

# **Legal Pluralism and Globalizing Business Contracts: Contributing to a Paradigm Shift in Contract Law?**

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## 1 Business, Law and New Global Pluralism

Legal pluralism is not new in international trade, although the concept itself has not been applied in mainstream contract law. It has earlier been discussed in legal sociology as multiple systems of norms<sup>1</sup>. On the one hand international trade has always lived with multiple national laws, trade practices, industrial standards, standard contracts as well as nationally and organizationally differing contracting practices. Yet, contracts have mostly been studied based on non-mandatory rules of national contract laws. Quite recently legal pluralism has, however, entered in international contract law with the label “New Law Merchant”.<sup>2</sup> While for sociologists global legal pluralism, as it now is called, appears in the role of enterprises in choosing the rules to be applied in the world of multiple sets of rules<sup>3</sup>, international contract law scholars seem to be more interested in harmonizing national contract laws. Since lawyers prefer coherent systems, they aim to create global law with harmonized legal rules known to all lawyers working in international trade. Harmonized rules could create legal certainty, especially if they were applied similarly in courts and international arbitration worldwide.

Lawyers and legal sociologists nourish differing approaches to multiple sets of rules depending on their research traditions. Legal sociologists are interested in the actors of international trade and their behavior in applying different sets of rules. Of these actors globalized companies are in the focus, as is their cooperation with their stakeholders. Lawyers, on the other hand, are mostly interested in contracts, which are scrutinized by lawyers in court procedures. Although the national rules of contract law are default rules, which can be put aside and other rules chosen instead, academic lawyers focus on studying these statutory rules. They tend to ignore that it is actually contractual terms and different standards, which govern contracts and thus simply refer to the autonomy of the contracting parties in this respect. They delegate the ignored rules to “party autonomy” and exclude them from their own research agenda as representing “only contractual practice”. A notable reason for excluding real contract practice from the research agenda is also that it is difficult to get information from contracts in practice, let alone analyze them publicly. Business managers and lawyers assisting them tend to regard their contracts as

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1 Griffiths distinguishes legal pluralism as an empirical state of affairs in society meaning different social groups having co-existing legal orders that do not belong to a single system and as a “juristic” view of legal pluralism as a problem of dual legal systems in European colonies (Griffiths, John, *What is Legal Pluralism?* 24 *Journal of Legal Pluralism* 1986).

2 von Bahr, Christian– Mankowski, Peter, *Internationales Privatrecht, Band 1: Allgemeine Lehren*, Verlag C. H. Beck, Munich 2003, Berger, Klaus, P., *The Creeping Codification of International Lex Mercatoria*, Wolters, Kluwer 2010.

3 For example Berman, Paul Schiff, *From International law to Law and Globalization*, 43 *Columbia Journal of Transnational Law* 2005, 485, Teubner, Gunther, *Global Bukowina: Legal Pluralism in the World Society*, in *Global Law without a State*, ed by. G. Teubner, Dartmouth, Aldershot 1997, 3-28, Zumbansen, Peer, *New Governance in Europe. Corporate Law Regulation as Transnational Legal Pluralism*. 15 *European Law Journal*, 246-276.

commercial secrets. There seems to exist willingness for benchmarking, but not for letting others learn from own mistakes.<sup>4</sup>

According to Ralf Michaels, who studied why conflict of laws and legal pluralism do not ask the same questions, the strategies, which law uses in guarding its borders are rejection (from State law), incorporation (into State law), defense (transforming into facts) and delegation (transformation into subordinated law such as codes of conduct or trade union law).<sup>5</sup> Contract law scholars have for instance incorporated trade practices into default rules. Typically a new phenomenon in business first develops in practice and is then possibly incorporated in legislation in one form or another. Examples range from new contract types to digitalized transfer of money.

For law scholars, the boring question on what can be accepted as law and legal rules blocks other more important sets of rules from entering their toolbox. This strategy functions as a defense against strange elements for the legal system. System theory sees this phenomenon as a strategy guarding closed systems of society.<sup>6</sup> When lawyers narrow their interest in “real law”, which consists only of legally binding rules, preferably of the State legal system, they in defending the legal system may unfortunately delegate the most interesting research challenges of the globalizing world to other disciplines. Stability and legal certainty is protected in order to keep the legal system coherent. Flexibility is regarded as something negative, although changing circumstances are more a rule than an exception in business and change could also bring along new possibilities and innovations.

In this paper I first depict the pluralistic framework of business contracting by describing what kind of sets of rules there exist and what does their relevance to business depend on? After that I focus on how the perspectives of the closed system of law have tried to be widened with the help of other disciplines. Thirdly I ask if the discussion on legal pluralism could pave the way for a paradigm shift for incorporating *ex ante* legal studies of contracting practices in contract law. Fourthly the article deals with obstacles and risks for this development and whether the risks could be turned into opportunities.

## 2 Multiplicity of Norms Concerning International Trade

Traditionally lawyers approach international business contracts through the lenses of *national legislation*. From this approach the first problem to be solved in contracts is which country’s law is applied to the contract. Lawyers representing private international law (conflict of laws) have created a huge set

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4 This is my own unscientific impression after having studied contractual practice without enough valid empirical evidence.

5 Michaels, Ralf, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*. 51 Wayne Law Review 1209-1259 (2009). Available at: “[ssrn.com/abstract=809244](https://ssrn.com/abstract=809244)” .

