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Adapting ESG Principles to Contracting Practices: Towards Sustainable Business Agreements

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ABSTRACT

Today, the role and importance of resource conservation, a careful attitude toward the environment, compliance with corporate ethics, and transition to a closed-cycle economy are increasing. The business community is increasingly incorporating environmental, social, and governance factors into its activities and following the principles of sustainable development when concluding contracts. In view of these trends, the topic of concluding contracts that reflect the principles of sustainable development is of both scientific and practical interest. In this context, the study aims to identify the attributes of sustainable contracts and supplement the basic principles and conditions under which they are concluded. The research methodology relies on the analysis of a limited number of studies selected using special parameters and comprehensively reviewed, as well as the method of analogy and comparative analysis. The conducted research indicates that a sustainable contract should be defined as an agreement whose conditions are focused on reducing risks in the economic, environmental, and social spheres to protect the rights and interests of present and future generations. Key findings suggest that incorporating ESG principles systematically can lead to corporate profit growth, attraction of investments, and improved reputation. These findings underscore the significance of sustainable contracts in promoting responsible business practices and enhancing the competitiveness of firms in the international market.

1. INTRODUCTION

Environmental, social, and governance (ESG) principles are important components of sustainable development that promote responsible business practices [1]. Companies adhering to these principles can attract more investment, improve their reputation [2], and increase their competitiveness in the market [3]. Studies have shown that businesses integrating ESG principles experience corporate profit growth and attract more investments, as investors are increasingly seeking responsible and sustainable investment opportunities.

However, integrating ESG principles into contracting presents several challenges for businesses. The pre-contractual process becomes more complex, requiring strategies for disclosing non-financial information, considering environmental and economic risks, and conducting human due diligence. The lack of standardization in ESG principles complicates their consistent application across different contracts. Ensuring compliance and enforcement of ESG clauses is difficult, especially when these clauses are not mandatory. Evaluating the performance of counterparties, including their environmental impact and adherence to employees' rights, adds another layer of complexity [4]. Jurisdictional issues arise in cross-border contracts, as different countries have varying regulations and standards related to ESG principles. Additionally, sustainable contracts often require enhanced transparency and disclosure of non-financial information, necessitating resource-intensive and technologically advanced solutions like blockchain and smart contracts.

Despite these challenges, the integration of ESG principles into contracting is essential for promoting responsible business practices and ensuring sustainable development.

The concept of sustainable development is gaining more influence on the business community and management models [5]. The use of ESG principles in contracting [6] prompts organizations to reconsider their involvement in resolving ESG problems [7].

A sustainable contract presupposes that the parties not only seek to achieve their own interests but also consider the interests of other parties and society. It also considers the long-term consequences of actions that may affect the environment and human health [8-10]. This category of contracts is based on the principles of sustainable development, general legal principles, and norms of international law that regulate the sphere of public relations. The described trends apply to business in almost all developed or developing countries.

Contractual practices under the concept of sustainable development are changing [11]. The pre-contractual stage of contracting is becoming more complex, there is a need to develop a strategy for disclosing non-financial information, consider environmental and economic risks, and conduct human due diligence procedures. Contracts are being supplemented with sustainability clauses [12]. These patterns of incorporation indicate the emergence of the concept of sustainable contracts, the practice of which is only taking shape and therefore requires a comprehensive analysis.

ESG principles are increasingly influencing international business and serve as a basis for the implementation of sustainable contracts [13]. These principles are fragmented and segmented and are not tailored to purely financial and economic legal relations, which have their specifics [14-16]. In practice, sustainable contracts may well encounter problems where ESG principles are not sufficiently developed [17] or specified for business turnover and the conclusion of business contracts. Therefore, ESG principles need to be studied and adapted to the conditions of the business community and civil turnover [18].

