ARTICLES

Contract Governance – A Draft Research Agenda

Florian Möslein and Karl Riesenhuber*

Abstract: While the concept of governance had originally been developed in Williamson's seminal article with a view to the "governance of contractual relations", it has ironically not received much attention in general contract law theory so far. This paper aims at developing potential perspectives that might arise from governance research in the field of contract law. Contract governance appears to be an important and indeed necessary complement to corporate governance. Contract and organisation are distinct forms of cooperation, yet, they are complementary and, in some cases, contract and organisation can be alternative instruments for the same goals. Moreover, the market mechanism as such requires an organisational framework which may exert an influence on market results and which is open to a governance analysis. Contract governance opens up the perspective for its various incentives and regulatory mechanisms. In that respect, governance research goes beyond traditional contract law theory: It contributes to "better" regulation, for example by helping to avoid misdirected regulation and counter-intentional effects. Contract governance may thus help preserving individual freedom as it may contribute to less intrusive regulation.

Résumé: Alors que le concept de gouvernance a été originellement développé, dans l'article séminal de Williamson, en vue de la "gouvernance des relations contractuelles", ironiquement, on ne lui a pas prêté beaucoup d'attention jusque là en théorie du droit des contrats. Cet article cherche à développer les perspectives potentielles qui pourraient être tirées des recherches sur la gouvernance dans le domaine du droit des contrats. La gouvernance contractuelle semble être un complément important et en réalité nécessaire à la gouvernance d'entreprise. Les contrats et les organisations sont des formes distinctes de coopération et, cependant, elles sont complémentaires et, dans certains cas, elles peuvent être des instruments alternatifs en vue des mêmes objectifs. De plus, le fonctionnement du marché en tant que tel suppose un cadre organisationnel qui peut exercer une influence sur les résultats de ce marché et qui se prête à une analyse en termes de gouvernance. La gouvernance contractuelle ouvre une perspective pour ces différentes incitations et mécanismes régulatoires. À cet égard, la recherche en matière de gouvernance va au-delà de la théorie traditionnelle du droit des contrats : elle contribue à une "meilleure" régulation, par exemple en aidant à éviter les régulations mal orientées et les effets contre-productifs. La gouvernance contractuelle

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peut ainsi aider à préserver la liberté individuelle, comme elle peut contribuer à une régulation moins intrusive.

Kurzfassung: Obwohl die Governance-Forschung in Williamsons epochalem Aufsatz ursprünglich mit Blick auf die „governance of contractual relations" entwickelt wurde, hat sie in der allgemeinen Vertragsrechtswissenschaft bisher nur wenig Aufmerksamkeit gefunden. Ziel dieses Beitrags ist deshalb, mögliche Perspektiven aufzuzeigen, die sich aus dem Governance-Ansatz für das Vertragsrecht ergeben können. Contract Governance erweist sich dabei als wichtige und sogar notwendige Ergänzung von Corporate Governance. Vertrag und Organisation sind unterschiedliche Formen der Kooperation, ergänzen sich jedoch gegenseitig und können teils sogar alternativ geeignete Mechanismen zur Erreichung ein- und desselben Zieles sein. Außerdem erfordert der Marktmechanismus selbst eine institutionelle Rahmenordnung, die Marktergebnisse beeinflussen kann und einer Governance-Analyse zugänglich ist. Contract Governance erweitert den Blickwinkel auf die unterschiedliche Anreiz- und Steuerungsmechanismen dieser Rahmenordnung. In dieser Hinsicht geht Contract Governance über die klassische Vertragsrechtswissenschaft hinaus: Sie kann die Rechtssetzung verbessern helfen und beispielsweise dazu beitragen, regulatorische Fehlanreize und kontraintentionale Effekte zu vermeiden. Contract Governance kann dadurch nicht zuletzt freiheitserhaltend wirken und dazu beitragen, staatliche Regeln weniger eingriffsintensiv zu machen.zugänglich ist. Contract Governance erweitert den Blickwinkel auf die unterschiedliche Anreiz- und Steuerungsmechanismen dieser Rahmenordnung. In dieser Hinsicht geht Contract Governance über die klassische Vertragsrechtswissenschaft hinaus: Sie kann die Rechtssetzung verbessern helfen und beispielsweise dazu beitragen, regulatorische Fehlanreize und kontraintentionale Effekte zu vermeiden. Contract Governance kann dadurch nicht zuletzt freiheitserhaltend wirken und dazu beitragen, staatliche Regeln weniger eingriffsintensiv zu machen.

Governance research has its origins in social and political sciences and in economics. It describes a field of research that is concerned with mechanisms of regulation and steering, as well as with their institutional framework. The focus is on coordination of action and behavior, be it hierarchical or not, but also on potential effects of such coordination.[1]

Within legal science, governance research was first applied to public and administrative law, where it soon developed into a field of research of its own.[2] Within private law, research has so far predominantly focused on the law of business organizations. This field of research has been tremendously successful under the term 'corporate governance'. While the concept had originally been developed in *Williamson*'s seminal article with a view to the 'governance

1 For a survey on the term 'governance' S. Burries / M. Kempa / C. Shearing, 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship' *Akron Law Review* 41 (2008) 1, 7–12; A.M. Kjaer, *Governance* (Cambridge: Polity Press, 2004) 3–7, with further references; J. Pierre, 'Introduction: Understanding Governance', in J. Pierre (ed), *Debating Governance* (Oxford: Oxford University Press, 2002) 1, 3 et seq; O.E. Williamson, 'The Economics of Governance' *American Economic Review* 95/2 (2005) 1.

2 G.F. Schuppert (ed), *Governance-Forschung – Vergewisserung über Stand und Entwicklungslinien* (2nd ed, Baden-Baden: Nomos, 2006).

of contractual relations', it has ironically not received a similar degree of attention in general contract law theory.[3] Such observation is rather surprising, given that contract governance has originally indeed been the initial starting point of corporate governance theory.[4]

In this paper, we would like to develop potential perspectives that might arise from governance research in the field of contract law. For this purpose, we initially try to analyse the characteristics of governance research and enquire into the reasons why it has been so successful in other areas of law (sub I). We will then consider potential meanings and implications of governance in contract law (sub II). On this basis we conclude with a provisional evaluation of the potential of governance research for the study of contract law (sub III).

I. Why Governance?

'*Why Governance?*' – What are the characteristics of governance research and which perspectives may emerge for contract law? An answer to this question requires a sketch of the potential meanings of the notion of governance (sub 1). As an example, a comparative view on the corporate governance debate might give us a first idea about the range of perspectives that governance research could open up for contract law (sub 2). Rooted in private law, corporate governance is a close relative of contract law and thus potentially a good starting point for a transfer of research ideas (sub 3).

3 O.E. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' *Journal of Law & Economics* 22 (1979) 233 et seq; consider also P. Vincent-Jones, 'Contractual Governance: Institutional and Organizational Analysis' *OJLS* 20 (2000) 317 et seq; P. Zumbansen, 'The Law of Society: Governance through Contract' *Indiana Journal of Global Legal Studies* Jul 14 (2007) 191 et seq and the contributions in *European Law Journal* 15 (2009) 155–276 (special issue on 'Regulating Markets and Social Europe: New Governance in the EU'); for economic studies on so-called 'exchange governance' see references below n 38. On the merits also H. Collins, *Regulating Contract* (Oxford: Oxford University Press, 1999) 225 et seq; H. Eidenmüller, 'Forschungsperspektiven im Unternehmensrecht' *Juristenzeitung* 2007, 487, 493; C. Windbichler, 'Cheers and Boos for Employee Involvement: Co-Determination as Corporate Governance Conundrum' *European Business Organization Law Review* 6 (2005) 507, 529 and 533 et seq; C. Windbichler, 'Arbeitnehmerinteressen im Unternehmen und gegenüber dem Unternehmen – Eine Zwischenbilanz' *Die Aktiengesellschaft* 2004, 190, 195 et seq.

4 Williamson, n 3 above, 233 et seq. To the same effect also P. Behrens, 'Corporate Governance', in J. Basedow / K.J. Hopt / H. Kötz (eds), *Festschrift for Drobnig* (Tübingen: Mohr Siebeck, 1998) 491, 491–494; S. Grundmann / F. Möslein, *European Company Law* (Antwerpen/Oxford: Intersentia, 2007) para 474 ('key problem of long-term contracts').

1. The Notion of 'Governance'

There is no generally accepted definition of governance. The notion has no precise meaning and rather refers to a 'type' of research (*Typus-Begriff*). Nonetheless, we can easily identify some features that characterise governance research and distinguish it from similar fields of research. In a very general manner, governance is usually described as the entirety of the various collective impacts on a social system.[5] Regardless of the linguistic relationship with the notion of govern*ment,* governance goes beyond political leadership and regulation *by the state.* Governance widens the perspective. Apart from legal instruments it also takes other mechanisms of social influence into account. How to regulate behaviour is indeed an important question here, but the focus is not so much on result-driven steering mechanisms, it is rather on the structure of institutions that shape behaviour. These institutions, however, may themselves create incentives and thereby have a potential influence on behaviour of individuals or groups.[6] Not only heteronomous steering, but also autonomous interaction and organisation rank among the elements of governance.

In that sense, governance research goes far beyond the traditional scope of legal research. A typical feature is the interdisciplinary approach and the exchange among all economic, political and social sciences. Legal research, however, plays a central role indeed, as most important institutions are designed by legal rules. Governance research is, therefore, important for rule-making – the design of legal institutions – but no less for those who have to follow the rules. Corporate governance is a prime example of all this.

2. The example of Corporate Governance

Over the last two decades, Corporate Governance has become an extraordinarily successful and influential field (or method) of research, initially in the US, but then also on a worldwide basis.[7] It corresponds with a rapid growth

5 J. Köndgen, 'Privatisierung des Rechts', *Archiv für die civilistische Praxis* 206 (2006) 477, 514, following the approach of M. Hill / P. Hupe, *Implementing Public Policy – Governance in Theory and in Practice* (London: Sage, 2002) 13 et seq.

6 R. Mayntz, 'From government to governance: political steering in modern societies', in D. Scheer / F. Rubik (eds), *Governance of Integrated Product Policy* (Sheffield: Greenleaf Publishing, 2006) 18–25; more specifically: R. Mayntz, 'Governance Theorie als fortentwickelte Steuerungstheorie?', in Schuppert (ed), n 2 above, 11–20; G.F. Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplinen', ibid, 378–382.

7 For a survey, see only T. Clarke, *International Corporate Governance* (New York: Routledge, 2007) esp 228 et seq ('The Globalisation of Corporate Governance'); more specifically, for instance: K.J. Hopt, 'Die rechtlichen Rahmenbedingungen der Corporate Governance', in P. Hommelhoff / K.J. Hopt / A. von Werder (eds), *Handbuch*

of corporate governance codes which are highly relevant in practice. Moreover, it triggered numerous legal and economic research projects and publications. Yet there are not many traces of the term Corporate Governance in legal statutes. In German corporate law, for instance, one can only refer to § 161 Stock Corporations Act (*Aktiengesetz*), introduced in 2002; in the UK, the Companies Act 2006 added at least some corporate governance rules to the Financial Services and Markets Act 2000.[8] Some try to equate corporate governance with the traditional subject matter of the internal organizational structure of companies.[9] Indeed, Corporate Governance looks at questions of management and control of business activities. Yet, is has a wider, partly innovative scope.[10] Only this wider scope can explain the impressive success of corporate governance in business practice and academic discussion alike. There are four features of this discussion that deserve closer attention:

a) Market orientation

First of all, Corporate Governance does not confine itself to an inquiry into the internal structure of companies. Instead, it also takes their market-drivenness into account.[11] This twofold perspective is often referred to as internal and external Corporate Governance.[12] It is based on an insight dating back at

Corporate Governance (Cologne: Schmidt, 2003) 29, 31, and, in more detail; K.J. Hopt, 'Corporate Governance: Aufsichtsrat oder Markt? – Überlegungen zu einem internationalen und interdisziplinären Thema', in P. Hommelhoff / H. Rowedder / P. Ulmer (eds), *Max Hachenburg, Dritte Gedächtnisvorlesung 1998* (Heidelberg: CF Müller, 2000) 9, 10 et seq and 14–24.