6 Luhmann, Niklas, *The Unity of the Legal System*, in *Autopoietic Law A New Approach to Law and Society*, ed. by G. Teubner, Berlin, De Gruyter, 1988.

of rules in order to decide on this very issue. These rules apply when the contracting parties have not chosen the national law to be applied to their contract. These rules for conflict of laws are national, but are nowadays more often based on international conventions (The Hague Conventions internationally and Rome I and the Rome Convention in the EU specifically). Lawyers, who participate in contractual negotiations, often complain that the choice of law term tends to be taken up in the last minute of negotiations or sometimes even forgotten. Businesspeople regard contractual negotiations as development of their own rules forgetting that default rules are sometimes needed to mend the gaps in contracts. In this way the parties end up on the mercy of the complicated rules of private international law. This may happen in case there will be a dispute, which ends up in litigation or arbitration. In the sale of goods, the widely applied Convention on the International Sale of Goods (CISG) contains rules for deciding on the choice of law when it has not been agreed in the contract. (Article 1). These rules can even cover companies, whose countries of domicile never even ratified the CISG.

The multiplicity of norms and regulations governing international business can be presented as in the following list.

*Public governance*

- International conventions such as the CISG
- EU regulations
- Nation State legislation

*Private governance*

- Trade practices
- Practices of Businesses
- Standard contracts of the subsequent branch (e.g. NL, Orgalime etc.)
- Certifications and standards governed by private organizations (e.g. ISO, FSC etc.)
- Academic *Lex Mercatoria* (PECL, UNIDROIT Principles, DFCG etc.)

*Conventions* and other international agreements between countries form the public governance of international norms for business contracting. Public governance is still to a large extent in the hands of the nation states themselves. In principle international conventions apply only to countries, which have agreed to apply them and incorporated them in their own national legislation. There are, however, exceptions, such as the above-mentioned possibility for being covered by the CISG even if the company were registered in a non-Convention country.

In the list above *supra-national* EU-regulation is presented as public governance above national legislation. In principle both primary and secondary

legislation of the EU cover only the EU member countries and have been incorporated in their national legislation. However, EU regulation influences on non-member countries, whose companies do business with companies originating from the EU.

Sometimes even national legislation can have strong extra-territorial effects. The United States is even more than the EU famous for extra-territorial law, since the country has extensive economic and political influence on other countries. The United States has for instance extended its criminal law to its citizens working in other countries. If businessmen working for US companies bribe citizens of other countries, they can be prosecuted in the United States. This happens in spite of the older principles of conflict of laws according to which the country where the crime has occurred has the jurisdiction on the crime. In this way the US can try to influence on other countries' business cultures, although companies can claim that paying an access to new markets to a representative of the political elite is an established habit in many countries. This example tells that national legislation is not dying out, although it has been put under the pressure of international and transnational agreements and regulations. Furthermore, it is an example of globalization of national rules, which often appears as "Americanization". The EU can try and influence the rest of the world in a similar way only by joining its forces.

National law in the commercial branch covers company law, competition law, consumer protection, intellectual property law, employment law, environmental law and so on. Often international models have strongly influenced national legislation. Especially competition law has strongly been harmonized in the EU. The same goes with intellectual property law, with international conventions as models for national legislation. International conventions are often seen to offer a minimum level of employment or environmental protection for countries with weak rules in those areas of law. Their influence on formal national legislation can sometimes be astonishingly strong.

Supranational power also lurks in such international governmental organizations, which are not even integration organizations of the type of the EU. World Trade Organization (WTO), the promoter of liberalization of trade offers an example of globalization through a governmental organization. Since only national legislation is governed by sanctions, the lack of sanctions on the global level has led to tighter and more effective dispute settlement. Member states may bring disputes before the WTO dispute Settlement Body claiming that another member state has broken the rules of a WTO treaty by protecting its own economy from import. The WTO Dispute Settlement Body governs liberalization of trade with private specialists who apply their special knowledge in interpreting the GATT, GATTS, TRIPS and other treaties under the framework of the WTO.

In EU countries it is often mistakenly understood that it is the EU, which is the source of liberalization of trade of for instance agricultural products and control of state subsidies. In fact, the EU only follows the treaties, which have been agreed in the WTO. The hands of both nation states and the EU are tied in trade policy and this reflects on weaker possibilities for drafting laws on e.g. environmental issues and health safety as numerous decisions of the WTO

dispute settlement body such as the Tuna-Dolphin case, or the Hormone Meat case show.

The disputed plan for private dispute settlement under the framework of the US-EU trade treaty, which now is being negotiated, follows the same globalized logic. Companies could turn to arbitration tribunals in their disputes with a state. This plan has been opposed, because it gives the power of the nation states and their democratic decision-making organs to private organs at the global level. On the other hand, it offers a possibility for companies to bring disputes against States to justice and reflects the mixed nature of private and public in the contemporary globalized world. Law escapes to the hands of private legal specialists diminishing accountability and the decision-making power of democratic organs of national states. Private governance in itself is not new in international trade in the relations between companies, who are accustomed to apply private arbitration in settling their disputes. It is not new between states and is already applied in disputes between states and companies based on investment protection agreements.

The New Merchant Law literature celebrates arbitration and other alternative dispute settlement. The same literature also emphasizes that before the rise of the nation states, trade law was more about customs and trade usages, which merchants themselves controlled. Although a joint and coherent European *lex mercatoria* in the Middle Ages has been shown to be a myth,<sup>7</sup> the undisputed existence of *merchant laws* tells a story of private governance, which is older than the nation states. With the rise of the nation states, national lawyers gradually got the power for law-making for business. Along with globalization, it is now internationally oriented lawyers, who claim the power to draft default rules for business in international trade producing collections of international legal principles and harmonizing law.

