs: Societal contract law

Although this first dimension of regulating GVC contracts through contract law can be categorised as mainly an academic debate with a few cases that demonstrate the far-reaching potential of such contract law to intervene and reconfigure GVCs, it is by no means the consequence that GVCs and the contractual architecture that they build on are otherwise free from regulatory interference. To the contrary, the absence of state-centred regulatory intervention, through regulatory or contract laws, and the past emphasis on facilitating international GVC trade rather than constraining it, provided a space for other forms of regulation to evolve: private regulation, based on contracts, is widespread in GVCs. Ironically, party autonomy and a significant absence of regulatory interference through law produced a plethora of regulations; yet this regulation derives from the private, rather than the public sphere. The political economy literature on GVCs analysed this as the outsourcing of governance functions by states to private parties (Mayer and Phillips 2017). In political science, the international relations literature has produced an impressive amount conceptual, empirical and critical literature on such private regulation, including on regulation in GVCs (Cutler 2003; Abbott and Snidal 2009; Büthe and Mattli 2011 On GVCs and private regulation: Bartley 2007; O'Rourke 2003). And there is legal literature connecting to this research and building upon legal pluralist

notions that identify a quasi-legal normativity in this private ordering of the chain (Turner 2016, 385f.).

1. Regulation by (lead firm) contracting

Private regulation in GVCs takes several forms, some of them being outside the realm of contracts. Private regulation takes place unilaterally through corporations and their core tools of codes of conduct (Ruggie 2018). It can also be pursued by societal actors that are generally outside the GVC contracting architecture but play a vital role as governance actors. This is specifically the case for certification and auditing (LeBaron, Lister et al. 2017; Paiement 2017). Private regulation in GVCs thus has become a notion to describe the various forms of regulation in GVC, for specifically human rights, labour and environmental protection that derive unilaterally or as coalitions of private actors (Bartley 2007; Cafaggi 2011). In this corporate, industry and wider civil society-based regulation, it is also contracts that have become an important and widely-used regulatory instrument. This role of contracts in GVCs has initially been coined as a form of "governance through contract" (Zumbansen 2007; Vandenbergh 2007; Cutler and Dietz 2017), later on as the regulatory function of contracts in GVCs (Cafaggi 2013). Based on this notion, research focused on the different contractual designs through which these functions can be realised (Cafaggi 2016.) as well as the relation between contracting and contract law in such regulation by contract (Cafaggi and Iamiceli 2020). Following this understanding, it is also existing contractual arrangements (framework agreements, standard terms and conditions, supplier codes of conduct, contractual clauses) that lead firms or chain leaders use to regulate by contract within GVCs for better environmental and social conditions.[17]

The unilateral regulation by contract has, however, not been viewed unequivocally positively in the debate. The political economy on GVCs shows that contractual relations operate within a framework of significant multi-level power asymmetries (Dallas, Ponte et al. 2019; Ponte, Bair et al. 2023) and empirical sociological studies reveal the counterproductive outcomes of such unilateral regulation for those in whose interest such regulation is exercised (Bartley 2018). As a result, there are calls to apply to private regulation similar requirements as for public regulation as regards participation and accountability (Cafaggi and Pistor 2015. Fundamentally and early on the democratic problems and potentials of non-state private governance schemes: Bernstein and Cashore 2007). And, from a legal perspective, there are of course questions raised as to the legitimacy and authority of contractual regulators, both in relation to being regulators and in the 'how' to regulate in the public interest (Wiater 2022, 862 f., 865 ff.). The regulation by contract in GVCs, in terms of its effectiveness but also its underlying normative choices of relying on private actors for achieving regulatory goals remains thus a contested form of regulatory interference.

[17] In a short analysis related to the pandemic, I have argued that this regulation by a specific contractual arrangement, such as a framework agreement, is – at least within GVCs – much more significant than the general rules on contract law; Beckers, Anna (2020). "Towards Constitutionalizing Global Value Chains and Corporations: The State of Exception and Private Law." Verfassungsblog, 08 April 2020. https://verfassungsblog.de/towards-constitutionalizing-global-value-chains-and-corporations/.