8 For the UK, see sec 1269–1273 *Companies Act 2006* as well as Part 6 *Financial Services and Markets Act 2000.* See also A. Calder, *Corporate Governance: A Practical Guide to the Legal Frameworks and International Codes of Practice* (London/Philadelphia: Kogan Page, 2008) 35 et seq, and subsequently the text at note 18 below.

9 To this effect F. Kübler, 'Aktienrechtsreform und Unternehmensverfassung', in W. Gebauer / B. Rudolph (eds), *Aktienmärkte im Finanzsystem* (Frankfurt: Knapp, 1994) 113, 115; J. Semler, in B. Kropff / J. Semler (eds), *Münchener Kommentar AktG* Band 5/1 (2nd ed, Munich: Beck, 2003) § 161 AktG para 2; A. von Werder, in H.-M. Ringleb / T. Kremer / M. Lutter / A. von Werder, *Kommentar zum Deutschen Corporate Governance Kodex* (3rd ed, Munich: Beck, 2008) preliminary note, para 1.

10 With a similar approach S. Grundmann / P.O. Mülbert, 'Corporate Governance – Europäische Perspektiven' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2001, 215, 217; Hopt (2003), n 7 above, 29, 31 et seq; M. Lutter, 'Vergleichende Corporate Governance – Die deutsche Sicht' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2001, 224, 225 ('rank of a distinctive field of legal research', our translation).

11 In more detail: F. Möslein, *Grenzen unternehmerischer Leitungsmacht im marktoffenen Verband* (Berlin: de Gruyter, 2007) in particular at 2.

12 Eg, Grundmann / Möslein, n 4 above, § 14; K.J. Hopt, 'Common Principles of Corporate Governance in Europe?', in B.S. Markesinis (ed), *The Clifford Chance Millennium Lectures – The Coming Together of the Common Law and the Civil Law*

least to the 1970 s: Shareholders in listed companies not only exert influence within the internal structure by exercising their voting rights (*voice*), but also outside of this structure, by selling their shares (*exit*).[13] This idea ultimately leads to a stronger nexus of company and capital market law,[14] and it gains influence where companies are increasingly financed through capital markets. Since the beginning of the 1990 s, capital markets have indeed played an increasingly important role in Continental Europe. This development coincides with the launch of the corporate governance debate.[15]

b) Forms and Instruments of Rule-making

Secondly, corporate governance implies modifications to rule-making. An impressive stock of different codes, guidelines, principles and reports of corporate governance is the result of this trend which can be observed on a worldwide basis.[16] One peculiarity is that standards of behaviour are no lon-

(Oxford: Hart, 2000) 105, 106 et seq; Hopt (2003), n 7 above, 34–36; C. Teichmann, 'Corporate Governance in Europa' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2001, 645, 646 et seq; and now also the monograph by A. Naciri, *Internal and External Aspects of Corporate Governance* (New York: Routledge, 2009).

13 A.O. Hirschman, *Exit, Voice and Loyalty* (Cambridge/Mass: Harvard University Press, 1970); similarly M. Lutter, *Der Aktionär in der Marktwirtschaft* (Berlin: de Gruyter, 1974) 18–22 (purchase and sale of shares, election of the supervisory board and discharge as means of indirect influence of the shareholders).

14 Generally on these interdependencies H.-D. Assmann, in K.J. Hopt / H. Wiedemann (eds), *Großkommentar AktG* (4th ed, Berlin: de Gruyter, 2004) Einl para 352–399; J. Garrido García, 'Company Law and Capital Markets Law' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 69 (2005) 761 et seq; Hopt, n 12 above, 105, 106 et seq; H. Merkt, 'Zum Verhältnis von Kapitalmarktrecht und Gesellschaftsrecht in der Diskussion um die Corporate Governance' *Aktiengesellschaft* 2003, 126, esp 130 et seq; P.O. Mülbert, *Aktiengesellschaft, Unternehmensgruppe und Kapitalmarkt* (2nd ed, Munich: Beck, 1996) 68–94; for EC company law: S. Grundmann, 'Die Struktur des europäischen Gesellschaftsrechts – Von der Krise zum Boom' *Zeitschrift für Wirtschaftsrecht (ZIP)* 2004, 2401, 2408 et seq.

15 This is indeed sometimes rightly qualified as a 'turn of an era' ('Zeitenwende'), cf Hopt (2003), n 7 above, 29, 36; with respect to one core element: A. Engert, 'Hedgefonds als aktivistische Aktionäre' *Zeitschrift für Wirtschaftsrecht* 2006, 2105 et seq.

16 See, for instance, R. Aguilera / A. Cuervo-Cazurra, 'Codes of Good Governance Worldwide: What is the Trigger?' *Organization Studies* 25 (2004) 417–446; for a survey on the most important rule-books cf Grundmann / Möslein, n 4 above, para 476 et seq; Möslein, n 11 above, 414 and extensively: Weil / Gotshal / Manges LLP (eds), *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States – Final Report* (Brussels, 2002) available for download at http://ec.europa.eu/internal_market/company/otherdocs/index_en.htm; an index with links to all codes is available at http://www.ecgi.org/codes (both last visited on 20 March 2009). Regulatory diversity is increasingly perceived as a specific characteristic of European Company law as such: S. Deakin, 'Reflexive Governance and European Company Law' *European Law Journal* 15 (2009) 224 et seq; P. Zumbansen, '„New

ger decreed by a legislator, but by a whole range of various institutions like supranational organisations, affected stakeholders or groups of experts. This method of rule-making does not exclude statutory recognition. However, many rules are no longer conceptualised as a rigid list of legal obligations, but rather as 'soft law',[17] allowing for deviations if only sufficiently justified (comply or explain). This idea is now enshrined, for instance, in German law in Article 161 of the Stock Corporations Act and in UK law in section 1240 (1) Companies Act 2006 and sections 90A and 90B Financial Services and Markets Act 2000.[18] Rather than strict compliance with codified rules, transparency and disclosure are required. Again, this concept originates in a market-oriented consideration: Capital markets will 'punish' companies deviating from the stipulated standards without good reasons.[19] Such firms are simply less attractive for investors.

Governance" in European Corporate Law Regulation as Transnational Pluralism' *European Law Journal* 15 (2009) 246 et seq.

17 Cf, eg, K.J. Hopt, 'Corporate Governance in Europa: Neue Regelungsaufgaben und soft law' *Der Gesellschafter* 2002 special issue, 4 et seq; Lutter, n 10 above, 224, 225; E. Vetter, 'Der Deutsche Corporate Governance Kodex – nur ein zahnloser Tiger?' *Neue Zeitschrift für Gesellschaftsrecht* 2008, 121, 128 (qualifying); Zumbansen, n 16 above, 12–21 and 47 seq; with respect to the notion and the concept: U. Ehricke, '"Soft Law" – Aspekte einer neuen Rechtsquelle' *Neue Juristische Wochenschrift* 1989, 1906 et seq; U. Mörth (ed), *Soft Law in Governance and Regulation* (Cheltenham: Elgar, 2004).

18 On the concept and its function (also with regard to issues of liability) see only P. Davies / G. Hertig / K.J. Hopt, 'Beyond the autonomy', in R. Kraakman / P. Davies / H. Hansmann / G. Hertig / K.J. Hopt / H. Kanda / E. Rock (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2004) 214, 224; K.J. Hopt, 'Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts – Zum Bericht der Regierungskommission Corporate Governance', in P. Hommelhoff / M. Lutter / K. Schmidt / W. Schön / P. Ulmer (eds), *Corporate Governance – Gemeinschaftssymposium* (Heidelberg: Verlag Recht und Wirtschaft, 2002) 27–67; M. Lutter, 'Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG' *Zeitschrift für das gesamte Handelsrecht* 166 (2002) 523 et seq; C.H. Seibt, 'Deutscher Corporate-Governance-Kodex und Entsprechens-Erklärung (§ 161 AktG)' *Aktiengesellschaft* 2002, 249 et seq; P. Ulmer, 'Der Deutsche Corporate Governance-Kodex – Ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften' *Zeitschrift für das gesamte Handelsrecht* 166 (2002) 150 et seq.

19 To this effect notably T. Baums (ed), *Bericht der Regierungskommission Corporate Governance* (Cologne: Schmidt, 2001) para 4 ('pressure of capital markets, in particular institutional investors, analysts, financial press and *listing rules* of stock exchanges, […] forces to obey specific Corporate Governance Principles', our translation); in this sense also the legislative material: BT-Drs 14/8769, 21. Cf further, eg, Lutter, n 18 above, 523, 535; Ulmer, n 18 above, 150, 168; M. Schüppen, 'To comply or not to comply – that's the question!' *Zeitschrift für Wirtschaftsrechts* 2002, 1269, 1273; sceptical in regard to a lack of empirical evidence: E. Nowak / R. Rott / T.G. Mahr,

c) Internationalisation

A third phenomenon is that corporate governance and internationalisation are closely interrelated. On the one hand, the corporate governance movement is essentially based on the globalisation of financial and capital markets.[20] Cross-border investments call for investor confidence in the mechanisms of decision and control of foreign companies. Investors need to know what they are about to venture into. Such confidence does not necessarily call for a harmonisation of the legal regime that applies,[21] but it requires transparency – here transparency of governance rules and standards of good business conduct. This consideration also provides for an argument for new ways of rule-making: corporate governance codes are more easily accessible across borders than national statutes and case law, not least because companies themselves have an interest in their international dissemination. On the other hand, these dynamics lead also to an internationalisation of academic discussion about corporate governance.[22] Corporate Governance seems to provide for a common language that makes it easier to compare both, rules and legal facts: Corporate Governance fosters functional comparisons of different (company law) jurisdictions.[23] Not least because of this effect, 'comparative corporate governance' has become a very rich and fertile field of research today.[24]

d) Interdisciplinarity

Fourth, corporate governance inspires interdisciplinarity. This effect has institutional as well as content-related reasons. As a matter of fact, standard

'Wer den Kodex nicht einhält, den bestraft der Kapitalmarkt?' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2005, 252 et seq.

20 Grundmann / Mülbert, n 10 above, 215, 217 et seq.

21 For the discussion on the harmonisation of rules on internal governance issues in Europe see, for instance, M. Deckert, 'Zu Harmonisierungsbedarf und Harmonisierungsgrenzen im Europäischen Gesellschaftsrecht' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 64 (2000) 478 et seq; Grundmann, n 14 above, 2401, 2408 et seq; S. Grundmann / F. Möslein, 'Europäisierung', in W. Bayer / M. Habersack (eds), *Aktienrecht im Wandel, Band 2* (Munich: Beck, 2007) 31, in particular 62–64; K.J. Hopt, 'Europäisches Gesellschaftsrecht – Krise und neue Anläufe' *Zeitschrift für Wirtschaftsrecht* 1998, 96, 101; Möslein, n 11 above, 201–203; monographically M. Pannier, *Harmonisierung der Aktionärsrechte in Europa – insbesondere der Verwaltungsrechte* (Berlin: Duncker & Humblodt, 2003).

22 In more detail Grundmann / Mülbert, n 10 above, 215, 217.

23 Seminal for a functional approach to comparative company law: Kraakman / Davies / Hansmann / Hertig / Hopt / Kanda / Rock (eds), n 18 above.