Since harmonization of contract law in the EU has not advanced within public governance, private governance has been applied instead. UNIDROIT-principles in the international level, Principles of European Contract Law (PECL) and Draft Common Framework for Contracts (DCFC) in the EU are results of international cooperation of academic and practicing lawyers, who have not been given a mandate to represent their nation states. These private efforts under the umbrella of the EU have now entered the EU organs in order to incorporate privately prepared regulations into the framework of EU regulation. The Common European Law for the Sale of Goods (CESL) is an example of an attempt of lawyers to harmonize contract law in a new but a rather complicated way. Since national contract law is blocked from harmonization, lawyers created a new artificial legal regime, which businesses could choose to govern their contracts. It, however, only creates more rules and adds to choices for legal regimes of trade in Europe. Lawyers often complicate things in trying to systematize and harmonize law. In this particular issue, the

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7 Foster, Nicholas H.D. , *Foundation Myth as legal formant: The medieval Law Merchant and the new Lex Mercatoria*, 2005 Available at: “[www.forhistiur.de/zitat/0503foster.htm](http://www.forhistiur.de/zitat/0503foster.htm)”.

drafters of the law probably rely on the opportunities of the CESL in the competition between various sets of rules.

*The New Merchant law* of European lawyers does not really represent such self-regulation of business, which older *lex mercatoria* used to be, since it is run by lawyers. *Self-regulation or rather private governance*, however, is still strong in business. The amount of *trade usages and trade practices* proves this. Strong belief in party autonomy and delegation through it keeps trade practices alive even in contract law, although the amount of state regulated default rules is often claimed to have supplanted trade usages. On the other hand, according to Lisa Bernstein's studies, American courts have been even too favorable in accepting proof on existence of trade practices. The reasons for such practices can be claimed to be found in the weak knowledge of judges about business.<sup>8</sup> There are, however, also states with more strict and mandatory legislative control of business contracting. For example Russian law stipulates that trade usages can be validated in courts only if they do not deviate from the rules of the Russian Civil Code (Article 5.1.).

Private governance is often represented by non-public organizations, which create *standard contracts*, general terms of contracts or general codes of practices for businesses to apply. It is lawyers, who usually create even these tools of private governance. In fact, it can be claimed that business contracting is tightly in the hands of trained lawyers, who apply their knowledge and experience in contract drafting in creating tools for private governance for more general use. In the sale of goods of especially machinery and electronics there are a lot of widely used standard terms of contract (NL, Orgalime etc). Construction industry has its standard terms of contract, which are treated almost as the law of construction business (YSE in Finland and AB in Sweden).

The growth of service business has, however, diminished the role of standard terms, since services are more often tailored and have thus become more difficult to standardize. Many bigger companies also started to prefer to develop their own standard terms and templates, which they offer to their contracting parties instead of referring to standard terms of the industry. Own terms are an advantage in negotiations, if they can be presented as the starting point for the negotiations. Researchers have also found strong trends of Americanization of contract terms.<sup>9</sup> This trend is set by multinational companies, whose lawyers seem to have a lot of influence in contracting of their companies. The American style in contracting appears as overwhelming documents with detailed contractual clauses and includes a lot of work of lawyers. Such a heavy way of drafting contracts has also produced critical counter approaches such as *lean contracting* or *relational contract*.

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8 Bernstein, Lisa, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*. In Customary Law and Economics, ed. by Bernstein, L. and Paresi, F., Edgar Elgar 2014.

9 Here I refer to Giuditta Cordero Moss's research team, e.g. Cordero Moss (ed.) *Boilerplate clauses, International Commercial Contracts and the Applicable Law*. Cambridge University Press 2013.

More rapid development of technology, especially in IT has accelerated globalization and created separate global regimes in the Internet. The effects of this New Economy are profound in business and they also threaten national legislative regimes. National legislation is lagging behind global digitalized operations. This development contributes to private governance, as well. New global ways of control have to be found, but cooperation between national states tends to be clumsy and lag behind the problems. This leaves the stage free for private governance.

*Industrial standards* are an old form of private governance of business. For instance ISO standards have been created and applied for a long time. Researchers of contract law, however, have not shown interest in them, although ISO standards have often been made obligatory for purchasing goods in order to control their quality and technological level. The ISO, an organization doing business with standardization, has increased its area of operation during the last decades. They now have even standards for environmental management, which standards (ISO 14000 and ISO 14001) are widely applied by companies all over the world. The reason for such popularity is that ISO standards stand close to industrial interests in the contemporary battle between various globally influential standards and certificates.

Private governance is developing to be an even more significant phenomenon. When public governance has not succeeded in environmental protection at the global level national states not having been able to agree on effective international conventions, NGOs have taken the lead. In this way, states are handing over their power to private law makers. Although some forms of global environmental problems, such as climate change, are still mostly in the governance of the states in international cooperation, NGOs have advanced in applying market governance in the area of natural resource governance. Sometimes NGOs have reached a tripartial governance which include civil society in the governance. The FSC (Forest Stewardship Council) certification represent such tri-partial governance. Forest companies agree with the ten quite general principles of the FSC and negotiate a more detailed contract with a local NGO, which then monitors the company's forestry. FSC has become well recognized and many western publishing houses require this certificate.<sup>10</sup>

Applying global certificates can be called market governance, since for instance buyers of paper for publishing houses rely more on an international certificate than any national legislation. It is, however, not consumers, but business buyers, who make the decisions to buy certified paper, which can be traced back to the forest where the wood came from.<sup>11</sup> For other natural resources there are no such certificates, which are monitored by a third party. In mining industry they apply national certificates, which are monitored by private consultants, because mining industry is reluctant to accept NGOs to

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10 "www.fsc.org" Forest Stewardship Council's website.