2. Alternative forms of regulating by contract

However, there is also evidence for much richer forms of contract regulation and thus a need to take a broader perspective on regulation by contract in GVCs. Next to the observance of corporate lead firms exercising their leverage and their regulatory obligations up and down the chain, we also find alternative forms of regulation by contract. There are very concrete examples of how regulation by contract in GVCs becomes reimagined by different societal actors and groups, including those affected by GVC operations, to facilitate their interests. The dimension of regulation by contract may thus, if broadly conceived, equally become a valid form of societal regulation relying on the instrument of the contract. An example of such reimagining of regulation by contract is the anthropological work by Laura Knöpfel. Looking at the GVC "from below" and "on the ground", she shows how contracts entangle affected communities and parties with the GVC, establish relations between affected parties and multinational corporations and how, properly understood, contracts are not only regulatory tools available to lead firms or business actors but also empower from below and can become an instrument for regulating boundaries of the chain and responsibility of the chain leader (Knöpfel 2020). Another examples of such "alternative" regulation by contract is the, also driven by bottom-up processes, setting up of model contract clauses. Documenting the problematic exercise of power by the chain leader to impose its regulatory vision onto suppliers and cascading it down the GVCs, an alternative has formed. The alternative has been to develop so-called model contract clauses for use in GVCs that are designed to equalise the power within the chain and allow access for those affected by the chain (For the first attempts for Model Contract Clauses in the American context: Snyder, Maslow et al. 2021; for the European Context: https://www.responsiblecontracting.org/emcs.). Beyond being instruments that offer alternative contract design for regulation by contract with potential benefits for regulating sustainability and human rights respect in the chain (on which Cafaggi in this handbook), those model contract clauses also prove important in presenting an alternative private regulatory vision for how contracts can operate in GVCs. The procedural nature of developing the clauses with the seeking of broad stakeholder input can equally be seen as a different use of contracts that, rather than being formed by the contracting parties (or the chain leader unilaterally), are developed in an open process with stakeholder consultation that is meant to offer wider acceptance and an aspect of procedural legitimacy.

3. Potential and limits of regulation by contract

This different evidence on regulation by contract in GVCs makes drawing an overall conclusion quite difficult. On the one hand, we can see a strong use of contracts by powerful companies in the chain to act as regulators. This regulatory role of companies to use their contracts has also been actively fostered by public authorities. When looking closely into the international frameworks on corporate responsibility and business and human rights, we can see how corporate leverage through private law instruments is viewed positively with a view to limiting negative human rights impact and enhancing environmental protection.[18] From an empirical perspective, we see mixed results as to how such regulation by contract is able to realise the regulatory objectives (Most

[18] Specifically, the UN Guiding Principles on Business and Human Rights 2011 whose 2nd pillar (corporate responsibility to respect) rests significantly on corporate leverage through contracts and economic power.

obviously researched empirically regarding labour standards: Locke 2013 and labour and sustainability governance Bartley 2018). We also see normative criticism that emphasises the lack of accountability of such contract regulators. On that point, we can see a connection between the dimension of the regulation by contract and the previous discussion on regulation of contract. When contracts become regulatory tools within GVCs, normative discussions about the legitimacy of such regulation inevitably connect to debates about regulating such contracts by formal law. In the first section on regulation of contracts, I discussed several doctrines where shifts from party autonomy to a public intervention are at least discussed. Much of this discussion relates to the observation of contracts becoming regulatory instruments and thus a need for contract law to respond to such private regulation.

In addition, we also need to emphasise that regulation by contract is not only exercised by powerful actors in GVCs but also becomes an instrument at the disposal of other societal actors. Suppose we include these other societal forces in the discussion on regulation by contract. In that case, we can see the contract as an institution where the broader societal stakes about regulation are debated. Investigating regulatory contract law then becomes not only a matter of reconstructing formal (contract law) rules, but also the task of relating the "regulatory life in contracts" to the legal constitution of contract law (Brownsword, van Gestel et al. 2017). And concretely for GVCs, it requires looking into the different private regulatory architectures to link them to existing contract law regimes.[19]

V. Regulating by contract as proxy: States' regulation through contract

In addition to regulation of contracts and regulation by contract, this contribution introduces yet another perspective on the relation between contract and regulation: public regulation is also exercised through GVC contracting. While the first section showed how the law, including contract law, can be regulatory and used by the state to intervene in GVC contracts, the second section revealed that private actors can also regulate by using contracts. When looking at the recent developments in the regulation of GVCs through law, there is a nascent third way in which regulation and contract are intertwined. Public actors neither regulatorily interfere with GVC contracting nor do they develop the legal institutions to allow private parties to self-regulate; instead, states now begin to rely on private exercise of regulatory authority in their public rulemaking to pursue their own ambitions.

