Social Capital, Networks, Law

Abstracts

Marc AMSTUTZ

Matteo FORNASIER, "Cross-Border Collective Bargaining: The Case of International Framework Agreements"

It is a widespread belief that the only goal pursued by multinational corporations is to generate (and maximize) profit for their shareholders. However, multinational corporations sometimes engage in practices that seem inconsistent with that perception. An example is the conclusion of International Framework Agreements (IFA). An IFA is a collective agreement concluded between the management of the corporation and employees' representatives. Unlike ordinary collective agreements, which are usually concluded at the national level, an IFA has an international scope of application, i.e. it is designed to cover all branches and subsidiaries of the corporation no matter in which country they are situated. The contents of IFAs vary from firm to firm. Speaking generally, they provide a minimum standard of protection for the employees of the company and/or implement certain mechanisms of workers' participation within the company. The aim of my paper is to shed some light on various aspects of this relatively new phenomenon. From a legal point of view, cross-border collective agreements are, by and large, *terra incognita*. There is no legal framework and only little case-law dealing with this kind of instruments. In particular, it is unclear to what extent IFAs are binding on the contracting parties and whether they confer enforceable rights on employees. In practice, the effectiveness of IFAs rests primarily on mutual trust and reputation effects rather than on traditional legal enforcement mechanisms.

Paul JURCYS, "Innovation Intermediaries and Mutual Trust"

Open innovation is a buzzword which is used to define the changing approaches to technology management. In the last decade, large firms have been more cautious about spending for risky R&D projects and their vertical integration. Instead, they tend to examine the surrounding markets and if missing technology is available outside, they seek to acquire it. Such a shift in strategies helps to increase investment returns and shorten the technology development cycles. In such an environment, much bigger role

is placed on the business model. Hence, one of the main issues in the open innovation debate concerns strengthening of inflow and outflow of knowledge. In this presentation, the main focus will be devoted to the role of intermediaries who play a central role in facilitating the dissemination of knowledge among various players in technology circles. It will be argued that one of the missing elements in the open innovation debate was mutual trust between the relevant stakeholders. Mutual trust performs the function of glue in innovation ecosystems: the flow of creative knowledge is much more likely to occur among the actors who trust each other. This observation calls for further discussion about the desirable institutional architecture and how the activities of the intermediaries should be facilitated. In such context, open innovation and mutual trust perspective also offers some valuable considerations about the role of intellectual property rights. Namely, it is suggested that rather the focus should shift from the appropriation of technology (by means of patenting) to the appropriation of externally available knowledge.

Poul KJAER, "The Transformation of the Network Function: The Generation of Social Capital in Corporatism, Neo-Corporatism and Governance"

This paper reconstructs the function of networks and the role of law in relation to the structuring of networks within three types of intermediary institutions: Corporatist, Neo-corporatist and Governance institutions. The hypothesis to be explored is that although all three types of intermediary institutions rely on networks as a way of generating social capital the relative centrality and function of networks differ fundamentally within the three types of intermediary institutions. In the European context, corporatism, a phenomenon which was vibrant from the mid-19th century to the mid-20th century, implied a continuation of essential feudal forms of organisation and within this broader framework networks played a central role as frameworks of collusion leading to the establishment of cartels and other types of monopolistic structures. In neo-corporatism, a post-world War II phenomenon, the centrality of the network phenomenon was greatly reduced insofar as earlier types of networks increasingly were substituted with hierarchical forms of organisation leaving only the kind of trust based policy networks surrounding the peak of hierarchical organisations as a central trademark. The "turn to governance", which has unfolded from the 1980s onwards, however mark a return to the reliance on networks. This development might be interpreted as a move towards "re-feudalisation" or alternatively as a reflection of increased social complexity which subsequently have led to the emergence of new types of networks which aimed at stabilising expectations and facilitate social exchanges.