24 See, in particular: K.J. Hopt / H. Kanda / M.J. Roe / E. Wymeersch / S. Prigge (eds), *Comparative Corporate Governance – the State of the Art and Emerging Research* (Oxford: Oxford University Press, 1998); K.J. Hopt / E. Wymeersch (eds), *Comparative Corporate Governance – Essays and Materials* (Berlin: de Gruyter, 1997).

setters and research institutions are composed of economists and lawyers, and they bring together academics, politicians and practitioners. This requires, but also fosters substantial discussions between various sectors, but also between various academic disciplines.[25] Such cross-sectoral and cross-disciplinary discussions are, however, also content-related, as corporate governance concerns questions of all these subject matters, in particular of corporate finance, business administration and corporate law.[26] Only a functional perspective allows for truly comprehensive discussions of these issues. Again, corporate governance proves to provide for a common language which, last but not least, paved the way for academic publications combining insights of legal, economic and social sciences in unprecedented breadth.[27]

3. Analysis and Transfer

a) (Corporate) Governance and Strategies of Regulation

Governance research is thus not a novel substantive field of business law, but rather stands for a modified research perspective. The focus is on issues of business organisation which always used to play a central role in company law. Yet the approach is different. The outward appearance of the governance perspective is characterized by a methodological research approach which is far more interdisciplinary and internationally oriented than traditional approaches: This perspective does not only take advantage of other disciplines and legal orders as auxiliary tools or standards of comparison, it rather accepts them as equivalent partners.[28]

However, the change in perspective also has an impact on the very legal mindset and argumentation. The institutional framework can be perceived in a much more differentiated way if not only statutes and jurisprudence, but also 'soft-law' mechanisms are taken into account. Moreover, these mani-

25 Grundmann / Mülbert, n 10 above, 215, 217.

26 To this effect Lutter, n 10 above, 224, 225 et seq; B. Rudolph, 'Unternehmensfinanzierung und Corporate-Governance-Entwicklungen und weiterer Anpassungsbedarf' *Betriebs-Berater* 2003, 2053 et seq; E. Vetter, 'Deutscher Corporate Governance Kodex' *Deutsche Notar-Zeitschrift* 2003, 748, 749 et seq; see also S. Rudolf, 'Entwicklungen im Kapitalmarkt in Deutschland', in M. Habersack / P.O. Mülbert / M. Schlitt (eds), *Unternehmensfinanzierung am Kapitalmarkt* (2nd ed, Cologne: Schmidt, 2008) § 1 para 13 et seq.

27 Exemplary Hommelhoff / Hopt / von Werder (eds), n 7 above.

28 Generally on 'plurality of methods' (our translation) S. Grundmann, 'Methodenpluralismus als Aufgabe' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 61 (1997) 423 et seq.

fold mechanisms become a field of research of its own.[29] Above all, the governance perspective perceives rules not simply as an instrument to resolve and sanction disputes in retrospect, but as a preventive mechanism of steering behaviour and structuring the framework for human interaction. Rules are more than a standard for courts and supervisory authorities to assess human behaviour by hindsight. They can (also) steer and coordinate such behaviour.[30] The probably most important insight of (corporate) governance research for legal science may therefore be formulated as follows: Rules do not only operate *ex post,* but also *ex ante.* They have an impact on the behaviour of managers and controlling shareholders, for example – even if they are not, or not in their entirety, enforceable by courts or supervisory authority.

Indeed, business law academics are increasingly focusing on the implementation of rules rather than on their enforcement.[31] The science of business law is increasingly sought after (also) as a strategy consultant of lawmakers, mainly with respect to drafting techniques and impact analysis.[32] One of the main reasons for this change in (self-)perception is the comprehensive perspective of Corporate Governance. Legal research on rule-making cannot do without a result-based analysis on how people react to social and legal norms.

b) Differences and common starting points

Contract law does indeed move into a similar direction. It also increasingly focuses on questions of rule implementation and design.[33] However, the governance perspective as such does not seem to have attracted much interest in contract law, certainly not to the same extent as in company law. This raises

29 J.-H. Binder, '"Prozeduralisierung" und Corporate Governance' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2007, 745; in detail H. Fleischer, 'Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht' *Zeitschrift für das gesamte Handelsrecht* 168 (2004) 673 ('prolegomena to a theory on rulemaking in the filed of company law', our translation).

30 Schuppert, n 6 above, 382–386 ('Steuerungswissenschaft'); with regard to Corporate Governance to the same effect Grundmann / Möslein, n 4 above, § 14 para 474 (incentives against opportunistic behaviour); in tendency also Fleischer, n 29 above, 673, 704 et seq.

31 Cf in particular H. Fleischer, 'Zur Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung', *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2007, 500, 502 et seq; similar Eidenmüller, n 3 above, 487, 487, and generally H. Eidenmüller, 'Rechtswissenschaft als Realwissenschaft' *Juristenzeitung* 1999, 53, 60.

32 In more detail Eidenmüller, n 3 above, 487, 490 et seq.

33 See eg G. Bachmann, *Private Ordnung* (Tübingen: Mohr, 2006) 359 et seq; G. Bachmann, 'Optionsmodelle im Privatrecht' *Juristenzeitung* 2007, 11, 19 et seq; H. Eidenmüller, 'Der homo oeconomicus und das Schuldrecht – Herausforderungen durch Behavioral Law and Economics' *Juristenzeitung* 2005, 216 et seq and 223.

the obvious question of whether governance might be a fruitful research perspective for contract law as well, or whether such transfer conflicts with any substantive differences between these two areas of law.

One fundamental difference is of utmost importance: Contracts are concluded on markets; corporate decisions are made within organisations. The decision mechanism in companies is of a hierarchical or collective nature (management or shareholder decision).[34] The power to make decisions and the burden to bear the economic risk may therefore diverge: Corporate decisions are within the competence of managers or majority shareholders but they affect all shareholders (and often also other *stakeholders*). The market mechanism, on the other hand, works fundamentally differently: As a rule, all contracts require an agreement of all parties concerned, ie the contracting parties. The distinctive feature of contract law therefore is equivalence. Furthermore, company law is characterized by hierarchical structures of business organizations.[35] Hierarchy and subordination are also characteristics of public law, the other important legal area where governance research receives particularly broad attention. Hierarchical structures in particular seem to require a governance framework that makes decision procedures transparent and urges decision makers to act according to their best judgment and in the interest of those concerned. On markets, in contrast, the self-interest of market participants in itself seems to provide for a steering mechanism and equitable solutions, at least in general.

This difference needs to be borne in mind. However, it does not exclude the concept of contract governance *a priori.* Firstly, contracts require a legal framework as well. This framework has to define the rules for market transactions. Moreover, the market mechanism does not always provide for equitable solutions (*Richtigkeitsgewähr*),[36] in particular where markets fail.

34 On this mechanism, see in detail P. Behrens, *Die ökonomischen Grundlagen des Rechts* (Tübingen: Mohr, 1986) 110–277.

35 On this distinction, see the seminal contribution of Williamson, n 3 above, 233 et seq; on other mechanisms of coordination (such as clans, federations, networks), see the survey of Mayntz (in Schuppert), n 6 above, 14 with further references.

36 German scholars speak of a *Richtigkeitsgewähr* or, more moderately, of *Richtigkeitschance:* A guarantee or at least a chance of just solutions inherent in the contract mechanism; W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', *Archiv für die civilistische Praxis* 147 (1941) 130 et seq; W. Schmidt-Rimpler, 'Zum Vertragsproblem', in F. Baur / J. Esser / F. Kübler / E. Steindorff (eds), *Festschrift for Raiser* (Tübingen: Mohr, 1974) 1; recently C.-W. Canaris, *Die Bedeutung der Iustitia Distributiva im deutschen Vertragsrecht* (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1997) 48–51; C.-W. Canaris 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft', in P. Badura / R. Scholz (eds), *Festschrift for Lerche* (Munich: Beck, 1993) 873, 883 et seq; R. Singer, *Selbst-*

Thirdly 'hierarchical' decision mechanisms apply also within (existing) contractual relationships. Examples are long-term contracts or contracts that leave some discretion to one of the contracting parties with respect to the performance.[37] To the extent that markets cannot ensure equitable results of the contract mechanism, alternative governance structures may be required.

Thus, it does not seem entirely unrealistic that the insights of corporate governance might fruitfully be applied to contract law. Of course, attention needs to be paid to the specific character of this area of law and to its decision mechanisms. At first, one possible starting point for the transfer might be the specific market orientation of the governance perspective. The dynamics of competition – and not only the specific contractual relationship – need to be taken into account where we ask, eg, whether a contracting party requires regulatory protection. Only by taking into account market structures and mechanisms can the question be considered of whether market failures exist and whether they justify regulatory intervention. Important insight might also arise once contract law is analysed within the framework of other steering mechanisms, taking into account, for instance, private codes of conduct and social norms,[38] but also – and above all – the market itself. Last, but not least: A functional perspective on legal mechanisms allows for comparative legal research. It also allows for interdisciplinary and in particular economic analysis of law. This is certainly not an original or novel insight; yet, it deserves being re-emphasized in our context.[39] In this respect, the governance perspective could help to cross the boundaries between legal orders and disciplines. It provides for a conceptual bridge, but also for a language which is internationally and interdisciplinary intelligible

bestimmung und Verkehrsschutz im Recht der Willenserklärungen (Munich: Beck, 1995) 9–12.

37 On this phenomenon, see in detail Behrens, n 4 above, 491, 493 et seq.

38 The 'natural' law-making monopoly of the legislator has, indeed, been called into question in recent years, and other steering mechanisms have been advanced; for a survey, see Bachmann (2006), n 33 above, in particular 44–47. On the other hand, marketing academics have produced several economic studies on the effectiveness and interaction of these different modes of 'exchange governance': J. Cannon / R. Achrol / G. Grundlach, 'Contracts, Norms and Plural Form Governance' *Journal of the Academy of Marketing Science* 28 (2000) 180 et seq; R. Ferguson / M. Paulin / J. Bergeron, 'Contractual Governance, Relational Governance, and the Performance of Interfirm Service Exchanges' *Journal of the Academy of Marketing Science* 33 (2005) 217 et seq; G. Grundlach, 'The Role of Legal and Non-legal Approaches Across the Exchange Process' *Journal of Public Policy & Marketing* 13 (1994) 246 et seq; G. Grundlach / R. Achrol, 'Governance in Exchange: Contract Law and Its Alternatives' *Journal of Public Policy & Marketing* 12 (1993) 141 et seq.

39 To this effect, see already H. Kötz, 'Coase-Theorem und Schweinepanik', in W. Hadding (ed), *Festgabe Zivilrechtslehrer 1934/1935* (Berlin: de Gruyter, 1999) 245.

and facilitates the dialogue across borders.[40] Governance research focuses mainly on mechanisms having an impact on conduct and behaviour. Therefore, the dialogue with behavioural sciences and behavioural economics is of key interest (see below, sub II 2 d)).

II. Topics of Contract Governance

It seems that the notion of Contract Governance has thus far only been used rather sporadically and not yet been defined in detail.[41] For the time being, the notion does not have any precise meaning. In general, the governance perspective focuses on the institutional framework, on the one hand, and on mechanisms of steering and coordination, on the other. Therefore, one may distinguish four different topics of contract governance. Depending on the perspective, these topics might, of course, overlap and/or complement one another:

(1) The *institutional framework of contract law rule-making*; in other words, the 'governance of contract law';
(2) *Contract law as an institutional framework* for private transactions; this aspect might be labelled 'governance of contracts';
(3) the design of *contract law as an instrument for steering behaviour and for achieving regulatory goals;* this concerns 'governance by means of contract law';
(4) *contracts as an institutional framework and mechanism of self-guidance of private parties*; which might consequently be described as 'governance through contract'.

Let us consider these different aspects in turn.

1. The Governance of Contract Law

a) General considerations

Governance of contract law can be understood as the analysis and design of the institutional framework within which rules for contracts are set. Given

40 In more detail W. Hoffmann-Riem, 'Methoden einer anwendungsorientierten Verwaltungsrechtswissenschaft', in W. Hoffmann-Riem / E. Schmidt-Aßmann (eds), *Methoden der Verwaltungsrechtswissenschaft* (Baden-Baden: Nomos, 2004) 9, 11; Schuppert, n 6 above, 373 et seq; in substance to the same effect alrady G.F. Schuppert, 'Schlüsselbegriffe der Perspektivenverklammerung von Verwaltungsrecht und Verwaltungswissenschaft' *Die Verwaltung* supplement 2/1999 (Werkstattgespräch aus Anlass des 60. Geburtstags von Eberhard Schmidt-Aßmann) 103 et seq.