1. Regulating through contracts: The EU and its value chain legislations

The EU is a prime example of this development with its various interventions into GVCs through the institutions of the company, the network and the market. More specifically, through corporate reporting rules and requirements of sustainability due diligence, the EU, like national approaches in the Member States[20] and the so-called Modern Slavery

[19] As I read it, such in-depth analysis for specifically the societal project of the Model Contract Clauses for human rights due diligence in the context of contract law, is done by Fabrizio Cafaggi in his chapter.

[20] I am referring here specifically to the French Devoir de Vigilance (2017) and the German Act on Corporate Due Diligence Obligations in Supply Chains (LkSG, 2021).

Legislation developed in different common law countries, imposes obligations on companies in relation to their GVC. However, these obligations do not directly interfere with the contracts. Instead, those laws piggyback on contracting by requesting companies to exercise precisely those governance functions for their value chain, specifically with respect to human rights respect and sustainability (Salminen and Rajavuori 2019). Simultaneously, the EU regulates GVCs through product safety, liability and consumer law by means of delineating the global production as a network of specified actors that have obligations for ensuring product safety towards the consumer. Finally, the EU, comparable to other regional powers, such as the US, relies on trade and market law. It increasingly requires documentation about the production process for products entering the territory (specifically visible with respect to deforestation and forced labour).[21] These GVC laws all have a different target within the GVC (Beckers 2023) but they also have several commonalities.

One significant commonality of this regulation of GVCs is its specific reliance on contracts. GVC laws are a peculiar form of regulation that, rather than interfering with the contracting practices in GVCs, rely on such contracting practices for the purpose of exercising regulatory power. Sustainability due diligence is a good case in point (also when read with the planned amendments through the Omnibus proposal): Due diligence obligations are not an active intervention into corporate practice and contracting practices to impose human rights and environmental obligations on corporations; instead, the rules constitute obligations for companies to develop own risk management systems and force them to use existing contractual mechanisms to leverage human rights respect. These laws are EU-originated transnational reflexive laws par excellence (Buhmann and Feld 2024) and – this makes them interesting for our discussion on contract and regulation – they specifically regulate through contracts as proxy to extend regulatory influence beyond the territory (Salminen, Rajavuori et al. 2024). In other works, we classified those laws as part of an evolving European transnational private law, i.e. a form of EU private law that relies on transnational regulation by private contract to extend the EU's influence on a global scale (Beckers 2024). It links to previous works that have – for various sectors – shown how contracts as private regulatory instruments are relied upon by the EU when regulating extraterritorially (Cantero Gamito and Micklitz 2019; Beckers, Micklitz et al. 2024). The reason for pursuing this regulation through contract are apparent: While, for reasons of national sovereignty, the EU cannot extend its regulatory authority beyond its own territory, regulating its own private regulators and imposing on them duties to regulate circumvents this problem. It leads not the EU to interfere outside the territory but the private actors that are not bound by the principle of sovereignty.

In relation to GVCs, this form of regulating through contracts is particularly prominent. And interestingly, it is not only the much-contested objective of sustainability and human rights respect that is pursued in the form of regulation through contract, but also other regulatory goals. In times of wars, global insecurity and instability, GVCs have become a core mechanism that states, and regional powers like the EU, the US or China, discovered for exercising geopolitical influence. Absent the opportunity to directly regulate

[21] Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 [2024] *OJ* L2024/3015; Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] *OJ* L150/206–247 (Deforestation Regulation).

extraterritorially, the contractual connections in GVCs with links to their own territory have become a viable option for states and regional organisations to exercise global power. In the EU, this is very visible in legal frameworks recently adopted to advance strategic autonomy on specific raw materials. These frameworks impose obligations for companies to risk-assess their supply chains and, where needed engage in diversification of the supply base.[22] In an almost hidden form concealed in the requirements to "diversify", "substitute" their supply chains or "identify" alternative forms of supply, these laws prescribe to specific private actors what priorities to set in their supply-chain contracting practices and how to conduct contract management to ensure the EU's access to critical minerals. This is quite akin to other resilience-aimed regulation, particularly in the Internal Market Emergency and Resilience Act. This regulation – drafted initially against the background of experiences of the covid-pandemic and borrowing from experiences gained after the financial crisis but quickly adapted in the wake of the war in Ukraine – contains various provisions that address companies in emergency situations to use the instruments at their disposal within GVCs to ensure continuous supply of goods.[23] With this strategic intervention into what is considered critical services and entities in a crisis, the public regulator, rather than using state-production and public purchasing, leverages private actors and their access to global production networks to achieve continuous supply of goods. To that, we can also add the developments in courts that aim in a similar direction. First case law on supply-chain liability, both in the field of human rights and climate, suggest that companies do have obligations to use contracts – at least as a best-efforts duty – for the purpose of mitigating emissions in their GVCs. The most explicit argument to that extent was made by the Hague Court in the *Milieudefensie* v *Shell* ruling.[24] Although overruled in the second instance and currently pending in the Dutch Supreme Court and thus unclear as to whether standing the test of time, this court ruling added to the growing literature that increasingly sees the use of contractual regulation in GVCs as a legal obligation for private actors for public policy objectives.