Amir LICHT, "Culture and Law in Corporate Governance"

Understanding the role of culture in corporate governance has become a subject of growing importance. Today, no institutional analysis of corporate governance systems would be complete without considering the cultural environment in which such system is embedded. This paper provides an overview of different accounts on how culture interacts with the law (especially corporate law) to shape corporate governance and on how this may help explain diversity and persistence in corporate governance. Basic concepts in cultural analysis are first presented, together with prevalent theories of cultural value dimensions and of social networks as social capital. Relying on this analytical framework, the paper reviews current research on culture's consequences for corporate governance on issues such as legal transplants, the objective of the corporation (corporate social responsibility), relations with investors and other stakeholders, the board of directors, and executive compensation.

Joseph MCCAHERY, "Understanding the Board of Directors after the Financial Crisis"

There are numerous studies on the effectiveness of boards that primarily focus on legal formalities, including gender diversity, size, remuneration, board evaluation and the role of the chairman of the board. While attempting to design a one-size-fits-all framework, scholars approaching board independence from an agency cost perspective have been less concerned with analyzing board structures that contribute to strategic decision-making and corporate performance. We examine the factors and board strategies that are associated with value creation and innovation by analyzing the composition of high-performance and high-growth companies. The paper shows that venture capitalists, with their specific expertise and experience, continue to play an important role as independent board members in the post-IPO period. We specifically investigate the importance of diversity, showing that there are significant differences between the companies in terms of age, gender diversity and business expertise (which is dependent on the stage in the company life-cycle).

MENG Zhen, "Ownership of Trust Property in China: A Comparative and Social Network Perspective"

This paper analyzes the reception of trust law in China and suggests that the current legal framework for dealing with trusts has a number of uncertainties, specifically related to the ownership of trust property. The ambiguous wording of "entrust" and other relevant provisions in the Law leave open the question as to the location of trust

property ownership and gave rise to a heated debate among Chinese legal circles. Nevertheless, in spite of the many unresolved legal issues surrounding the Chinese trust law, the trust business is booming.

Data published by the China Trustee Association showed that the total assets managed by the 67 trust companies in China reached a record-high RMB 9.45 trillion ($1.54 trillion) by the end of the second quarter of 2013, which is second only to banking sector assets of more than RMB 100 trillion in Chinese financial industry. Grouped by source of assets, trust assets in China consist of Assembled Funds Trust (23.37%), Single Funds Trust (70.83%) and Property Management Trust (5.80%). Grouped by the function of the assets, trust assets in China consist of Financial Trust (48.52%), Investment Trust (32.94%) and Management Trust (18.54%). As to the flow of the trust funds, about 26.84% of funds were invested in infrastructure, real estate accounted for 9.12%, industrial companies made up 29.40% of investments, investment in stocks and bonds made up 10.5%, financial institutions accounted for 10.68%.

Seemingly, the trust business can function effectively in China without a clear assignment of ownership. In this paper, a number of concepts from social network analysis - particularly social capital - will be used in order to explain this apparent anomaly.

Yuki OI, "Legal Framework and Practice of Outside Directors (*shagai-torishimariyaku*) in Japan"

Colin SCOTT, "Regulatory Capacity and Networked Governance"

Regulation has been long established as a core instrument of governance. Increasingly regulatory power is characterised not as the exercise of the power of command and control, but rather as demonstrative of significant interdependencies. We argue in this paper that a central response of actors within regulatory spaces to the recognition of such interdependencies is to participate in and actively use networks as a means of accessing the capacity of others within a policy domain. Informal and, increasingly, formalised networks are significant and nearly ubiquitous for organisations within major regulatory regimes in Ireland at both national level, in supporting the gathering and deployment of knowledge by government and others, but also at supranational level in underpinning processes of policy learning and exchange of operational information, and bolstering capacity of national actors. Regulatory capacity, then, is the sum of the resources available to actors within regulatory regimes for getting things

done, including expertise, and these resources are typically spread, not only amongst state bodies, such as government departments, regulatory agencies and courts, but also between state and non-state actors. The paper examines how participation in networks enhances regulatory capacity.