11 Forest Policy and Economics 2013; 31, *A special issue on Trust* ed. by Soili Nysten-Haarala and Maria Tysiachniouk. Available at "dx.doi.org/10.1016/j.forpol.2013.04.007".

monitor them.<sup>12</sup> Needless to say that it is difficult to find third parties, with enough specialist knowledge and in addition to that give an image of impartiality. In mining business it seems that even if NGOs are not incorporated in monitoring activities, they have managed to influence on stricter rules of international standards for the mining industry.<sup>13</sup>

The role of NGOs and their activism has been disputed a lot. Their participation in creating rules for private self-regulation and monitoring them is on the one hand seen as direct grass root democracy.<sup>14</sup> On the other hand especially industry complains that such governance escapes democratic decision-making processes of nation states and gives a small group of activists excessive power. These globally governed certificates grow in amount and are important rules since violating them can lead to consumer boycotts and amount to great losses for business. Violating legislation of a developing country or any nation state might not have consequences of similar economic scale. In this respect the question whether such sets of rules are equal to binding law, can be regarded as a ridiculous academic issue raising interest only in “the Ivory Tower”.

An example describing the dilemma is a western forest company, whose Russian supplier based on a supplier contract is responsible for complying with Russian legislation. When this supplier turns out to have cut or bought wood from old forest from another supplier, a legally valid contract does not help the western company to avoid responsibility in the eyes of western consumers. If NGOs are going to make the issue widely known, explaining that no laws were violated or even an acquittal from court cannot get the company out of trouble. Standards and certifications are thus often more powerful than legislation, even when lawyers do not recognize them as binding law. Power has been delegated to other than State law as a defense strategy of the closed legal system maintained by lawyers.

Even if the nation state is not yet disappearing, its grasp on issues of international trade is loosening. There are, and have always been a huge quantity of different sets of rules for international trade. When business is getting more global, these sets of rules, were they legally binding or not, gain more influence in the market. While some lawyers gain new specialist roles in guiding international trade on the global level, the role of default rules of nation state contract law is diminishing and giving floor to other choices of sets of rules in private governance. This phenomenon can be labeled as increasing

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12 About the Towards Sustainable Mining Program (TSM) of Canadian mining industry presented for the Finnish Mining Industry, see “sitra.fi/ekologia/vastuullinen-kaivostoiminta”. The Australian Minerals Industry Code for Environmental Management (AMICEM), which is based on the Global Mining Initiative Program (“www.icmm.com/document/104”) has not advanced to third-party governance either.

13 Dashwood, Hevina, *Sustainable Development and industry self-regulation: developments in the global mining sector*, *Business and Society* 53 (4), 2014, 551-552.

14 *The UCECE Convention on Access to Information, Public Participation and Decision Making and Access to Justice in Environmental Matters* (The Aarhus Convention 25.6.1998) can be mentioned as representing this opinion.

global legal pluralism and increasing private governance. Law is not disappearing anywhere. It is only becoming more multifaceted.

### **3 Can the Scope of Legal Studies be Widened to Cover Global Legal Pluralism?**

#### **3.1 *Incorporation as a Strategy and the Strong Defense of the Closed Legal Systems***

Traditional legal studies reject “non-legal” sets of rules, which are not incorporated in the legal system. Monitoring these rules can be delegated to function within private autonomy. If parties to contract, however, incorporate such rules in their contract, they become legally binding to the contracting parties. In this way business has power to incorporate privately governed rules into legal discussions in courtrooms.

Strong strategies of ignoring market governance from the part of legal studies are from a system theoretical standpoint explained as guarding the legal system and keeping it function according to its own inherent rules. The legal system is a typical rather closed system in society. Professional lawyers, who protect their own area from outside influences, guard the gates of the legal system. Lawyers, who get a specialized education for methods of legal decision-making, are to decide what to let to be incorporated in the system. According to Luhmann’s theory autopoietic law reforms itself by absorbing outside influences but transforming them into a form, which fits in the system.<sup>15</sup> Another system theorist Talcott Parsons emphasizes the role of professional groups in keeping their own subsystems running according to own values and resisting fashionable new trends, which come and go.<sup>16</sup> Maintaining professional values is thus important in maintaining the significance and coherence of the professional group of lawyers, because it also reflects on the esteem of the group and the legal system in society.

In business contracting, lawyers have even managed to smuggle their own professional principles and values in business, and they work as bridge-builders between business and the legal system or rather as gatekeepers of the closed legal system. The influence of lawyers in creating standard contracts and “owning” contract drafting in corporations is astonishingly strong. In interviews businesspeople often explain that contract documents are the legal part of the deal and are thus given to lawyers as specialists of legal issues to take care of. However, lawyers seldom control implementation of the deals or projects under the framework of these legal documents.<sup>17</sup>

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<sup>15</sup> See footnote 6.

<sup>16</sup> Parsons, Talcott, *The Professions and Social Structure*, Social Forces, Vol 17 (1939), 457-67.