2. Challenges and criticism: Regional conflicts in transnational law

This dimension of regulating through contracts poses yet other challenges than the regulation by contract and the regulation of contracts. When states aim to regulate extraterritorially and indirectly, by using private contracts linked to their territory, the political controversies are translated into a matter of contract. There are different variations of this conflict: First, as the debate on due diligence shows most obviously (but a similar argument can be made for resilience-oriented GVC regulation through contract), such regulation through contract can unfairly impose EU 'values' and 'standards' on countries and regions that occupy 'lower' positions within GVCs (Bose 2023). In this debate, we encounter what international law has discussed under the notion of TWAIL, in a transnational contractual setting. However, investigating such regulation through contracts through a decolonial lens is more than reversing the perspective from the Global North to the Global South (Mak 2025). It is not states vs states, Global North vs

[22] See, explicitly, Art. 24 Critical Raw Materials Act. Similar measures are required for companies identified as critical entities, Art. 13 Critical Entities Resilience Directive.

[23] The instrument to achieve this are so-called "priority-rated requests", Art. 29 Internal Market Emergency and Resilience Act, which includes the permission for companies to prioritize certain contract arrangements and even to breach other existing contracts to achieve compliance with those requests.

[24] *Vereniging Milieudefensie and others* v *Royal Dutch Shell Plc*, Rechtbank Den Haag, 26 May 2021, ECLI:NL:RBDHA:2021:5337.

Global South, imperialism vs colonialism in its classical understanding that determines who is on the "imposing" and the "receiving" end. Instead, the regional imbalances are enshrined in the structure of GVCs with significant effects on participation. Political and potentially imperialist goals are exercised indirectly by means of employing private actors and contractual power imbalances (Omari Lichuma 2021). From the perspective of political participation, this transformation of political power into the realm of the private has significant consequences. Once the distinction between contract (as private arrangements) and regulation (as political intervention) blurs and contracts are employed to exercise outspoken political goals, then political communities and democratic processes vanish in the contractual notions of "third parties" and the problem of delineating "stakeholders". If taken seriously, then TWAIL approaches to such regulation through contracts would need to be significantly expanded to address transnational law including private regulation (Vallejo 2024, 153 f.).
Theoretically, this approach brings the question of contract and/or regulation close to reflexive law and societal constitutionalism (Teubner 2012). It requires the contracts used for regulatory purposes to be interpreted as genuinely political and comes with a quest for understanding the politics in contract.

Moreover, it requires the need to consider such a societal sphere not as homogeneous but as highly conflictual. With different states employing this regulation through contract, new types of conflicts arise. Contracting parties are not only asked to pursue regulatory objectives through contracts, but they also become exposed to different, conflicting objectives. Suppliers operating within value chains may have to comply with objectives imposed by different buyers, which, in turn, originate from obligations imposed on them by different states seeking to access and control the same chain. This requires a new form of conflict of laws that not only is able to accommodate pluralism but also may accommodate original public law conflicts within private ordering and thus the privatization of geopolitics (Kono 2024). Whether contract law is able to achieve this within its confined categories remains an open question.

VI. Conclusion

In this contribution, the task was to look at GVCs and the contracts as a "regulation of specific contractual aspects". In executing this task, my argument was to explain how such regulation in GVC is not only limited to specific aspects but may also require us to examine the intersection between regulation and contract differently. Rather than thinking of regulation solely or mainly as intervention into contracts by law, GVC force us to consider such regulatory contract law as interwoven with regulation by contract and regulation through contract. Constituted through contracts and stabilised largely by the underpinnings of contract law, GVCs form a specific political economy in which different societal actors, lead firms and others, exhibit sufficient power to operate as regulatory agents. At the same time, in taking advantage of this specific economic structure of GVCs, states regulate, facilitate and deploy this private regulation. The hope is that the study of GVCs and the thinking through of contract law, contracts and GVC regulation as dimensions on a regulatory spectrum opens a space to discuss the relevance contracts and their legal underpinnings as mechanisms in the ordering of the global political economy more generally.

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