SUTHATIP Yuthayotin, "Mutual Trust, Transnational B2C Commerce & the Law"

With the rapid development of technological communication in recent decades, B2C e-commerce offers great benefits, including speed, convenience, low cost and free market access without limitations from political or geographical boundaries. Many studies have highlighted the importance of B2C e-commerce in emerging markets. Nevertheless, the lack of trust (from both consumers and traders) seems to be an obstacle to achieve global commercial exchange and the potential of B2C e-commerce activities. Therefore, in order to strengthen the B2C e-commerce, the concept of "mutual trust" should become the focus of debates to provide a platform for designing appropriate regulations and strategies. Focusing in particular on the SE Asian experience, this paper aims to identify a number of institutional mechanisms that can enhance trust, focusing on the crucial role of intermediaries as trust brokers.

Shinto TERAMOTO, "What Makes Medical Records Safe in the Cloud?"

Recently, more and more projects have been funded by the Japanese government to accumulate medical records in the cloud and to enable medical practitioners and researchers to share them. "One for All, All for One" is the context underlying these projects. The medical record of one patient contributes to saving the life and aiding the health of other patients, while the accumulated medical records of a number of patients contribute to saving the life and aiding the health of all patients. The past medical records of a patient contribute to saving their own life and aiding their health. Medical clouds can ensure their medical records are available for their current and future attending practitioners.

On March 11th, 2011, the Great East Japan Earthquake hit Japan. 3.11 reminded us of the importance of the "availability" of medical records. 300 or more hospitals and more than 1,200 clinics were damaged due to 3.11.[1] Medical records in

[1] mhlw.go.jp/stf/shingi/2r9852000001uo3f-att/2r9852000001uo7y.pdf.

paper-form or stored on hospital servers were destroyed by the TSUNAMI. However, the electronic medical records stored outside of the hospitals were safe.[2]

As the days go by after a disaster, practitioners have to care more and more for patients with chronic diseases, while the need to care for patients that have been severely injured decreases. Medical teams from outside the disaster-affected area (including DMAT = Disaster Medical Assistance Teams) have to deal with these patients, because the local hospitals and clinics, as well as medical practitioners, are also affected by the disaster. The past medical records of a patient are very helpful to such medical teams who must care for chronic diseases. Under usual conditions, only the attending doctor and his/her team at local hospitals and clinics are authorized to access the medical records of their patients. However, in order to save the patients under disastrous or emergency conditions, such restrictions must be temporarily relaxed and the records made available to the medical teams (the so-called "Break Glass" Policy). We have to note that the Break Glass Policy works only when the medical records are safe. On 3.11., many medical records stored in local hospitals and clinics were washed away by the TSUNAMI.

Obviously, medical clouds are essential for realizing the secure storage of medical records, of which information is available to medical practitioners, while protecting the privacy of patients. The latest guidelines of the MHLW (Ministry of Health, Labour and Welfare) regarding the security management of medical information systems (ver. 4.1 of February 2010) no longer prohibits the use of cloud computing services for the storage of medical records. However, the managements of hospitals and clinics, and conservative lawyers are still hesitating to go forward to employ medical clouds.

There are several issues that must be overcome in order to realize the wider use of medical clouds. These issues arise from the persistent attitude of lawyers, as well as ordinary but well-educated people. They tend to consider that the law is based on the assumption that a person cannot trust others. Moreover, they tend to consider that the law has little relationship with ***mutual trust*** between the actors who constitute the ***social network***. We must overcome and reform such attitudes, so they understand the laws from the perspective of ***mutual trust*** among the ***social network***. The assumption of medical regulation - "without mutual trust, no medicine" - is not properly understood by lawyers and citizens. Moreover, the Japanese law provides patients and their attending practitioners no practical means to ensure the availability of their own past medical records.