<sup>17</sup> Such interviews were collected in the research projects: *Corporate Contracting Capabilities in Business (2006-2009)* funded by the Finnish Funding Agency for

Furthermore there are a lot of informal rules influencing on business contracting. Informal rules or institutions as they are called in institutional economics can be working and thinking habits as well as values, which are not always even recognized.<sup>18</sup> They function in interaction with formal institutions such as legislation or formal contracts. This interaction can be studied empirically. Although it is not the aim of this paper to analyze this interaction, I cannot avoid mentioning it. We lawyers often tend to ignore the power of informal institutions, because we are so deeply oriented in formal rules.<sup>19</sup> In practical contracting there are a lot of background values, working habits and thinking modes, which drive it rather strongly. The idea that the legal document is separate from the project itself and belongs to the world of lawyers is one of such strong thinking modes.<sup>20</sup>

### 3.2 Widening the Scope of Law as a Research Strategy

The legal system as well as education for legal professions focus on legislation and courts applying it. Although only a small part of lawyers actually works in traditional legal professions such as judges and attorneys, education focuses almost totally on this “core of law”. There have, however, always been lawyers who working with their clients have noticed that clients’ problems are not always solved with the help of the legal system, but rather by avoiding it. From this experience Louis M. Brown, who besides his academic professorship worked as a legal counsel and developed “*preventive law*”.<sup>21</sup> It actually is an approach to law aiming at avoiding unnecessary disputes and solving them in a peaceful way. Courts preventive law regards as the last resort. Even if the court system for many lawyers and even ordinary people represents access to justice, courts are in business in fact resorted to simply when a definite decision is needed. The decision is reached applying the adversary procedure of the courts, the legal arguments of which can be incomprehensible for the disputing parties. The result does not necessarily represent justice, but is only an exit. “Access to justice” can be complicated, costly and also ambivalent. The Law often turns out to be less coherent and systematic than anticipated. The advantage of court procedure, however, is compulsory decision-making.

Preventive law has inspired such corporate lawyers, who noticed that the goal of their work is to keep business running and not spending money on

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Technology and the Academy of Finland, and Intellectual Property in Open Business Models (2008-2011) funded by the Finnish Funding Agency for Technology.

18 North, Douglass C., *Understanding the Process of Economic Change*, Princeton, Princeton University Press, 2005.

19 The importance of values is, however, not totally forgotten in contemporary positivist legal theory. The same idea, which North presents in institutional economics, also appears in legal theory. Kaarlo Tuori expresses the same idea with different levels of law, which have to be connected in order to gain acceptance for the law (Tuori, Kaarlo, *Critical Legal Positivism*, Ashgate 2002).

20 Based on interviews with businesspeople and lawyers. See footnote 17.

21 Brown, Louis M., *Preventive Law*, New York 1950.

unnecessary legal disputes. In Scandinavian countries this approach is nowadays known as *proactive law*.<sup>22</sup> Proactive law is an attempt to try to widen legal studies into practical lawyering, where the courts are only a small curiosity. In order to be successful in business lawyering, there should exist capabilities to set the law in its business framework. This, however, requires knowledge of other disciplines such as economic, business and organization studies. If the lawyer does not have this knowledge, she should at least be able to cooperate with people representing other professional groups. Proactive law, in fact, shares the same goal with those who research legal pluralism; widening the scope of legal studies.

It, however, seems that the closed system of law and legal studies has been able to push both studies on legal pluralism and proactive law out from the mainstream labeling the former legal sociology and the latter mere practice, which do not have anything to do with legal theories. The lack of a legal theory quite effectively prevents proactive law from being recognized among academic lawyers. However, more practically oriented corporate lawyers can on the one hand easily recognize the practical value of this approach. On the other hand, companies, who use law firms to assist their contracting, often collide with lawyers, who are convinced that contracts should be written for potential litigation, just in case that something goes wrong.

Interestingly also businesspeople often share the same attitude and voluntarily leave contract documents for their lawyers to work with. The document is then forgotten in a safe-box or a drawer and business is taken care without returning to the legal document.<sup>23</sup> In this way contracts and lawyers start to represent high, but potentially necessary transaction costs, which, however, should be diminished. Businesses anyhow try to avoid disputes in courts as much as possible. Thus trying to monopolize contract drafting may not be a good strategy for lawyers in the long run.

The narrow scope of legal studies has led to several other approaches aiming at widening it to cover the activities of those actors, who actually apply contracts in their work. *Relational contract*, which Stewart Macaulay introduced in the 1960's<sup>24</sup> and which Ian Macneil later developed further, found inspiration in contractual practice.<sup>25</sup> According to Macaulay businessmen in their own opinion did not conclude contracts but only made deals, which were confirmed with handshakes or agreed by telephone calls. Ian Macneil developed relational contract as a legal approach for courts to apply as well, but its influence has, however, been more visible in practical

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22 See e.g. *Scandinavian Studies in Law Vol 49: A Proactive Approach*. Stockholm University Law Faculty, Stockholm 2006.

23 These opinions are picked up from interviews of lawyers and businesspeople, see footnote 17.

24 Macaulay, Stewart, *Non-contractual Relations in Business: A preliminary Study*. 28 *American Sociological Review* 1963, 55-67.