41 See the references n 3 above.

that markets are increasingly European, international and even global, contract law rules not only stem from national and European legislators, but also from various other players like regulatory authorities and courts, business associations and advocacy groups, but also groups of academic experts.[42] Governance of contract law would be faced with the task to describe and analyse the interplay of these different players and levels of regulation with respect to rule-making. Incentives and interests of all potential players need to be taken into account.[43] The main focus is therefore to analyse the various processes of rule-making in contract law. This could potentially lead to a coordination of the various levels with the goal of optimizing the rule-making process and their products so as to achieve the best possible framework for contracting.

b) Elements of the framework

The framework in which governance of contract law operates breaks down in different dimensions. On the one hand, one can distinguish the local, national and supranational level. At the local level, virtually only non-legislative rule makers play a certain rule, for instance with respect to local and commercial customs. The second and, increasingly, the third level are much more important for today's contract law. Two central questions – on which level to regulate contract law, and how to coordinate different levels of regulations – are

42 G.-P. Calliess / J. Freiling / M. Renner, 'Law, the State, and Private Ordering' *German Law Journal* 9 (2008) 397; G.-P. Calliess, *Grenzüberschreitende Verbraucherverträge – Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz* (Tübingen: Mohr, 2006); G.-P. Calliess, 'Weitergehende Übereinstimmung und laufendes Programm – Zur Legitimation von Privatrecht im Zeitalter der Globalisierung', in K. Riesenhuber / K. Takayama (eds), *Rechtsangleichung – Grundlagen, Methoden und Inhalte* (Berlin: de Gruyter, 2006) 115 et seq; R. Michaels / N. Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization', *American Journal of Comparative Law* 54 (2006) 843, 868 et seq; for a stock-taking, see Köndgen, n 5 above, 477, 479 et seq. See also N. Winkler, 'Private Ordering: Harmonisierung des Unternehmensvertragsrechts ohne Europäischen Regelgeber?', in K. Riesenhuber (ed), *Perspektiven des Europäischen Schuldvertragsrechts* (Berlin: de Gruyter, 2008) 43 et seq; M.A. Wiegand, 'Die Auflösung des Staatsbegriffs in internationalen Rechtsverhältnissen', in Riesenhuber / Takayma (eds), op cit, 83 et seq.

43 To this effect in particular F. Cafaggi / H. Muir-Watt (eds), *Making European Private Law: Governance Design* (Cheltenham, UK/Northampton, MA, US: Edward Elgar, 2008); G.-P. Calliess / M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance' *Ratio Juris* 22 (2009) 260–280; cf also F. Cafaggi, 'Introduction', in F. Cafaggi (ed), *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006) 1 ('The Need for Governance in European Private Law'); F. Cafaggi, 'Una governance per il diritto europeo dei contratti?', in F. Cafaggi (ed), *Quale armonizzazione per il diritto europeo dei contratti?* (Padova: CEDAM, 2003) 189.

mainly discussed for the national and European level.[44] However, these are increasingly global issues.[45] Competition between different rule makers is possible. In many areas of private and contract law, it has indeed already become reality.[46] This development leads to the question of a suitable institutional framework – a competition order for regulatory competition.[47]

There is also an important distinction of another dimension: State and private (also hybrid) rule makers need to be distinguished. They can both design contract law with regulatory instruments of various degrees of flexibility (public/private/hybrid governance). Namely with respect to transnational transac-

44 See in particular S. Grundmann, 'The Structure of European Contract Law' *European Review of Private Law* 4 (2001) 505 et seq; cf also S. Grundmann, 'Harmonisierung, Europäischer Kodex, Europäisches System der Vertragsrechte' *Neue Juristische Wochenschrift* 2002, 393 et seq; S. Grundmann / W. Kerber, 'An Optional European Contract Law Code: Advantages and Disadvantages' *European Journal of Law and Economics* 21 (2006) 215 et seq.

45 G.-P. Calliess, 'The Making of Transnational Contract Law' *Indiana Journal of Global Legal Studies* 14 (2007) 469 et seq; D. Caruso, 'Private Law and State-Making in the Age of Globalization', *Journal of International Law and Politics* 39 (2006) 1 et seq; W. Kerber, 'Institutional Change in Globalization: Transnational Commercial Law from an Evolutionary Economics Perspective' *German Law Journal* 9 (2008) 411 et seq; Michaels / Jansen, n 42 above, 843 et seq; J.M. Smits, 'Law Making in the European Union: On Globalization and Contract Law in Diverging Legal Cultures' *Louisiana Law Review* 67 (2007) 1181, in particular 1200 et seq. On the idea of a global (Commercial) Contract Code, see eg M.J. Bonell, 'Do We Need a Global Commercial Code?' *Dickinson Law Review* 106 (2001) 87 et seq; O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' *American Journal of Comparative Law* 53 (2005) 379, 384.

46 With regard to company law S. Grundmann, 'Regulatory Competition in European Company Law – Some Different Genius?', in G. Ferrarini / K.J. Hopt / E. Wymeersch (eds), *Capital Markets in the Age of the Euro – Cross-Border Transactions, Listed Companies and Regulation* (The Hague: Kluwer, 2002) 561–595; more generally J.-W. Franck, 'Rechtsetzung für den Binnenmarkt: Zwischen Rechtsharmonisierung und Wettbewerb der Rechtsordnungen', in Riesenhuber / Takayama (eds), n 42 above, 47 et seq; E.-M. Kieninger, *Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt* (Tübingen: Mohr, 2002) (sceptical); for EC contract law, see also K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin: de Gruyter, 2003) 187 et seq.

47 Cf in particular W. Kerber, 'Zum Problem einer Wettbewerbsordnung für den Systemwettbewerb' *Jahrbuch für Neue Politische Ökonomie* 17 (1998) 199 et seq; with regard to company law (but also beyond) Grundmann, n 46 above, 561, 574 et seq; similarly with regard to contract law S. Grundmann, 'Europäisches Vertragsrecht – Quo vadis?' *Juristenzeitung* 2005, 860, 867 et seq; with doubt: M. Müller, 'Gefahren einer optionalen europäischen Vertragsordnung – Aktionsplan der EG-Kommission zum Europäischen Vertragsrecht' *Europäische Zeitschrift für Wirtschaftsrecht* 2003, 683, 685.

tions, private governance is increasingly important.[48] However, private rule-making needs to be legitimatised.[49] Moreover, under a governance perspective the institutional design of rule makers themselves is of particular interest. This is so because their rule-making activity can only be explained by looking 'behind the scenes', ie at their internal governance structure.[50] Furthermore, the governance interaction of public and private institutions in the process of rule-making is important. One example are European social partners contributing to European labour law by delivering statements and draft rules ('framework agreements', see Article 138 seq EC; Article 154 seq TFEU).[51] Similarly complex and manifold is the process of rule-making in European accounting and capital market law. Again, the European legislator confines itself to framework rules. The actual standard-setting is left to committees, composed of (national) supervisory authorities and professional market participants.[52] Such interaction of rule makers can also be relevant in general contract law. One example are quality standards of private business

48 On individual phenomena S.A. Schirm, *New Rules for Global Markets – Public and Private Governance in the World Economy* (Basingstoke/New York: Palgrave Macmillan, 2004); J.-C. Graz / A. Nölke (eds), *Transnational Private Governance and its Limits* (London/New York: Routledge, 2008); from a perspective of Evolutionary Economics Kerber, n 45 above, 411 et seq.

49 G. Bachmann, 'Privatrecht als Organisationsrecht', in C.-H. Witt et al (eds), *Jahrbuch Junger Zivilrechtswissenschaftler 2002 – Die Privatisierung des Privatrechts* (Stuttgart: Boorberg, 2003) 9; C. Schmid, 'Legitimationsbedingungen eines Europäischen Zivilgesetzbuchs' *Juristenzeitung* 2001, 674 et seq.

50 To this effect F. Cafaggi, 'Self-Regulation in European Contract Law' *European Journal of Legal Studies* 1 (2007) 1, at http://www.ejls.eu/1/10UK.pdf (last visited on 20 March 2009); cf also F. Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (The Hague: Kluwer, 2006).

51 See eg R. Birk, 'Vereinbarungen der Sozialpartner im Rahmen des Sozialen Dialogs und ihre Durchführung' *Europäische Zeitschrift für Wirtschaftsrecht* 1997, 453 et seq; G. Falkner, 'Zwischen Recht und Vertrag: Innovative Regulierungsformen im EG-Arbeitsrecht' *Zeitschrift für Europäisches Privatrecht* 2002, 222 et seq; K. Langenbucher, 'Zur Zulässigkeit parlamentsersetzender Normgebungsverfahren im Europarecht', *Zeitschrift für Europäisches Privatrecht* 2002, 265 et seq; R. Schwarze, 'Legitimation kraft virtueller Repräsentation' *Recht der Arbeit* 2001, 208 et seq. On the broader policy framework, see G. Barret, 'Deploying the Classic "Community Method" in the Social Policy Field' *European Law Journal* 15 (2009) 198 et seq.

52 Cf, for instance, with respect to regulatory approaches in accounting law Grundmann / Möslein, n 4 above, para 622 et seq; in securities law: S. Kalss, 'Kapitalmarktrecht', in K. Riesenhuber (ed), *Europäische Methodenlehre – Handbuch* (Berlin: de Gruyter, 2006) § 20 para 5–26; K.U. Schmolke, 'Der Lamfalussy-Prozess im Europäischen Kapitalmarktrecht – Eine Zwischenbilanz' *Neue Zeitschrift für Gesellschaftsrecht* 2005, 912, 913 et seq; and extensively V. Wiegel, *Die Prospektrichtlinie und Prospektverordnung – Eine dogmatische, ökonomische und rechtsvergleichende Untersuchung* (Berlin: de Gruyter, 2008) 91–148.

associations or audit organisations which may (exceptionally) be imputed to the seller, according to Article 2 para 2 lit d Sales Directive.[53] Another distinction concerns the question of whether rule-making occurs *in abstracto* and *ex ante*, or whether it occurs with respect to a particular case and *ex post,* ie by the courts. Of course, both forms of governance of contract law are legitimated differently. But they may well be compared on a functional basis.[54] Again, the most important differences concern the internal governance structures. These differences result in different incentive structures to which different rule makers are subject.[55]

c) Instruments

The governance of contracts' toolbox does not only contain obvious tools like statutes and codes, but also subordinated public regulation by supervisory authorities (for instance, in banking law or on regulated markets), as well as case law (in particular, but not exclusively, in *common law* jurisdictions). Since governance research does not only look at state bodies, numerous other instruments form part of this framework, namely private bodies of rules and regulations. One important example, currently discussed in European contract law, is the *Common Frame of Reference* (CFR).[56] It has recent-

53 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJEC* 1999 L 171/12. In more detail: D. Oughton / C. Willet, 'Quality Regulation in European Private Law' *Journal of Consumer Policy* 25 (2002) 299 et seq; with respect to the German transposition H.P. Westermann, in F.J. Säcker / R. Rixecker (eds), *Münchener Kommentar BGB* Band 3 (5th ed, Munich: Beck, 2008) preliminary note to § 433 para 13 et seq and § 434 para 26. More generally on 'expert law' Köndgen, n 5 above, 477, 481 et seq; J. Köndgen, 'Die Rechtsquellen des Europäischen Privatrechts', in Riesenhuber (ed), n 52 above, § 7 para 55–59.