If the medical practitioners cannot share medical information with their colleagues (or, even with their patients), we cannot expect the healthy provision and development of medicine. No doubt, medical records of patients constitute one of the major classes of medical information. However, without mutual trust between medical practitioners (and, also, patients), medical records cannot be shared by them. Without the sharing of medical information among medical practitioners and patients, no medicine can be administered properly. Medicine is based on an information network

[2] microsoft.com/ja-jp/casestudies/saiseikan.aspx.

that enables us to store and share medical information, and such information network is based on mutual trust through the social network.

The said principle is substantially affirmed by the Japanese medical laws, as well as the traditional ethical practices of medicine such as the Hippocratic Oath. Article 20 of the Medical Practitioners' Act of Japan (Law No. 201 of 1948) provides "No medical practitioner shall provide medical care ... ***without personally performing an examination*** ...". The Hippocratic Oath states "I will apply dietetic measures for the benefit of the sick ***according to my ability and judgment ...***". The law requires that any medical treatment is provided based on a diagnosis conducted by a medical practitioner. A medical practitioner can perform his/her own diagnosis because he/she has learned the cases accumulated up until that time. The said regulation assumes that accumulated cases are shared by medical practitioners. In order to ensure our own satisfactory medical treatment even in an emergency or disaster, we have to ensure that our own medical records are available to practitioners.

The Act on the Protection of Personal Information (Law No. 57 of 2003), as well as privacy protection under the Civil Code, gives a person the right to stop the use of their personal information by an entity or person that they do ***not trust***. However, Japanese law provides a citizen substantially no means to ensure the availability of their own medical records by medical practitioners that they do ***trust***. Moreover, Japanese law provides a citizen substantially no means to ensure that their own medical records are maintained and available at the data centers to which they can trust.

Citizens cannot appoint in advance medical teams who may save them in a disaster. In order to ensure the availability of past medical records of patients to medical teams in a disaster, we have to assume that patients and their attending doctors "deem" trust to possible medical teams and medical cloud providers in the event of a disaster. Such trust would be developed through continuous sharing of information through medical practitioners and patients (including potential patients). However, trust can be easily broken by only a few incidents of distrustful activities. Moreover, attending doctors and medical cloud providers, as well as medical teams, would demand that they are indemnified if they decide to Break Glass. Presumably, we need laws supporting "deemed" trust, assuring a certain degree of indemnity, while regulating the degree of security and moral standards.

Mutual trust between parties will be maintained because each party has the power to impose a penalty on the party breaking trust. Patients and medical practitioners need rights to ensure the portability of medical records. If a medical cloud provider breaches their trust, they must be able to transfer their records from such provider's data center and store them at a new and trustworthy data center. However, portability of medical records of individual patients is not practicable. Such rights demanding portability of medical records should be collectively assigned to a trustee representing the interests of patients and their attending practitioners. A new right that ensures portability of medical records, as well as the assignment of such right to a trustee, is necessary.

3.11 has reminded us of the importance of mutual trust among the network of patients, medical practitioners and data center providers storing medical records.

However, in order to develop mutual trust, so that such trust functions as social capital that promotes the welfare of citizens, we have to continuously create and amend the laws based on the perspective of mutual trust.

Erik VERMEULEN, "The Theory and Practice of Venture Capital Contracts"

Venture capital financing arrangements are increasingly standardized. In the United States, the trend is for venture capitalists (and recently also angel investors) to use the legal templates that are developed by the National Venture Capital Association as the starting documents for investments in promising high-tech companies. Developments in the production of standardized templates have attempted to avoid bias towards either the entrepreneurs/startup company or the venture capitalists (and offer flexibility to enable the parties to tailor the terms as they see fit). Empirically, it is well-known that the legal provisions predominantly focus on protecting the latter against the downside risks by providing them with seniority or preferential rights over the founders and other investors. This is largely due to the omission of explicit template provisions that protect the entrepreneurs against inept venture capitalists.