25 Macneil, Ian, *Contracts: Adjustment of Long-term Economic Relations under Classical, Neoclassical and Relational Contract Law*. *Northwestern University Law Review* 1976, 6, 854-905.

contracting. Macneil's framework of contracting is too far from earlier accepted sources of law to catch the interest of judges. Relational contract has, however, guided lawyers, who draft contracts with strong relational elements. Framework contracts for new forms of megaprojects are a good example of relational contracts.<sup>26</sup> Project alliances, which aim to closer cooperation between project partners, strive for avoiding courts by excluding the right to take a dispute before the court. The idea is to develop trust by closing out adversary methods and maintaining trust with carefully chosen partners, who possess good capabilities for cooperation.<sup>27</sup>

*Law and economics* has been more successful in influencing the legal system. A more closer look, however, shows that it is only those parts of these new approaches, which focus on decision making in courts, that have woken up the interest of lawyers. Law and economics covers a lot of different approaches. Lawyers, however, know best the approach, which Posner and the Chicago School represent in focusing on economic efficiency as the basis for court decisions.<sup>28</sup> This approach draws from economic theories assuming that market forces will lead to the most efficient decisions. Therefore legal decisions should not distort the market or give distorted signals to the market. Posnerian law and economics actually aims to incorporate economics in the sources of law.

Law and economics, however, is not only Posnerian economic theory. *Transaction cost analysis*, which combines economics, law and organization studies, focus more on how companies create different governance structures for their contracting. Originally Oliver E. Williamson emphasized that companies tend to save their transaction costs aiming at rational decisions, but having to rely on bounded rationality in circumstances of uncertainty.<sup>29</sup> TCE focuses on companies and their governance structures rather than on courts and aims to explain why companies make the choices they make and how different governance structures work in practice. In this way it can be seen as an approach focusing on similar problems as proactive law. Many proactive lawyers, however, dislike TCE, since it gives "a negative image" of business explaining it to be driven by opportunism.<sup>30</sup> In my own opinion the approach of TCE on how to transform potential opportunism into cooperation is quite realistic, and TCE thus can, based on economic and organization theory, provide with explanations for contracting practices. Cooperation and trust are not self-evident in business, but have to be created and maintained.

Besides these approaches, which aim to widen law into the *ex ante* problems, there exist new approaches, which try to improve the adaptability of

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26 Campbell, David, Harris. Donald, *Flexibility in Long-term Contractual Relations. The Role of Co-operation*, *Lean Construction Journal* 2005, vol 2, 1-25.

27 The exit through court procedure cannot, however, be closed out completely, but it is left open for situations of gross negligence.

28 Posner, Richard S., *Economic Analysis of Law*, Aspen, 7th ed. 2007.

29 Williamson, Oliver, E., *The Mechanisms of Governance*. New Yor. 1996.

30 Haapio, Helena, *Next Generation Contracts: A paradigm Shift*. Doctoral Dissertation. University of Vaasa, Helsinki, Lexpert Ltd. 2013.

law. *Adaptive law* is known mostly in the field of environmental law and focuses on finding ways to design legislation, which better responds to the need of adaptive management of natural resources recognizing stakeholder representation and taking an ecosystems' approach into consideration. The theoretical framework for adaptive law is found in regulation theories and multi-level governance in political science.<sup>31</sup> Focusing on legislation, adaptive law is more understandable from the perspective of traditional law. Regulation theory, however, also has the dimension of taking even self-regulation and private governance into account.

Adaptive law is in this way widening the system of law to cover wider interests of society and the nature. It recognizes pluralism and can include a proactive approach to regulation and agreements with stakeholders. Private contracts are often used for governing experiments of new ways of improving the quality of the environment. The development in environmental law is worth mentioning, because when values, which take ecosystems and stakeholder cooperation into consideration, are successfully harnessed to support environmental legislation, they might in the long run also start to influence on business and contracting.

### ***3.3 Discussion on Legal Pluralism as a Tool in Advancing Proactive and Multidisciplinary Approaches in Legal Studies***

It seems that in trying to influence legal studies and getting inside the circle of the autopoietic legal system, there has to be a message to the court-centered legal theories. Legal theory based on legal pluralism and attempting to widen the sources of law might have an opportunity to influence on opening up legal theories and incorporating multiple sets of rules in them. Proactive law has weaker opportunities in this respect, since it is interested in the court-centered law only to the extent of being able to avoid disputes in courts. An obvious consequence for its interest in business goals is that the main goal should be not to expose the business goals to the logics of court centered law. Business and the legal system are separate systems with different logics.<sup>32</sup> The huge amount of cross-disciplinary approaches to law, however, shows that interaction between different systems of society is needed. Law does not simply control and judge business, but can also enable business to reach its goals. This is done proactively and in collaboration, not only the lawyer pointing out legal mistakes.

Not only legal pluralism is typical in the contemporary globalizing world. The rapid change in digitalized technology has led into more rapid changes in organizations and business models. Supply chains, which relational contract took care of with relational methods and which TCE tied with specific assets,

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31 e.g. Ruhl, J.B., *Thinking of Environmental Law as a Complex Adaptive System: How to Clean up the Environment by Making a Mess of Environmental Law*. *Houston Law Review* vol 34, No 4, 933-1002.

32 Nysten-Haarala, S., *The Long-term Contract: Contract Law and Contracting*, Helsinki 1998.

have turned into networks or shorter living relationships.<sup>33</sup> The New Economy, however, emphasizes knowledge, frequency and uncertainty, which TCE found as guiding circumstances of organizational cooperation and contracting. Bounded rationality, which Williamson emphasized in order to make a difference to neo-classical economics, which assumes rational decisions, is even more bounded to rapidly changing knowledge and overall uncertainty for economic development. This development certainly increases the need for proactive approaches.