54 To this effect J. Scott / S.P. Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' *Columbia Journal of European Law* 13 (2007) 565 et seq; for EC private law M. Lehmann, '"Judicial Governance" im europäischen Privatrecht aus verfassungstheoretischer Sicht', in A. Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs* (Bern: Stämpfli, 2006) 213, 214–221; C. Schmid, 'Judicial Governance in the EU – The ECJ as a Constitutional and a Private Law Court', in E.O. Eriksen / C. Joerges / F. Roedl (eds), *Law and Democracy in the Post-National Union* (Oslo: Arena, 2006) 197 et seq; from a sociological perspective S. Frerichs, *Judicial Governance in der europäischen Rechtsgemeinschaft* (Baden-Baden: Nomos, 2008).

55 With insight on incentive and behavioural structures of judges R. Posner, *How Judges Think* (Cambridge/Mass: Harvard University Press, 2008).

56 On the (D)CFR, see, eg, the contributions of C. von Bar, 'Coverage and Structure of the Academic Common Frame of Reference' *European Review of Contract Law* 3 (2007) 350 et seq; H. Beale, 'The Future of the Common Frame of Reference', *European Review of Contract Law* 3 (2007) 257 et seq; M. Kuneva, 'Introduction', *European Review of Contract Law* 3 (2007) 239 et seq; O. Lando, 'The Structure of the

ly been published in the version of a *Draft Common Frame of Reference* (DCFR).[57] Albeit supported by the European Commission, which also set the broad framework for the project, the body of rules has ultimately been elaborated by a 'private' group of experts, academics and practitioners. Even though the rules have not yet been adopted by state bodies, they may well influence contractual practice. Furthermore, they may influence Community Law or the Law of Member States as institutions of contract law rule-making. According to the Convention on the law applicable to contractual obligations as well as according to the Draft Rome-I-Regulation, parties cannot choose the (D)CFR as applicable law, at least for the time being.[58] However, these rules may well be used as a valuable source for the interpretation of law (namely the *lex mercatoria*) and even for rule mak-

Legal Values of the Common Frame of Reference (CFR)' *European Review of Contract Law* 3 (2007) 245 et seq; H. Schulte-Nölke, 'EC Law on the Formation of Contract – from the Common Frame of Reference to the "Blue Button"' *European Review of Contract Law* 3 (2007) 332 et seq.

57 C. von Bar / E. Clive / H. Schulte-Nölke (eds), *Draft Common Frame of Reference (DCFR) – Outline Edition* (Munich: Sellier, 2009). On the project and the draft, see, eg, W. Ernst, 'Der "Common Frame of Reference" aus juristischer Sicht' *Archiv für die civilistische Praxis* 208 (2008) 248 et seq; S. Grundmann, 'The Structure of the DCFR – Which Approach for Today's Contract Law?' *European Review of Contract Law* 4 (2008) 225 et seq; N. Jansen / R. Zimmermann, 'Grundregeln des bestehenden Gemeinschaftsprivatrechts?' *Juristenzeitung* 2007, 1113 et seq as well as well as the contributions in H.-W. Micklitz / F. Cafaggi (eds), *After the Common Frame of Reference – What Future for European Private Law?* (Cheltenham, UK/Northampton, MA, US: Edward Elgar, 2009, forthcoming); M. Schmidt-Kessel (ed), *Der Gemeinsame Referenzrahmen – Entstehung, Inhalte, Anwendung* (Munich: Sellier, 2009); R. Schulze / C. von Bar / H. Schulte-Nölke (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen – Kontroversen und Perspektiven* (Tübingen: Mohr, 2008); and the contributions in *Zeitschrift für Europäisches Privatrecht* 2008, issue 4.

58 Cf recitals 13 and 14 of Regulation 593/2008 on the law applicable to contractual obligations (Rome I), *OJEC* 2008 L 177/6; further D. Martiny, 'CFR und internationales Vertragsrecht' *Zeitschrift für Europäisches Privatrecht* 2007, 212, 217 et seq; H. Beale, n 56 above, 257, 260. More generally on this issue C.-W. Canaris, 'Die Stellung der „Unidroit Principles" und der „Principles of European Contract Law" im System der Rechtsquellen', in J. Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen: Mohr, 2000) 5–31; S. Grundmann, 'Lex mercatoria und Rechtsquellenlehre – insbesondere die Einheitlichen Richtlinien und Gebräuche für Dokumentenakkreditive', in J. Jickeli / H. Kotzur / U. Noack / H. Weber (eds), *Jahrbuch Junger Zivilrechtswissenschaftler 1991 – Europäisches Privatrecht, Unternehmensrecht, Informationspflichten im Zivilrecht* (Stuttgart: Boorberg, 1992) 43; S. Grundmann, 'Law merchant als lex lata Communitatis – insbesondere die Unidroit Principles', in U. Diederichsen / G. Fischer / D. Medicus (eds), *Festschrift for Rolland* (Köln: Bundesanzeiger, 1999) 145 et seq.

ing,[59] and they can also be incorporated in contracts as standard terms. Model laws and *Restatements* in US-American contract law are not so different from a functional perspective. They have equally been formulated by private bodies. And their legal force depends also on the wide-spread adoption by state legislators or courts.[60]

Another important aspect of private regulation are rules created by business organisations themselves (the 'self-created law of business' – '*selbstgeschaffene Recht der Wirtschaft*'). These rules also form part of the framework for contracts.[61] Standard terms of contract do not only affect specific contracts, but can also serve as role models constituting or even forming whole types of contracts.[62] On the national level, this phenomenon is well known in banking, for instance.[63] On the supranational level, international commercial clauses and namely *incoterms* are the traditional instruments that form part of the framework.[64] Standard terms of contract and commercial clauses, however, are already an interface to the 'Governance through Contract', to be analysed sub (4). Once standard terms of contract develop a quasi-institutional (!) character, they need to be considered as part of the framework. This is indeed the case for both examples, for banks' standard

59 On this terminology Canaris, n 58 above, 16 et seq; N. Jansen, 'Traditionsbegründung im europäischen Privatrecht' *Juristenzeitung* 2006, 536, 538, 540 et seq. Cf also K. Riesenhuber, 'Systembildung durch den CFR', in Schmidt-Kessel (ed), n 57 above, 173 et seq; F. Möslein, 'Legal Innovation in European Contract Law: Within and Beyond the (Draft) Common Frame of Reference', in Micklitz / Cafaggi (eds), n 57 above.

60 These US-American instruments have, to a certain extent, served as models for the development of European private law: H. Coing, 'Europäisierung der Rechtswissenschaft' *Neue Juristische Wochenschrift* 1990, 937, 940; Schmid, n 49 above, 674, 676; on these instruments as such, see eg D.P. Currie, 'Die Vereinheitlichung des amerikanischen Privatrechts' *Juristenzeitung* 1996, 930, 933 et seq; T. Schindler, 'Die Restatements und ihre Bedeutung für das amerikanische Privatrecht' *Zeitschrift für Europäisches Privatrecht* 1998, 277.

61 H. Großmann-Doerth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht* (Freiburg: Wagner, 1933) reprinted and discussed in U. Blaurock / N. Goldschmidt / A. Hollerbach (eds), *Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth* (Tübingen: Mohr, 2005).

62 Path-breaking L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen* (Hamburg: Hanseatische Verlags-Anstalt, 1935).

63 On the German Standard Terms of Banks (*AGB-Banken*), see only H.-J. Bunte, 'Entstehung und Bedeutung der AGB-Banken', in H. Schimansky / H.-J. Bunte / H.J. Lwowski, *Bankrechts-Handbuch* (3rd ed, Munich: Beck, 2007) § 4 para 1 ('The phenomenon that business, using the tool of standard term, creates its own laws where the legal system lacks sufficient rules can be observed in many areas, in particular in banking law', our translation), 12 et seq, 24 et seq.

64 See only K.J. Hopt, in A. Baumbach / K.J. Hopt, *Handelsgesetzbuch* (33rd ed, Munich: Beck, 2008) (6) Incoterms Einl para 3–9.

terms of contracts as well as the *incoterms.* Their functional effect may well be compared to that of public rules. For one of the parties, an opt-out of theses clauses is virtually impossible. Vis-à-vis the negotiating partner, there is no room for negotiation (internal Contract Governance), and due to the sector-wide applicability, there are no other options to be chosen on the market (external Contract Governance).[65]

Finally, we need to mention collective agreements (in a wide sense), which play a prominent role namely in labour law (§ 2 German Act on Collective Agreements [*Tarifvertragsgesetz*], § 77 German Labor-Management Relations Act [*Betriebsverfassungsgesetz*]),[66] but also with respect to copyright law (§ 36 German Copyright Act [*Urheberrechtsgesetz*], §§ 12 seq German Collecting Societies Act [*Urheberrechtswahrnehmungsgesetz*]).[67] According to § 4 German Act on Collective Agreements, collective bargaining agreements indeed have a normative effect in the strict sense. Moreover, in certain cases the instrument of collective bargaining agreements enables the social partners to opt out of legal rules which are strictly binding for individual parties.[68] This confers special dignity to collective bargaining agreements. But even where tariffs have only indicative effects, policed by courts or only in fact, they need to be considered under a governance perspective.

d) Research Methods

Governance of Contract Law concerns the process of rule-making. Therefore, methods and instruments of general governance research can be applied. As contract law rules are not exclusively made by a sovereign law maker, Governance of Contract Law has, in particular, much in common with a new research field that is called 'New Modes of Governance'. It concentrates on non-hierarchical means of coordination.[69] Moreover, one can recur to so-

65 With a similar approach S. Grundmann, in C.T. Ebenroth / K. Boujong / D. Joost (eds), *Handelsgesetzbuch, vol 2* (Munich: Beck, 2001) preliminary note to § 343 HGB para 77 et seq (a practice so 'intensive and uniform' that 'for a given transaction only this particular set of clauses is available', our translation).

66 See only W. Zöllner / K.-G. Loritz / C.W. Hergenröder (eds), *Arbeitsrecht* (6th ed, Munich: Beck, 2008) §§ 34 (346 et seq), 48 II (496 et seq). With respect to US labour law: C. Estlund, 'Something Old, Something New: Governing the Workplace by Contract Again', *Comparative Labor Law & Policy Journal* 28 (2007) 351 et seq.

67 See only H. Schack, *Urheber- und Urhebervertragsrecht* (4th ed, Tübingen: Mohr, 2007) paras 969 et seq, 1210 et seq.

68 Zöllner / Loritz / Hergenröder, n 66 above, § 6 I 2 (56 et seq).

69 A. Héritier, 'New Modes of Governance in Europe: Policy-Making without Legislating?', in A. Héritier (ed), *Common Goods: Reinventing European and International Governance* (Lanham: Rowman & Littlefield, 2002) 185 et seq; A. Héritier / S. Eckert, 'New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe' *Journal of Public Policy* 28 (2008) 113 et seq; C. Scott, 'Governing

cial and political sciences in order to explain and describe the behaviour of public, but maybe also of specific private actors in the contract law arena.[70] Political sciences may promise further insight, too.[71] Answers to questions of legitimacy require a constitutional approach, however combined with the private law model of legitimacy by agreement.[72] On the European scale, Governance of Contract law needs to recur to insights of (institutional) European law, European studies and, in particular, European Governance.[73] As market mechanisms also play a role ('regulatory competition'), economic science requires some consideration as well. Of particular importance are the economics of competition and regulated markets.[74]

2. The Governance of Contracts

a) General Considerations

Governance of contracts concerns the analysis and structure of legal and extra-legal institutions or factors which constitute the framework for private transactions: 'the study of good order and workable arrangements' on markets.[75] This mainly concerns rules – contract law rules in particular – which

Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU' *European Law Journal* 15 (2009) 160 et seq; on the ongoing activities of the respective, Europe-wide research network cf www.eu-newgov.org (last visited on 20 March 2009).