Despite extensive research on the application of ESG principles, there remains a significant gap in understanding how these principles can be systematically integrated into contracting practices. Current literature often lacks a comprehensive analysis of the methods for evaluating counterparty performance and the specifics of embedding ESG conditions within contract terms.

The article contains a literature review, as well as a description of the research methods and the results of the study. The conclusion section draws theoretical and practical conclusions and describes the limitations of the study.

2. LITERATURE REVIEW

The concept of sustainable contracts has so far been addressed in very few studies [8-10]. In identifying the main characteristics of sustainable contracts, researchers note that adherence to ESG principles in doing business promotes:

- corporate profit growth [19-22];
- attraction of investments [23-25];
- expansion of markets and the scope of activities [26-29];
- better reputation: adherence to ESG principles can help companies improve their reputation among customers, investors, and the public. Companies that demonstrate social and environmental responsibility can be more attractive to investors and customers [30-32].

In studies, special attention is paid to counterparty performance evaluations in sustainable contracts. The factors that should be evaluated in sustainable contracts include:

- potential and proven environmental impact of economic entities: pollutant emissions, waste production and utilization, the use of alternative energy sources [33-35];
- ensuring the basic rights of employees of contracting companies, decent remuneration for labor, the right to sick leave, vacations, etc. [36-39];
- non-financial information to be provided by economic subjects, as well as reporting and verification mechanisms [40-43].

The issues of applying ESG principles in contracting have been investigated by many researchers. However, the adaptation of these principles to the evaluation of counterparties' performance when concluding sustainable contracts, as well as the description of the terms of ESG principles in the text of the contract itself, has not been sufficiently analyzed in the studies conducted so far.

Thus, the purpose of the article is to identify the attributes of sustainable contracts and supplement the basic principles and conditions under which they are concluded.

3. METHODS

We applied the methods of desk review and comparative analysis of the works written by scholars on the topics of sustainable contracts, sustainable development principles, and circular economy. A bibliographic search was conducted in Scopus, Web of Science, and Google Scholar (URL: https://scholar.google.com.sv/scholar) and on official websites publishing the main international legal acts, judicial practice, and social surveys on the impact of ESG principles on business and the practice of sustainable contracts in international business. For a comprehensive analysis, we selected studies that contained the definitions of sustainable contracts, pre-contractual practice of sustainable contracting, ESG principles in international business, and sustainability factors in business. The time frame of 2003 to 2023 was chosen to provide a broad perspective on the evolution of ESG principles and their integration into contracting practices. This period captures the early discussions and subsequent developments in sustainable business practices, reflecting changes in regulatory environments and corporate strategies.
In our document search, we adhered to the Preferred Reporting Items for Systematic Reviews and Meta-Analyses (PRISMA) standards (Figure 1). PRISMA requires that all steps in the search and review process be documented in detail by researchers. The PRISMA flowchart consists of four steps: identifying articles, screening articles, deciding on the eligibility of studies, and finalizing the list of studies for inclusion in the systematic review.

Studies were selected automatically based on the following criteria:

1. The authors have at least three publications on ESG principles in international business in the past 10 years;
2. More than 50% of publications on legal topics in the total number of authors' publications;
3. The authors' profiles state that their publications are thematically related to legal sciences;
4. The paper was written between 2003 and 2023.

With these criteria, initial identification provided over 170 sources. After a more thorough analysis, 57 sources were included in the sample for analysis.

In defining the concept of sustainable contract, the method of analogy was applied and the characteristic features, conditions, and practice of using contracts with a sustainability clause in international business were highlighted.

While our choice of databases and selection criteria aimed to provide a comprehensive overview, there are inherent limitations. The exclusion of non-English language studies and the reliance on specific databases may have omitted relevant research published.

To mitigate selection biases, we implemented several measures. We included Google Scholar to capture a wider range of studies beyond traditional academic journals. We also cross-verified our selections against other databases and consulted experts in the field to identify any significant omissions.