Both theory and empirical studies are needed to strengthen proactive approaches. Empirical data can be collected in companies and among stakeholder groups to find out how contracts are drafted and how they govern cooperation. Non-adversary contracts with strong elements of cooperation are very rarely taken before courts or even arbitration tribunals, but are privately governed. These experiences need to be studied and understood, since they reflect new approaches in dealing with problem-solving in a pluralizing world. In this way a proactive research approach can be established and maintained to complement court centered law and diminish legal centralism,<sup>34</sup> which now still is self-evident in the mindset of most lawyers.

Incorporating the discussion on legal pluralism in legal theory could be a theoretical bridge connecting legal studies with stakeholder management. Discussion on legal pluralism could also be a bridge between ex ante and ex post legal studies in helping to widen the theory on sources of law and opening the legal system for other elements than adversary dispute resolution. In this way lawyers might start to realize their growing challenges in interaction with society and sustain from placing themselves above the society and controlling other systems of society from an assumed impartial and autonomous standpoint.

### **3.4 What does this Imply for Study and Practice of Commercial Law?**

Commercial law is already a fragmented branch of law, which does not reflect the idea of a coherent system any more. Every branch of commercial law, such as company law, competition law, intellectual property, consumer protection, contract law and torts reflects its own values and strives for coherence in its narrow field. In research and education the trend is towards more and deeper specialization. In these narrow fields lawyers tend to search for adversary elements in order to solve disputes for the benefit of their client. There is, however, a growing need for specialists who could work proactively in cooperation with specialists of business and technology and who possess relational skills in negotiating as well as finding solutions for problems in a way, which benefits all stakeholders. This kind of development is already seen

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33 See for instance Paasi, J., Valkokari, K., Rantala, T., Nysten-Haarala, S., Lee, N., Huhtilainen, L., *Bazaar of Opportunities for New Networked Innovation, Intellectual Property and Business*. Imperial College Press 2013.

34 About the concept legal centralism, see Nysten-Haarala, S., 1998.

in the growth of alternative dispute settlement. Business, however, favors bilateral problem-solving and private governance. Thus, lawyers should also include negotiation skills in their tool-box.

The strong development of fragmentation in society also calls for generalists and peacemakers, who understand connections between different systems and the power of interaction. For education this sets requirements to teach and learn skills of negotiation and problem solving. If education of law remains to emphasize adversary interests and own rights against rights of others, the readiness for learning these relational skills later in practice diminishes. These skills should be studied through life, and they develop the more they are practiced. The role of education is to plant the seeds for the skills to develop.

The vision of proactive law is that lawyers should take more responsibility in business decisions, and proactively prevent legal problems from arising. It can, however, be questioned whether they are at all capable for such responsibilities. There are obstacles, which our underdeveloped institutions set on the way of this path. These obstacles are discussed further in chapter 4.

The task to renew legal science is in every way immense. Lawyers developed the nation state and placed themselves as guardians of it. The mandate for such a role was found in the autonomy of law. In trying to reach and maintain coherence, other tasks were forgotten. F.C. von Savigny failed in developing organic and flexible law governed by lawyers.<sup>35</sup> Legal realists failed in bringing the legal system in a flexible interaction with society.<sup>36</sup> Contemporary attempts in modernizing law, stem from several different, multidisciplinary approaches to law. What is in common to them is widening the scope of law either through the sources of law or stepping out to the proactive sphere.

#### **4 Obstacles for Widening the Scope of Legal Studies**

Proactive law challenges lawyers to take more responsibility in business. It is, however, questionable, whether they are capable for doing so. There is a strong and unfavorable path-dependence in legal studies and lawyering opposing such a development. Law is a closed system, which lawyers control as their own, and from this safe haven seem to assume that they also control the rest of the society through an autonomous court system. Institutions of our society are underdeveloped for the challenge of proactive law. They are based on nation state law, which resists flexibility and rapid adaptability.

Because of poor ability to adapt to changes, the fate of lawyers as a profession is at stake. Fast development of technology and economics

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35 For an analysis on how the flexible and organic elements disappeared from the new mainstream Jurisprudence of Concepts, see Tolonen, Juha, *Stat och rätt. En studie över lagbegreppet*. Meddelanden från Stiftelsen för Åbo Akademi forskningsinstitut. No 111 Åbo 1986.

36 Morton Horwitz sees this failure of legal realism as a failed attempt to modernize law. See Horwitz, Morton, J., *The Transformation of American Law 1870-1960. The Crisis of Legal Orthodoxy*, New York, Oxford University Press. 1992.

challenges existing law, which cannot cover new developments at the same pace. The coherence of law and sometimes even its cornerstones are threatened. One example of threatened cornerstones of mainstream contract law is privity of contract, which does not respond to the contemporary world of networks. Nor does the law manage to protect consumers from such globally operating business, which is advisedly avoiding consumer protection. On the one hand it seems that lawyers are going to have a lot of work as legal specialists in a continuously legalizing world. Keeping the legal system coherent under the pressure of new challenges will keep law scholars busy. On the other hand the fate of lawyers as a profession is not any more in the hands of lawyers to the same extent as it used to be when lawyers created the nation state.