70 Generally to this approach C. Engel / A. Héritier (eds), *Linking politics and law* (Baden-Baden: Nomos, 2003).

71 Cf, eg, Bachmann (2006), n 33 above, 58–76.

72 On this issue in more detail Bachmann (2006), n 33 above, 159–225, and Bachmann, n 49 above, 21 et seq; A. Röthel, 'Lex mercatoria, lex sportiva, lex technica – Private Rechtssetzung jenseits des Nationalstaates?' *Juristenzeitung* 2007, 755, 756 and 761 et seq.

73 On this latter area, see, eg, C. Joerges / R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press, 2002); G. de Búrca / J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

74 Exemplary S. Grundmann / W. Kerber, 'European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-Making', in S. Grundmann / J.H.V. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer, 2002) 295; W. Kerber, 'European System of Private Laws: An Economic Perspective', in Cafaggi / Muir-Watt (eds), n 43 above, 64 et seq. The starting point is the economic theory of federalism; ground-breaking C.M. Tiebout, 'Exports and Regional Economic Growth' *Journal of Political Economy* 64 (1956) 416 et seq; further eg: W. Kerber, 'Interjurisdictional Competition within the European Union' *Fordham International Law Journal* 23 (2000) 217 et seq; V. Vanberg / W. Kerber, 'Institutional Competition Among Jurisdictions: An Evolutionary Approach' *Constitutional Political Economy* 5 (1994) 193 et seq.

75 Williamson, n 1 above, 1 et seq. Similar Collins, n 3 above, 225 et seq, speaking about '(power and) governance'.

are laid down by the various actors discussed above (1). This perspective contrasts with the *governance through* (or: *with the means of) contract law* which will be dealt with subsequently (3): While the latter is (also) concerned with regulatory and therefore *heteronomous* goals of the legislator, governance of contracts aims at creating a playing field for the parties to pursue and realise their own, autonomous ends. In this perspective, contract law fulfils a *facilitative* or *enabling function.* It is part of a framework or infrastructure for the co-operation of private individuals.[76] Such co-operation not only occurs in organisations, being the subject of corporate governance research, but also in spot contracts, recurrent contracts or on-going exchanges.[77]

b) Elements of the Framework

The fundamental elements of the framework are the market economy and freedom of contract – both of which are, not accidentally, the core elements of a private law society.[78] Freedom of contract signifies the freedom to conclude contracts with a partner of one's own choice and with the contents of one's own choice. It further implies the binding nature of the contract and its enforceability:[79] There is no contract without the principle of *pacta sunt servanda.*[80]

As regards the legal components of the framework, governance of contracts does not, of course, imply complete freedom of contract and a total abstention from any regulation. Also with regard to the facilitative function of contract law, there is room to remedy deficits of the contract and the market mechanism. This was a matter of course for the *ordo-liberal* 'Freiburg School' of economic theory which, in particular, emphasised the fundamental function of competition laws in a market economy.[81] But also certain (other) el-

76 Bachmann, n 49 above, 20 et seq; S. Grundmann, 'Regulating Breach of Contract – The Right to Reject Performance by the Party in Breach' *European Review of Contract Law* 3 (2007) 121, 143; C. Windbichler, 'Neue Vertriebsformen und ihr Einfluss auf das Kaufrecht' *Archiv für die civilistische Praxis* 198 (1998) 261, 271; with respect to company law Fleischer, n 29 above, 673, 707; for the adoption in (institutional) economics cf n 99 below.

77 See also Bachmann, n 49 above, 20 et seq.

78 F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' *ORDO* 17 (1966) 75 et seq; on this point K.-H. Ladeur, *Der Staat gegen die Gesellschaft – Zur Verteidigung der Rationalität der 'Privatrechtsgesellschaft'* (Tübingen: Mohr, 2006); and the contributions in K. Riesenhuber (ed), *Privatrechtsgesellschaft* (Tübingen: Mohr, 2007).

79 Bachmann, n 49 above, 21.

80 Domestic and foreign security, the statal monopoly on the use of force and a well-functioning court system are taken for granted here.

81 E.-J. Mestmäcker, '50 Jahre GWB – Die Erfolgsgeschichte eines unvollkommenen Gesetzes' *Wirtschaft und Wettbewerb* 2008, 6 et seq; W.-H. Roth, 'Kartell- und Wettbewerbsrecht', in Riesenhuber (ed), n 78 above, 175 et seq. See also E.-J.

ements of public policy, for example in the field of consumer protection (cf rules on doorstep selling), can be explained as elements of the framework of the governance of contracts. This is particularly the case where such rules are designed to cure market failure (externalities) or other structural or individual deficits. From the functional perspective of governance, we cannot distinguish the elements of the framework in categories of contract law in a traditional or formal sense and, say, competition law. This is a development, incidentally, that we can discern in EC contract law, too.[82] Pre-contractual duties to inform are an example. Here, the Commission had originally contemplated a comprehensive duty to inform in contract law[83] – and subsequently put this plan into practice,[84] yet through the vehicle of the Unfair Commercial Practices Directive[85].

c) Instruments

The instruments of contract law as a framework encompass in the first place the default rules of contract law with their facilitative function: as an instrument that is frequently designed in a way that mimics the hypothetical intention of the parties and that aims at helping the parties to shape their contract so that it fits their goals and ends. Default rules thus function as a sort of blueprint: It facilitates the formation of a contract by relieving the parties of the burden to bargain over each and every individual contract clause but leaves, at the same time, room for adjustments with regard to specific interests and circumstances of the parties.[86] As another mechanism, contract law can offer

Mestmäcker, 'Franz Böhm', in K. Riesenhuber / S. Grundmann (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler*, vol 1 (Berlin: de Gruyter, 2007) 31 et seq.

82 For a functional approach to European contract law, in particular: S. Grundmann, *Europäisches Schuldvertragsrecht* (Berlin: de Gruyter, 1999).

83 Cf D. Staudenmayer, 'Europäisches Verbraucherschutzrecht nach Amsterdam – Stand und Perspektiven' *Recht der Internationalen Wirtschaft* 1999, 733, 737.

84 See only K. Riesenhuber, *Europäisches Vertragsrecht* (2nd ed, Berlin: de Gruyter, 2006) para 277a et seq and (critical) para 931 et seq.

85 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') *OJEC* 2005 L 149/22.

86 For instance S. Grundmann / A. Hoerning, 'Leistungsstörungsmodelle im Lichte der ökonomischen Theorie – nationales, europäisches und internationales Recht', in T. Eger / H.-B. Schäfer (eds), *Ökonomische Analyse der europäischen Zivilrechtsentwicklung* (Tübingen: Mohr, 2007) 420, 424 et seq; Kerber (2008), n 74 above, 64, 69; seminal: R.A. Posner / A.M. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' *Journal of Legal Studies* 6 (1977) 83, 89 ('purpose… to effectuate the desires of the contracting parties').

the parties the choice between various options to choose from (so-called *optional law*).[87] Apart from default rules and optional rules, the central instruments for the regulation of contracts have in recent years been duties to inform (pre-contractual as well as contractual), rights of withdrawal (as a procedural mechanism of protection), form requirements (with or without an accompanying right/duty to obtain legal or economic advice, eg, from a notary or a credit counsellor),[88] as well as a substantive control of the contract terms (eg, the Unfair Contract Terms Directive).[89] In view of the supposed aim to help parties pursue their own interests and goals, this enumeration can indeed be understood as a hierarchy of governance instruments. Procedural mechanisms such as default rules, duties to inform, rights of withdrawal or form requirements are preferable to substantive mechanisms such as control of agreed terms ('proceduralisation').[90]

While all this sounds familiar to orthodox contract theory, governance opens the perspective for other means or elements of regulation. As an example, we may consider advertising as a form of spontaneous information.[91] Governance furthermore encompasses collective self-information as it occurs in an institutionalised way through private or state agencies (consumer protection agencies, organisations for the protection of competition, product testing organisations), but also – less institutionalised and rather spontaneously – in the internet through forums established by suppliers or consumers. Fur-

87 On this point I. Ayres, 'Menus Matter', *University of Chicago Law Review* 73 (2006) 3, and extensively Bachmann (2007), n 33 above, 11 et seq.

88 For various instruments to protect parties against unrequested contracts see the monography by S. Lorenz, *Der Schutz vor dem unerwünschten Vertrag* (Munich: Beck, 1997) and D. Medicus, 'Verschulden bei Vertragsverhandlungen', in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (Cologne: Bundesanzeiger, 1981) 485, 519 et seq ('Der Schutz vor unerwünschten Verträgen').

89 For a survey: K. Riesenhuber, 'Wandlungen oder Erosion der Privatautonomie?', in K. Riesenhuber / Y. Nishitani (eds), *Wandlungen oder Erosion der Privatautonomie?* (Berlin: de Gruyter, 2007) 1, 4–9; cf also F. Möslein, 'Inhaltskontrolle und Inhaltsregeln im Schuldvertragsrecht', ibid, 233, 235–237.

90 Cf on this point C.-W. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' *Archiv für die civilistische Praxis* 200 (2000) 273, 282 et seq. Cf also Ayres, n 87 above, 3, 4 (with the general goal 'to change the world with less intrusive interventions').

91 In the European discussion, it was mainly the ECJ who promoted this view with his jurisprudence on the fundamental freedoms; path-breaking Case 120/78 *Rewe* v *Bundesmonopolverwaltung* [1979] ECR 649 et seq ('*Cassis de Dijon*'); Case 193/80 *Commission* v *Italy* [1981] ECR 3019 para 27; Case 178/84 *Commission* v *Germany* [1987] ECR 1227 para 35 et seq; for a survey see Riesenhuber, n 84 above, para 134 et seq and 271 et seq.

thermore, voluntary agreements can be taken into account,[92] such as best-practice standards and codes of conduct, eg, on customer data,[93] health and safety standards[94] or product safety.[95] Promoted by legislators, such soft instruments of regulation have gained considerable importance throughout Europe.[96] And such instruments do indeed have 'teeth' where markets function as external governance mechanisms and where transparency and rules on fair commercial practices exist as complementary instruments.[97] In certain circumstances, the law may even defer widely to other, eg, social or ethical elements of the framework ('*order without law*').[98] Governance wi-

92 E. Kocher, 'Unternehmerische Selbstverpflichtungen zur sozialen Verantwortung – Erfahrungen mit sozialen Verhaltenskodizes in der transnationalen Produktion' *Recht der Arbeit* 2004, 27 et seq.

93 More extensively mainly to US-American practice: V. Haufler, *A Public Role for the Private Sector – Industry Self-Regulation in a Global Economy* (Washington: Carnegie, 2001) 91 et seq; for the most important private initiative on certification cf at www.truste.org ('Make Privacy Your Choice') (last visited on 20 March 2009).

94 OECD (ed), *Corporate Responsibility – Private Initiatives and Public* Goals (Paris: OECD, 2002) 33 et seq.

95 H. Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2007).

96 *European governance – A white paper*, COM(2001) 428 final, 20 (legislation 'often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation'); Green Paper on European Union Consumer Protection, COM(2002) 531 final, 14 et seq. Exemplary with respect to self-regulation: W. Frenz, 'Verbraucherinformation durch Gesetz und Selbstverpflichtungen' *Zeitschrift für Gesetzgebung* 2002, 226, 233; F. Ritter / J. Fuchs, 'Die Selbstverpflichtung der Deutschen Post AG – hilfreich für den Verbraucher?' *Verbraucher und Recht* 2004, 391 et seq; with respect to sector-wide self-regulation U. Ehricke, 'Dynamische Verweise in EG-Richtlinien auf Regelungen privater Normungsgremien' *Europäische Zeitschrift für Wirtschaftsrecht* 2002, 746 et seq; A. Röthel, 'Verbände und Gemeinschaftsrecht' *Zeitschrift für Europäisches Privatrecht* 2002, 58, 63 et seq.