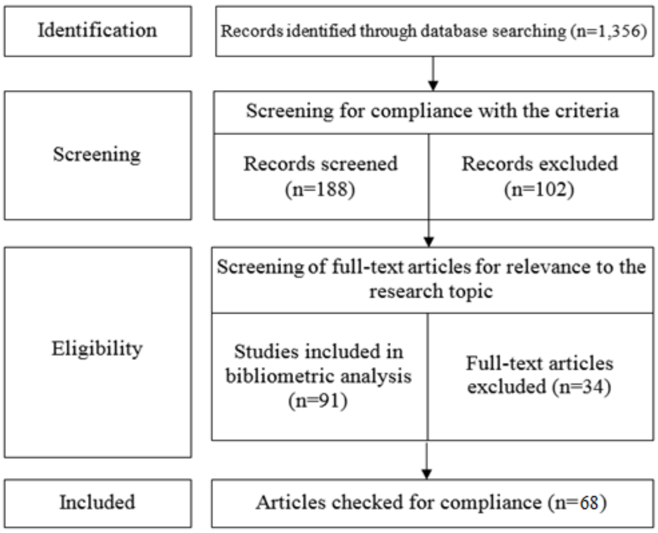

Figure 1. PRISMA flowchart of the process of selecting bibliographic sources for bibliometric analysis

4. RESULTS

A sustainable contract should be defined as an agreement, the terms of which are directed at reducing risks in the economic, environmental, and social spheres to protect the rights and interests of present and future generations. The implementation of sustainable contracts is intended to secure the following interests:

- qualifying the contract in the framework of sustainable development can guarantee many preferences for both the contracting parties and third parties, such as investors [19];
- contract efficiency associated with compliance with ESG standards;
- development of recommendations subject to ESG principles for future contracting.

Our research findings suggest that the list of Principles for Sustainable Contracts proposed within the framework of UN recommendations in 2011 is constantly developing and several principles have already taken root in practice, namely, the principles of justice [44-47], rationality [48-51], responsibility [52-56], and transparency [57-60].

The principle of justice assumes that all parties to the contract must be equal, without discrimination or exploitation. All participants have to have equal opportunities to represent their interests and defend their rights. This provision is difficult to argue with, yet it is important to note that this principle applies to all contracts, is of a general nature, and does not account for the specifics of sustainable contracts.

The principle of rationality does have specificity regarding the sphere of influence. It is aimed at accounting for the interests of the parties and possible environmental impacts. Therefore, it is advisable to bear this principle in mind and use it when concluding sustainable contracts.

The principle of responsibility also addresses the specifics of contracts with a sustainable development clause. It assumes a responsible attitude to nature and resources, both human and natural, as well as predicting the consequences of activities and accounting for negative factors [61]. For this reason, this principle can well serve as an additional guideline for sustainable contracting.

Particularly noteworthy is the principle of transparency, which must necessarily be used in the conclusion of sustainable contracts, since contract information should be clear and accessible to all parties. This includes the terms of the contract, the obligations of the parties, and any potential risks or problems. The importance of transparency in the implementation of sustainable contracts is particularly emphasized in our research.

However, on our part, we believe that the principles of corporate responsibility can be additionally used in the sphere of concluding agreements based on ESG standards. Corporate responsibility principles systematically integrate business processes and focus on environmental, economic, and social results. The principles appropriate to mention here are:

Systematicity: environmental, economic, and social tasks in the course of activities of economic entities should be solved in an integrated manner, considering the risks and possible negative consequences;

Partnership: the desired result can only be achieved in cooperation with reasonable compromises;

Goal-orientedness: economic entities must retain long-term incentives for sustainable development. To realize this plan, goals must be set for the circular economy in all areas. Monitoring of implementation should be established to achieve these goals;

Integrity: the activity of economic entities should be balanced and proportionate, account for a variety of factors, and consider the consequences to preserve environmental resources and maintain financial equilibrium;

Adaptability to changing external factors: changes in external circumstances should be calculated, and economic entities in such conditions need to react adequately and make effective management decisions;

Dynamism: parameter changes in the course of economic activity shape indicators and affect the closed-loop economy, which should be considered when concluding sustainable contracts.

