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# Contractual Interpretation and Environmental Sustainability

by:

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The legal debate around environmental sustainability is today on many lips and fingertips. One of the aspects that seems, however, not to have been extensively discussed yet is the function of the process of contractual interpretation as a potential catalyst for the ecological transition. In a nutshell: can – and if yes to what extent – means and rules of contractual interpretation observe general interests related to environmental sustainability? Getting to grips with this issue is by no means easy. The challenges are numerous and already arise from the current conceptions of contract and consumer law. Although there are some exceptions, these areas of law are traditionally designed and applied with eyes to economic efficiency and consideration of a single exchange only, without usually observing the general effects of an agreement on society, nature or third parties. But does this have to be so? And does the current legal and conceptual framework allow a different view?

Because it permits the integration of “objective” elements (i.e. by adjudicating from the outside what the parties have expressly or tacitly agreed), the process of contractual interpretation may be a tool to recognize and develop an eco-literate understanding ([Mattei/Quarta, 2019](#)) of the law. We identify at least six (very) general ways to integrate environmental sustainability through contractual interpretation for the implementation of a sustainability-oriented (or sustainability-adjusted; [Ulfbeck/Hansen, 2020](#)) contract and consumer law. As the different aspects of this blog post will be the subject matter of a more extensive forthcoming publication, we will only summarize them very briefly here in the form of interrogations:

1. **Ecological Principle:** is there a general duty to act in an environmentally sustainable way that can be implemented, and which would permit considering sustainability as a legal and primary obligation of each contractual party (as opposed to an ethical or moral one; [Ulfbeck/Hansen, 2020](#); also [Zhu, 2020](#))?
- **Eco-literate understanding of the contractual *causa*:** can we understand the “old-fashioned taboo” concept of the *causa* in an eco-literate way, that is to adopt a presumption of validity if the contract concurs with the well-being of the whole ([Mattei/Quarta, 2019](#)) or is not contrary to the ecological “ordre public”?
- **Horizontal effect of human rights and constitutional values:** in the absence of intention and willingness of the contractual parties to observe environmental interests, can – and if yes how – third parties intervene in a contract to defend their subjective fundamental rights? And to what extent are the rights of future generations, as an element of intergenerational social justice

([Poncibo, 2016](#); [Weston 2012](#)), to be observed in the horizontal context of contractual interpretation?

- **Climate policy as context:** to which extent should or can national or regional climate policies influence the process of contractual interpretation if their integration in the contract is not covered by the will of the parties ([Zhu, 2022](#))?
- **Environmental sustainability as an implied contractual term:** what happens when the will of the parties does not expressly or tacitly cover the integration of a sustainability-oriented term? Can a court come to the conclusion that such a term is implied or even infer it for reasons of public interest (e.g. by integrating open-ended conformity criteria such as the “normal durability of the good” (see [art. 7\(1\)d Consumer Sales Directive 2019](#))?)
- **Towards sustainable rules of interpretation in general terms and conditions?** General terms and conditions represent both an obstacle to environmental sustainability and a tool for its concrete implementation ([Pavillon, 2021](#)). For instance, should a term of a product-as-a-service agreement which makes the repair with a spare-part coming from the circular economy subject to a briefer notice of defects to the seller be considered unfair? Or, in case of doubt on a specific term, should the more sustainable interpretation prevail under the justification that an unsustainable interpretation involves equivalent “disadvantages” (i.e. externalities) for each party?

As can be sensed, the issues raised by contractual interpretation for environmental sustainability are complex and of fundamental nature; they have barely been touched on here and obviously lead to many additional questions. To name just a few: what is the role of each individual’s autonomy and freedom, and to what extent is it admissible to limit it for considerations of environmental protection? What criteria should be applied in practice to determine whether a contract is compatible with the well-being of the whole? Are these aspects even a matter of contractual interpretation? And, will the conceptual delimitation between private law and public law even lose its importance in the face of the environmental challenges ahead ([Graham, 2021](#))?

Despite difficulties in tackling these highly complex and most certainly controversial issues – that will, however, have to be solved in a way or another – the application of a precautionary principle (see [art. 191\(2\) TFEU](#)) in the context of contractual interpretation could eventually already be envisaged based on existing means and rules of interpretation. One example here is the rule *in dubio contra stipulatorem* (see [art. 5, second sentence, Directive on unfair contract terms in consumer contracts](#)), which could be understood that, if there is any doubt as to the most sustainable understanding of a clause, the most environmentally friendly version should prevail (“*in dubio pro natura*” as the most favourable interpretation to the consumer’s general interest for environmental sustainability). The principle of good faith could also be used (by extension) as an anchor point: each individual living today has an enforceable duty to act for future generations in the same way as a trustee would ([Mattei/Quarta, 2019](#)).

Finally, given the progressive consideration of the many externalities of each activity of anthropocentric origin also in private law, one element seems, however, rather clear already today: from a bilateral or multilateral relationship, the contract will likely sooner or later evolve in a relationship between each of the contracting parties on one side and environmental sustainability as an “external” interest on the other. It is up to us to decide if these two sides of the same leaf are going to be green or brown.