At the fund level, business law practice has also developed boilerplate clauses in the limited partnership agreement that are designed to reduce the agency costs between the venture capitalists and the fund's investors. The limited partnership agreement typically contains certain provisions that seek to protect the investors against managerial misbehavior such as limits on the fundraising period and the limited lifespan of the fund. It is not surprising, however, that the compensation and profit distribution arrangements usually give the managers the better hand in the deal. Compensation usually derives from two main sources (the so-called 'two and twenty' arrangement). First, fund managers are typically entitled to receive 20% of the profits generated by each of the funds, the carried interest. A second source of compensation for the fund managers is the annual management fee, usually 2% to 2.5% of a fund's committed capital.

While transaction costs are reduced by standardized templates, there has been little effort to discover why fund investors and entrepreneurs express few concerns about the suboptimal standardized and boilerplate provisions? A plausible explanation is that they largely rely on implicit relational tools, such as trust and reputation. The argument is based on the view that in a venture capital ecosystem, norms, motivations and transparency – that prevent venture capitalists from engaging in opportunistic behavior – are made explicit through social networks and contracts. In such a system, law firms and other service providers act as the guardians and gatekeepers of the ecosystem by, for instance, tracking and disclosing recent trends and developments. That said, the absence of such an ecosystem or an underdeveloped ecosystem arguably explains why (1) venture capital fund agreements in Europe tend to include more protective provisions; (2) entrepreneurs outside the United States are generally more

uncomfortable with accepting venture capital support (which is often correct given the presence of a number of unscrupulous and unprofessional venture capital fund managers), and (3) reputable venture capitalists that operate without an established ecosystem experience more suspicion and hostility from startup companies.

In this paper, we argue that standardized legal documents may be generally less effective and accepted in an unstable ecosystem. Indeed, consider again the case of the venture capital industry. An analysis of venture capital over the last decade highlights how the industry has generally failed to live up to the expectations of entrepreneurs, investors and policymakers, given its risk profile. For instance, most traditionally structured venture capital firms have, with a few notable exceptions, delivered uninspiring returns. This has not only led to a significant decrease in the number of venture capital funds, but has led many funds toward the less risky financing of later and growth stage companies. Moreover, whilst we see more conservative investments in the form of expansion and later stage venture capital rounds, new categories of investors, such as crowdfunding platforms, super-angels and multinational corporations have stepped up to fill the 'funding' gap in the earlier stages of the corporate life cycle. When we add the fact that startup companies have generally become less capital intensive, we conclude that the traditional venture capital ecosystem is obsolete and would benefit from substantial reform.

This view is supported by several post-financial crisis trends in venture capital contracting. For instance, the paper shows that investors in venture capital funds are demanding the inclusion of more investor-favorable compensation terms in the limited partnership agreements. These results suggest that the new terms not only provide the investors with more favorable management fee and profit distribution arrangements, but also give them more control over the fund's investment decisions. The growth of this pattern of contracting also reveals the inclusion of more straightforward co-investment rights. At the same time, we observe that investors want to see more skin in the game from the managers/general partners.

This article also looks at the portfolio company level where there have been significant changes in the in venture capital contracts. First, our data captures a significant shift towards more entrepreneur favorable deal terms. Second, the increasing interest in crowdfunding as a new type of entrepreneurial finance which makes it possible for early-stage start-up companies to raise 'venture capital' from a large group of individuals, sidestepping the traditional fundraising process that includes lengthy due diligence periods and tough negotiations over the pre-money valuation and contractual terms. In this respect, it is remarkable (and this is our third observation) to see venture capital firms experimenting with non-jargony and more accessible term sheets. Fourth, the attempt of reputable and well-established venture capitalists to come up with some kind of venture capital code of conduct to restore trust and confidence in the venture capital ecosystem is a clear confirmation of the climate change in the industry.