These principles are actively applied in Russian practice. Small and medium-sized businesses are increasingly incorporating the sustainability factor into their deals. According to IFORS Research, businesses in Russia are ready to integrate ESG principles into existing contracts [62]. The survey finds that 49% of small and medium-sized businesses are willing to incur additional financial expenditures to meet their counterparties' sustainability requirements. More than half of the companies are in favor of green sourcing, 62% comply with the principle of closed-loop sourcing, and about 40% of suppliers check manufacturers for environmental certifications.

Adherence to these principles when entering sustainable contracts will, in our opinion, contribute to the efficient use of resources, reduce the risks of irreparable damage to the environment, build trust between counterparties, attract investment funds, and create successful business partnerships. By following these ESG principles, companies will be able to reconsider their business model and improve it. For example, companies can utilize environmentally friendly technologies or seek new markets that align with their ESG principles.

By systematically integrating ESG principles into their contracts, businesses can enhance their reputation, attract more investment, and improve competitiveness in the market. Additionally, incorporating long-term incentives for sustainable development into strategic planning encourages setting clear goals for circular economy practices and establishing monitoring mechanisms to track progress and make necessary adjustments.

5. DISCUSSION

Successful fulfillment of the highlighted principles depends on the evaluation of counterparties' performance when concluding sustainable contracts, as well as on the ESG conditions specified in the text of the contract itself. However, businesses may face several challenges in implementing these principles. One significant challenge is the complexity of adapting existing contractual frameworks to incorporate comprehensive ESG clauses. Businesses must develop strategies for disclosing non-financial information and conducting due diligence, which can be resource-intensive and require specialized expertise.

Another challenge is the need for robust evaluation mechanisms to assess counterparty performance accurately [63]. Businesses must invest in technologies and processes to monitor compliance with ESG standards, which may pose financial and operational burdens, particularly for small and medium-sized enterprises.

Nevertheless, we highlighted the main factors that influence success in following the emphasized principles.

Determining conditions. Our study found that a stable contract as a bilateral or multilateral transaction includes conditions that constitute its content. Mandatory conditions include the subject matter, terms, and place of performance of the contract. Additional conditions are those stipulated by law, as well as agreements to which the parties come through an agreement. Additional conditions are not mandatory, and non-compliance with them does not invalidate the contract. Since the practice of sustainable contracts has not yet taken root, it is difficult to determine the status of ESG clauses. If they are made mandatory, requirements in this part of the contract will need to be fulfilled. In turn, if ESG clauses are defined as additional, the parties will not be motivated to comply with them, as they have virtually no effect on the fulfillment of the agreement and the validity of the contract. Perhaps, at the first stage of establishing sustainable contracts, it would be expedient to define ESG conditions as additional and analyze the practice that will evolve and the actions of counterparties.

Establishing the principle of sustainability. When sustainable contracts are concluded, they should obligatorily contain a sustainability clause. For example, the Pirelli Group's contracts were concluded within the framework of ESG standards and contained a sustainability clause. As additional conditions, sustainable contracts should include liability issues, compliance with ESG parameters, and regulation of examinations, assessments, and audits.

Assessing environmental impact. In the pre-contractual stage of sustainable contracts, it is necessary to assess the potential and proven environmental impact of the counterparties: pollution levels, greenhouse gas emissions, the use of alternative energy sources, etc. [33-35]. It is also essential to determine the extent to which non-financial information to be disclosed will be reported.