97 See the list of misleading commercial practices in Annex I of the Unfair Commercial Practices Directive, in particular no 1 ('Claiming to be a signatory to a code of conduct when the trader is not') and no 3 ('Claiming that a code of conduct has an endorsement from a public or other body which it does not have'); cf also recital 20. More extensively E. Kocher, 'Unternehmerische Selbstverpflichtungen im Wettbewerb – Die Transformation von „soft law" in „hard law" durch das Wettbewerbsrecht' *Gewerblicher Rechtsschutz und Urheberrecht* 2005, 647 et seq; see also Kocher, n 92 above, 27 et seq; cf also G. Teubner, 'Codes of Conduct multinationaler Unternehmen – Unternehmensverfassung jenseits von Corporate Governance und Mitbestimmung', in D. Gosewinkel / W. Merkel / D. Simon (ed), *Festschrift for Kocka* (2007) 36.

98 We refer to the title of a theory of rules which mainly builds upon empirical evidence: R. Ellickson, *Order without Law – How Neighbors Settle Disputes* (Cambridge/Mass: Harvard University Press, 1991).

dens the research perspective so as to take account of such phenomena as well.

d) Research Methods

Not surprisingly, economic theory as well as behavioural theory can play a prominent role for the inquiry into the bases of this framework. In particular, new Institutional Economics considers private law not so much as a limit to private action and co-operation (by means of creating property rights) but also as an infrastructure which opens up manoeuvring room for the parties – *facilitative law.*[99] If we look at the purpose of allowing the parties to pursue and realise their own aims, the difficulty in structuring the framework is to find the proper balance between excessive protection (and regulation) with its infringement of individual freedom, on the one hand, and undersized protection, on the other. Economic theory is an invaluable tool that helps to define precisely and accurately any market failure.[100] And as the framework concerns the behaviour of market actors, behavioral law and economics appears as an indispensable complementary discipline.[101]

Behavioural theory can also contribute to a description and analysis of the broader institutional framework as such. Following *Durkheim's* famous dictum that 'in a contract not everything is contractual'[102] – (market-) sociologists in particular intensively study the extra-legal framework private transactions and contracts are embedded into (*embeddedness*).[103] Today, modern

99 Cf, for instance, E.G. Furubotn / R. Richter, *Institutions and Economic Theory – The Contribution of New Institutional Economics* (2nd ed, Ann Arbor: University of Michigan Press, 2005) 12 et seq; R.C. Clark, 'Agency Costs versus Fiduciary Duties', in J.W. Pratt / R.J. Zeckhauser (eds), *Principals and Agents – the Structure of Business* (Boston/Mass: Harvard University Press, 1985) 55, 60–72; cf also Kerber (2008), n 74 above, 64, 67–72.

100 Exemplary (for default and mandatory company law rules): Behrens, n 4 above, 491, 502 et seq.

101 Seminal D. Kahneman / A. Tversky, 'Prospect Theory – An Analysis of Decision under Risk' *Econometrica* 47 (1979) 263 et seq; further C.F. Camerer / G. Lowenstein / M. Rabin (eds), *Advances in Behavioral Economics* (Princeton: Princeton University Press, 2004); C.R. Sunstein (ed), *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000); in German mainly Eidenmüller, n 33 above, 216 et seq; C. Engel / M. Englerth / J. Lüdemann / I. Spiecker gen Döhmann (eds), *Recht und Verhalten* (Tübingen: Mohr, 2007); H. Fleischer, 'Behavioral Law and Economics im Gesellschafts- und Kapitalmarktrecht – ein Werkstattbericht', in A. Fuchs / H.-P. Schwintowski / D. Zimmer (ed), *Festschrift for Immenga* (Munich: Beck, 2004) 575 et seq.

102 E. Durkheim, *The Division of Labor in Society* (New York: Free Press, 1997, French original of 1893) 158.

103 Cf only: J. Beckert, 'Economic Sociology and Embeddedness' *Journal of Economic Issues* 37 (2003) 769 et seq; J. Beckert, 'The Moral Embeddedness of Markets', in J.

Institutional Economics widely accepts the importance of the 'social order' as a requirement for the functioning of markets,[104] but also its potential to replace legal institutions in certain circumstances. Beyond that, the subject of 'lawlessness and economics' has even developed into a field of research in its own right.[105] Governance of contracts can – and should – build upon such interdisciplinary insight.

3. Governance by Means of Contract Law

a) General Considerations

We have already characterised governance through or with the means of contract law as the employment of contract law for the attainment of public goals and thus goals that are extraneous to those of the parties. The legislator uses contract law as an instrument for his own purposes. As in the case of governance of contracts, the legislator thus interferes. His objective, though, is not to enhance the pursuit of autonomous interests of the parties but rather to achieve his own – and thus for the parties: heteronomous – ends. Contract law serves a regulatory function here.[106] It is used as an instrument to influence private behaviour.[107]

b) Localisation within the structural framework

From this perspective, contract law becomes an instrument to pursue extraneous goals, just like other parts of the legal system such as tax law[108] or public procurement law are being employed for extraneous purposes.[109]

Clary / W. Dolfsma / D.M. Figart (eds), *Ethics and the Market: Insights from Social Economics* (London/New York: Routledge, 2006) 11–25; M. Granovetter, 'Economic Action and Social Structure: The Problem of Embededness' *American Journal of Sociology* 91 (1985) 481 et seq. The notion *embeddedness* is based on K. Polanyi, *The Great Transformation* (Boston: Beacon, 1957, first published 1944) 57 and 61 in particular.

104 J. Beckert, 'The Social Order of Markets' *Theory and Society* 38 (2009) forthcoming.

105 Seminal A.K. Dixit, *Lawlessness and Economics – Alternative Modes of Governance* (Princeton: Princeton University Press, 2004); cf also: E.A. Posner, *Law and Social Norms* (Cambridge: Harvard University Press, 2000).

106 On this point, at the European level: F. Cafaggi (ed), *The Regulatory Function of European Private Law* (Cheltenham, UK/Northampton, MA, US: Edward Elgar, 2009).

107 In detail on the legitimacy of preventive and regulatory functions of private law: G. Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' *Archiv für die civilistische Praxis* 206 (2006) 352 et seq; criticizing, for instance, H. Honsell, 'Die Erosion des Privatrechts durch das Europarecht' *Zeitschrift für Wirtschaftsrecht* 2008, 621, 626 et seq.

108 On this point, for instance (rather critical) P. Kirchhof, *Der Weg zu einem neuen Steuerrecht* (2nd ed, Munich: dtv, 2005).

In this context, it is particularly important to take the full perspective on the legal framework into account in order to avoid counter-intentional effects or misguided incentives.[110] The prohibition of discrimination in EC contract law may serve as an example. Here, the legislator has not considered sufficiently whether discrimination is a social problem that is not adequately being taken care of by the market or instruments of social control and thus justifies intervention. As a consequence, the interference with freedom of contract weighs particularly heavy[111] and there is a particular risk that the regulation will have counter-intentional effects or that the parties concerned (such as landlords or owners of health clubs) may develop avoidance strategies.[112]

From a governance perspective, contract law is merely one of several instruments. The governance perspective opens the perspective for the whole range of regulatory instruments, legal as well as extra-legal instruments. For example, one may consider the functional equivalence of contract law and rules on unfair competition as regulatory instruments. Apart from direct state intervention, we may also consider soft incentive mechanisms, such as social dialogue and dialogue with NGOs[113] or the instrument of gender mainstreaming[114] which the EC legislator installs in the anti-discrimination directives. We may also consider institutionalised self-commitment. One example is

109 See, for instance, with respect to the declaration of compliance with collective wage agreements V. Rieble, 'Tariftreue vor dem Bundesverfassungsgericht' *Neue Zeitschrift für Arbeitsrecht* 2007, 1 et seq; BVerfG (German Constitutional Court), *Neue Zeitschrift für Arbeitsrecht* 2007, 42 et seq; for a survey, see: Zöllner / Loritz / Hergenröder, n 66 above, § 38 V (396); for an assessment under EC law see Case 346/06 *Rüffert* v *Niedersachsen,* 3 April 2008 (ECJ). Also (individual) labour law might be regarded as a means not only to protect workers, but to reach policy goals, ie to influence the labour market: S. Krebber, 'Individualarbeitsrecht als Arbeitsmarktrecht und Anknüpfung des Arbeitsverhältnisstatuts', in H. Konzen et al (eds), *Festschrift for Birk* (Tübingen: Mohr, 2008) 477, 487 et seq.

110 For this perspective, in particular Collins, n 3 above. Exemplary for European Consumer Law: M. Martinek, 'Unsystematische Überregulierung und kontraintentionale Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr', in S. Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts – Gesellschafts-, Arbeits- und Schuldvertragsrecht* (Tübingen: Mohr, 2000) 512 et seq.

111 Riesenhuber, n 89 above, 50 et seq.

112 Many examples to be found in an archival collection of cases under the (German) non-discrimination laws ('Archiv zum Allgemeinen Gleichbehandlungsgesetz (AGG)') at www.agg-hopping.de (last visited on 20 March 2009).

113 Cf only the German transposition in § 29 AGG; more extensively on this point the comments in G. Thüsing, in F.J. Säcker / R. Rixecker (ed), *Münchener Kommentar BGB* Band 1, Teilband 2 (5th ed, Munich: Beck, 2007) § 29 AGG para 1 et seq.

114 On this point E. Kocher, 'Vom Diskriminierungsverbot zum "Mainstreaming"' *Recht der Arbeit* 2002, 167 et seq.

the 'certification mark' against discrimination which *Ayres* and *Brown* have developed: *In lieu* of a legal prohibition of discrimination on grounds of sexual orientation, enterprises may obtain a license to use the certification mark if they make a promise, enforceable by third parties, to abide by the rules of non-discrimination.[115] Governance thus focuses on the choice of the adequate regulatory instrument.[116]

c) Contract Governance (also) as an instrument for liberalisation

Where contract law is being employed to attain heteronomous objectives, there seems to be an imminent danger of intrusions into freedom of contract and private autonomy. Governance by means of contract law may, however, instead turn out to be an instrument for liberalisation where the issue in question was hitherto subject to a more intensive and mandatory form of regulation such as *ius cogens.* Frequently, governance considerations will open a new perspective on regulation and direct the view to other, potentially also to softer and less intrusive mechanisms. Thus, for example, also default rules (*ius dispositivum*) can exert a regulatory influence. They may well predetermine the substantive result, for example, where the transaction costs for negotiating a deviating solution are particularly high or where the parties blindly trust the legal standard of the default rule. Default rules notably influence contract negotiations, for example, where they provide for particularly 'partial' solutions that place the burden of contracting out on one of the parties and force him to reveal information (*penalty default rules, information-forcing default rules*).[117] Beyond that, the legislator may also influence private behaviour by offering a set of choices or options. This may well channel the bargaining process or steer it into a certain direction. As *Ayres* says: menus matter.[118] Contract governance thus may leave private autonomy and freedom of contract largely unfettered and yet exert a noticeably regulatory

115 I. Ayres / J.G. Brown, 'Mark(et)ing Non-Discrimination: Privatizing ENDA with a Certification Mark' *Michigan Law Review* 104 (2006) 1639 et seq; Ayres, n 87 above, 3, 7 et seq; furthermore, Kocher, n 92 above, 27 et seq. For a similar, but legislatively backed model in Spanish labour law, namely art 50 Ley Organica 3/2007 de 22 de marzo para la igualdad efectiva de mujeres y hombres: K. Adomeit, 'Spanisches und Deutsches Gleichbehandlungsrecht und gemeinsame Probleme der Umsetzung europäischer Direktiven', in Konzen et al (eds), *Festschrift for Birk*, n 109 above, 1, 5.

116 On this point Bachmann (2006), n 33 above, 49 et seq; Schuppert, n 6 above, 395 et seq.

117 Path-breaking I. Ayres / R. Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' *Yale Law Journal* 99 (1989) 87, 91; cf also O. Ben-Shahar / J.A.E. Pottow, 'On the Stickiness of Default Rules' *Florida State University Law Review* 33 (1993) 651 et seq.