Digitalization makes everything faster and challenges business. Profits have to be made continuously, and business decisions have to be made fast and efficiently. These values seem to be generally accepted among business managers and politicians, who also compete for the efficiency of their national economies. Hopefully the call for new values in taking ecosystems, social values and challenges of climate change into account is gradually going to find response in business. Unfortunately business managers seem to be poorly equipped for this challenge. Even in business education more general disciplines, which offer wider approaches to societies where business operates, are studied in a diminishing amount. Business managers, who now have taken the role of lawyers as the profession determining the limits of society, do not admit that they even have such a role. However, it is business, which chooses among pluralist sets of rules and requires economic efficiency to be accepted as the main value in society. With a narrow education business managers cannot realize their own responsibility in anything else than just profit-seeking for their own companies.

When societies are becoming more multilevel governed, it actually implies that everybody is responsible and every stakeholder group should be incorporated in decision-making. It is not only lawyers who control with formal rules and the court system. It is not the nation state, which has the overall control with its legislation. Politicians have a huge task to try and govern the new economy, which ignores their decisions. Business managers do not control everything either, but they now have the keys to orchestrate how choices are made in the multi-level and pluralistic world.

It is obvious that contemporary institutions are not ready for approaches favoring cooperation, since they are built on adversary ideas of competition and control. Cooperation between interest groups representing differing ideas is, however, the only sustainable path for us to survive on this planet. It all starts from recognizing pluralism and the need for cooperation flowing from this state of affairs. Although coherence is the traditional approach to the legal system, it cannot be maintained at the expense of preventing flexibility in the development of business and society.

The way in which business managers understand efficiency is crucial to proactive lawyering. If managers see lawyers as an obstacle for business and only increasing transaction costs without contributing to successful business decisions, their services may not be valued any more. Already now we are

witnessing how contract drafting is moving to countries, where lawyers' services are cheaper. We also see how contract drafting is cut into smaller pieces and given to specialized lawyers, who do not have any idea of the whole picture for which they are contributing to. The profession of lawyers is heading towards simpler and more technical tasks in contracting. Their contribution in making business decisions is not needed any more, if lawyering is regarded only as a set of pure technical skills. One reason may be the expensive structures of law firms and their excessive billing as Richard Susskind suggests. Who would like to pay a huge hourly fee for work, which young and inexperienced lawyers do using an excessively long time for it?<sup>37</sup> If managers no longer hope for skillful lawyers, who could participate in business decisions and who could analyze law in its environment, lawyers have lost their case. The limited and somewhat arrogant role of "a cop" in controlling business managers from not taking an illegal path, has led to lower respect of lawyers' work.<sup>38</sup> Similarly, the lack of skills in giving good and balanced legal advice for business, has limited the potential scope of lawyers' work.

Lawyers may still have work to do, but their work will not be valued and paid as highly as earlier. Lawyers' role will diminish in society, since they do not have skills, which leaders or those who can connect different stakeholder groups in society should have.

The role of the legal system will continue diminishing in contractual relations. Out of the contracts made and applied, extremely few are ever tested in courts. One can even question whether judges with only legal education and narrow understanding of business are the correct specialists to decide on disputes in business. This argument actually sets the approach of contract law into a new light. Who needs contract law, which only focuses on a tiny part of contracting and ignores the more important proactive issues. Earlier, and even now businesspeople have been happy letting lawyers take care of contract documents. In the future other specialists may take this task from lawyers, who only contribute delivering different standardized terms of contract.<sup>39</sup> Managing contractual relations will become more important and could thus be given totally to other specialists, who understand more about the business aims of contracting and can approach contracts proactively.

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37 Susskind, Richard, *The end of lawyers? Rethinking the nature of legal services*. Oxford University Press 2010.

38 Nelson and Nielsen 's empirical analysis of U.S. corporate lawyers identify different professional roles of lawyers, one being a "cop" focusing only on legal mandate. The authors *see* that corporate lawyers continuously struggle for influence and legitimacy within the corporation. (Nelson, Robert, L. And Nielsen, Laura Beth, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, *Law and Society Review*, ol 34, No 2 (2000), 457-494.

39 Susskind, Richard, *Tomorrow's lawyers. An introduction to your future*. Oxford University Press 2013.

## **5. Conclusion**

As much as I hope for a paradigm shift in contract law I am yet afraid that ousting lawyers from business contracting will be a more probable future than wider development of lawyers' skills and widening the scope of law in business. When lawyers do not draft contracts, disputes in courts will have a diminished role in contracting. Disputes will be solved in other, more business friendly ways. Yet, there still remains the need for an exit for disputes, which cannot be solved through negotiations. This exit, however, will more often be private arbitration. This development pushes contract law even further from contracting practices in business than it now is.

Business has escaped the nation states from governing business contracts and is returning to private governance and private ordering. This path is not so revolutionary than we might assume at first sight. Business contracting has never really been controlled with default rules of contract law, but has even in the era of the nation states functioned within private governance. Now it is time for businesspeople to gain the contract, the effective tool of business governance, back for themselves. Lawyers, who are ready and qualified to assist business within private governance, still have a future in contract drafting and negotiations. The amount of lawyers, who participate in business decisions, will, however, diminish considerably, if their education is not significantly reformed. Lawyers' work will become increasingly technical and less valued in business.

The diminishing role of lawyers in business seems more probable because of our path-dependent institutions. Adversative and closed role of the legal system as well as deep-rooted working methods and practices sustain institutions, which do not rely on cooperation, but on control and competition. Reversing this path would require a significant change in the underlying values of society. Fundamental changes in technological development alone might not be sufficient drivers for a fundamental change in the values of business contracting. Yet, a paradigm shift is knocking on the door of contract law.

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