Responsibility for compliance with ESG principles and dispute resolution mechanisms. A crucial and yet underresearched issue is establishing liability for violations of ESG principles by entities that indirectly participate in a sustainable contract. These include successor companies, subcontractors, designers, suppliers, and other stakeholders who are parties to the contract chain. To give an example, Toyota's Tier 1 upstream supply chain alone consists of nine sub-networks with 1,670 suppliers worldwide [64]. The large number of parties in the supply chain in sustainable contracts should encourage coordination of activities and control over the actors that are indirectly involved in the transaction to comply with ESG principles and standards. As another example, the Ministry of Economy and Finance of France filed a lawsuit against Amazon, in which it was stated that the company, taking advantage of its position, imposes unfavorable conditions on suppliers. Given this fact, the Ministry demanded punishment for Amazon and the payment of a 10 million euro fine [65].

At the stage of discussing the terms of sustainable contracts, it is necessary to choose the ways of dispute resolution: out-of-court, judicial, and arbitration. The competence of international commercial arbitration should be considered; if a dispute is referred to arbitration, it should have the appropriate competence and experience.

The presence of different jurisdictions. Another problem in concluding sustainable contracts is determining the applicable law when a contract is concluded between entities based in different countries and, therefore, under different jurisdictions [24]. Many countries have adopted legislation that considers ESG principles and sustainable development factors. This legislation also regulates the issues of determining the applicable law in cross-border contracts. Some examples are the California Transparency in Supply Chains Act of 2011, the UK Modern Slavery Act of 2014, the Child Labor Due Diligence Act adopted by the Dutch Senate in 2017, etc. When concluding sustainable contracts, given their scale and the large number of actors involved in their execution, it is advisable to apply legal biotechnologies that will make it possible to determine which legal orders will apply to the individual parts of the contract that can be isolated. The legal regulators of sustainable contracts can be standards and guidelines of ESG principles. However, for this to happen, such a condition must be included in a sustainable contract at the preliminary stage.

Conditions for transparency and disclosure of non-financial information. As a rule, sustainable contracts need to contain additional terms concerning information transparency and disclosure of non-financial information [40-43]. Future technological advancements, such as the integration of artificial intelligence and machine learning, could further influence ESG integration in contracts [66, 67]. Information transparency can be provided through digital technology, such as blockchain, for instance, in identifying suppliers and their ESG status or monitoring the quality of supplied products [68]. Smart contracts can offer transparency regarding the actions of suppliers and counterparties, as well as facilitate the use of blockchain arbitrage and the introduction of automated enforcement in the application of sustainable contracts. From the standpoint of a closed-loop economy, smart contracts can become ecosystem chains, although this issue requires more detailed consideration and assessment of economic costs.

Our findings also have implications for policy recommendations and corporate governance standards. Policymakers could consider developing standardized ESG criteria and guidelines to facilitate consistent implementation across different sectors. These standards could include mandatory disclosure of ESG-related information, ensuring that businesses are held accountable for their sustainability practices. Additionally, regulatory frameworks could incentivize the adoption of sustainable contracts through tax benefits or subsidies for companies that meet specific ESG criteria.

6. CONCLUSIONS

Integration of ESG principles, evaluation of counterparties' activities when concluding sustainable contracts, as well as a clear description of ESG conditions specified in the text of the contract itself, will support the development of modern entrepreneurship and contribute to the efficient use of resources and financial and human capital, ensuring sustainable development. The development of these trends has promoted the concept of sustainable contracts.

The most important findings include the importance of defining and incorporating clear ESG clauses in contracts, the necessity of thorough pre-contractual processes, and the benefits of using digital technologies like blockchain and smart contracts to enhance transparency and enforceability.

The scale of the present study is limited to the selected sample of sources. The analysis was conducted based on information from the sources selected using the specified keywords. Although individual conclusions can indeed change with a different composition of sources for analysis, the key conclusions describing the change of ESG principles and their effect on the conclusion of contracts in view of sustainable development factors will remain the same.

Further research on the issues of contracting should consider the conditions that influence risk mitigation in the economic, environmental, and social spheres in the context of trends in global geopolitical changes.

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