118 This is the title of Ayres, n 87 above, 3 et seq; similar: Bachmann (2007), n 33 above, 11, 16 et seq.

effect, in particular by structuring the bargaining process. This is very much in line with the general notion of governance.

The model of the European Works Council Directive 94/45/EC[119] is an excellent example of this form of contract governance.[120] After a lengthy and controversial legislative process, a new regulatory approach, shifting from substance to procedure, paved the way for the directive. Instead of enacting uniform rules for *a* European Works Council, uniformly applicable in all enterprises covered throughout the Community, the legislator installed a procedural framework that allows both sides – employer and employees – to tailor a structure of employee participation that serves their specific interests and needs.[121]

From a viewpoint of governance, we thus consider the withdrawal of more rigid forms of state influence or control in favour of a regulation with the means of contract law.[122] Based on the *Davignon Report,*[123] the EC legislator has employed a similar instrument of contract governance as well for both, the *Societas Europaea*[124] and the *Societas Cooperativa Europaea*[125] which ba-

119 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, *OJEC* 1994 L 254/64.

120 In this sense, also in terminology ('contract governance'): Eidenmüller, n 3 above, 487, 493; Windbichler (2005), n 3 above, 507, 529 and 533 et seq.

121 M. Weiss, 'Arbeitnehmermitwirkung in Europa' *Neue Zeitschrift für Arbeitsrecht* 2003, 177, 179; M. Weiss, 'Europäische Betriebsräte und Konzern – 20 Thesen' *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 1995, 633, 635 (paradigm shift).

122 More extensively on this approach (criticizing, however, specific arrangements): C. Windbichler, 'Der gordische Mitbestimmungsknoten und das Vereinbarungsschwert – Regulierung durch Hilfe zur Selbstregulierung', in U. Jürgens / D. Sadowski / G.F. Schuppert / M. Weiss (eds), *Perspektiven der Corporate Governance* (Baden-Baden: Nomos, 2007) 282 et seq; R. Kiem, 'Vereinbarte Mitbestimmung und Verhandlungsmandat der Unternehmensleitung – Ein Beitrag zur mitbestimmungsrechtlichen Verhandlungslösung und guter Corporate Governance' *Zeitschrift für das gesamte Handelsrecht* 171 (2007) 713 et seq; see also Eidenmüller, n 3 above, 487, 488 et seq; and, in particular Windbichler (2004), n 3 above, 190, 193 and 195 et seq.

123 On this point see only M. Heinze, 'Die Europäische Aktiengesellschaft' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2002, 66 et seq.

124 Grundmann / Möslein, n 4 above, para 1121; H. Kallmeyer, 'Die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft' *Zeitschrift für Wirtschaftsrecht* 2004, 1442 et seq; H. Oetker, 'Unternehmerische Mitbestimmung kraft Vereinbarung in der Europäischen Gesellschaft (SE)', in B. Dauner-Lieb / P. Hommelhoff / M. Jacobs / D. Kaiser / C. Weber (eds), *Festschrift for Konzen* (Tübingen: Mohr, 2006) 635 et seq.

125 See only Grundmann / Möslein, n 4 above, para 1121.

sically follows the same approach of regulation in the field of employee participation. The impact of governance becomes obvious here when we consider parties' incentives to negotiate. With regard to the employee bench, there is an incentive to negotiate in order to obtain a concept of employee participation that is tailored to the needs of the enterprise and better suits its specific interests. For the employee side, on the other hand, there will often be considerable incentives to negotiate, too. This is because they do not want to take the blame if the cooperation intended with the *Societas Europaea* fails (with resulting peril for jobs).[126]

German copyright law offers another example of a tendency towards contract governance. With regard to private copying levies, the Copyright Act has now been changed from a system where the state fixes the level of levies to one where industry, on the one hand, and collecting societies, on the other, negotiate the 'price'.[127] Again, the transposition from a system of state regulation to one of contract governance is instructive with regard to the negotiation procedures installed. In the first draft for the new law, these procedures were considerably biased, setting a ceiling of 5 % of the sale price for the levies. This was alleviated to some extent in the course of the legislative procedures, and the law ultimately enacted merely provides that the levies should not unduly burden the industry and that the level of the levies should reflect an appropriate relation to the price of the relevant products (§ 54a German Copyright Act). The negotiation procedures remain defective, though, in that they give the debtor of levies an incentive to protract the negotiations which, in turn, may seriously put the economic interests of right holders at risk.[128] In particular, the law does not even provide for an obligation of the debtor of such levies to pay undisputed sums pending negotiations.

126 J. Kenner, 'Worker Involvement in the Societas Europaea: Integrating Company and Labour Law in the European Union?' *YEL* 24 (2005) 223, 239 ('type of penalty default'); W. Heinze / A. Seifert / C. Teichmann, 'Verhandlungssache – Arbeitnehmerbeteiligung in der SE' *Betriebs-Berater* 2005, 2524 et seq.

127 On this point, see only S. Müller, 'Festlegung und Inkasso von Vergütungen für die private Vervielfältigung auf der Grundlage von Korb 2', in R. Kreile / J. Becker / K. Riesenhuber (eds), *Recht und Praxis der GEMA* (2nd ed, Berlin: de Gruyter, 2008) Kap 7; S. Müller, 'Festlegung und Inkasso von Vergütungen für die private Vervielfältigung auf der Grundlage des "Zweiten Korbs"' *Zeitschrift für Urheber- und Medienrecht* 2007, 777 et seq; F. Niemann, 'Urheberrechtsabgabe – Was ist im Korb?' *Computer und Recht* 2008, 205 et seq.

128 On this point, from the perspective of a collecting society Müller (2008), n 127 above, Kap 7 para 77 et seq; Müller (2007), n 127 above, 777.

The preceding examples hint at a wide spectrum of possible regulation[129] by means of contract law. The law primarily provides for a structure for the negotiations. But various instruments imply an influence on the outcome of the negotiations. Consider, for example, the default solution applicable when negotiations fail, limitations to the leeway for negotiations (such as a ceiling), menus of possible solutions (which, again, can be conclusive or exemplary – they will exert an influence in any case). In all these instances – and beyond that: in any case – the parties will negotiate 'in the shadow of the law'.[130] Contract governance thus amounts to a form of 'regulated self-regulation': where the procedures and, to a varying degree, also the outcomes are being determined by the state (or another external rule maker).[131]

d) Research Methods

When 'soft' mechanisms of governance are being employed, the practical effect largely depends on the behaviour of the actors. Therefore, again, governance by means of contract law has to be based on assumptions of human behaviour such as the model of the *homo oeconomicus* as well as its refinement or modification on the basis of behavioural theory (*behavioural law and economics*).[132] Where we focus on the structuring of negotiation procedures, research on negotiation promises to be useful for an analysis of practical effects of such regulation.[133] Openness for these methods of research is

129 See, for instance, also OECD (ed), *Regulatory Policies in OECD Countries – From Interventionalism to Regulatory Governance* (Paris: OECD, 2002); Schuppert, n 6 above, 401–404.

130 Similar ('in the shadow of law'): Calliess, n 45 above, 469, 471; Dixit, n 105 above, 10; Williamson, n 1 above, 1, 14.

131 W. Hoffmann-Riem, 'Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen – Systematik und Entwicklungsperspektiven', in W. Hoffmann-Riem / E. Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden: Nomos, 1996) 261 et seq (in particular 301 et seq: 'self-regulation regulated by the state', our translation); Calliess (2006), n 42 above, 200 et seq; Windbichler, n 122 above, 296.

132 See references above, n 101 above. More generally on the interdependence of autonomy and effectiveness of regulation: C. Engel, 'Rationale Rechtspolitik und ihre Grenzen' *Juristenzeitung* 2005, 581, 587 et seq.

133 Cf, for instance, C. Bühring-Uhle / H. Eidenmüller / A. Nelle, *Verhandlungsmanagement – Intuition, Strategie, Effektivität* (Munich: dtv, to be published in May 2009); R. Korobkin, *Negotiation Theory and Strategy* (New York: Aspen Publishers, 2002); for a specific question: H. Eidenmüller, 'Druckmittel bei Vertragsverhandlungen', in R. Zimmermann (ed), *Störungen der Willensbildung bei Vertragsschluss* (Tübingen: Mohr, 2007) 103, bes 105–108. Similar already the fundamental analysis by N. Horn, 'Neuverhandlungspflicht' *Archiv für die civilistische Praxis* 181 (1981) 255 et seq; A. Nelle, *Neuverhandlungspflichten Neuverhandlungen zur Vertragsanpassung und Vertragsergänzung als Gegenstand von Pflichten und Obliegenheiten* (Munich: Beck,

an indispensable prerequisite for an evaluation of the law of contract with regard to its regulatory effects. At the same time, we find here another contribution to a development of contract law towards a discipline that focuses not only on adjudication but also on rule-making.

e) The Regulation of Collecting Societies as an Example

The regulation of collecting societies in its historical development and from a comparative perspective is a good example of governance by means of contract law. In Germany, the legislator initially did not provide for any regulation of collecting societies. In 1903, the legislator created the composer's exclusive performance right, well aware that it is impossible for the individual composer to enforce this right (sell licenses; prohibit illegal performances). The legislator was, of course, well aware that in France, a similar legal background had led to the formation of the first collecting societies some fifty years previously. And he also knew that composers (and their publishers) in Germany struggled to form similar organisations.[134] The legislator thus trusted that the right-holders would organise their interests in the private sphere without any state help or intervention.[135] And in fact, this is what emerged – the first German collecting societies.

But the state did not only trust that the right-holders would organise their interests in the private sphere, it also relied on private law – contract law and company law (cartel law was virtually inexistent at the time in Germany) – to govern the relation of right-holders and collecting societies, on the one hand, and collecting societies and users, on the other:[136] contract governance of collecting societies, such as it still exists in some countries today. It was not

1994); see also the critical discussion by M. Martinek, 'Die Lehre von den Neuverhandlungspflichten – Bestandaufnahme, Kritik – und Ablehnung' *Archiv für die civilistische Praxis* 198 (1998) 329 et seq.

134 On this point M.M. Schmidt, *Die Anfänge der musikalischen Tantiemenbewegung in Deutschland* (Berlin: Duncker & Humblot, 2005).

135 On the economic functions of collecting societies: E.-J. Mestmäcker, 'Collecting Societies in Law and Economics', in E.-J. Mestmäcker (ed), *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration* (Baden-Baden: Nomos, 2006) 709 et seq, also reprinted in K. Riesenhuber (ed), *Ernst-Joachim Mestmäcker – Beiträge zum Urheberrecht* (Berlin: de Gruyter, 2006) 407 et seq; G. Hansen / A. Schmidt-Bischoffshausen, 'Ökonomische Funktionen von Verwertungsgesellschaften – Kollektive Wahrnehmung im Lichte von Transaktionskosten- und Informationsökonomik' *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2007, 461 et seq.

136 K. Riesenhuber / F. Rosenkranz, 'Das deutsche Wahrnehmungsrecht 1903–1933 – Ein Streifzug durch Rechtsprechung und Literatur' *Archiv für Urheber- und Medienrecht* 2005/II, 467 et seq.

until 1933 that – with the enactment of the so-called Stagma Law[137] – the legislator replaced the system of contract governance with one of rather strict governance by public law, providing for state concession, a legal monopoly and state supervision. The Law on Collecting Societies, enacted in 1965, abrogated the legal monopoly but still provides for a duty to register and state supervision, and only within this framework returns to contract governance (since 1958 supplemented with cartel law). Given the monopoly position or, in any case, a market-dominating position of collecting societies, contract law cannot, of course, effectively exert control. Thus, the Law on Collecting Societies provides for a duty of the collecting societies to contract with the right-holders, on the one hand, and with the users, on the other, and also installs judicial control of the terms of the contract. On the EC level, we have a legal situation that, effectively, leads to similar results in many respects, based on competition law (Article 81, 82 EC).[138] In the US, too, we have a system of contract governance complemented by substantial state control by means of cartel law.[139]

4. Governance through Contract

a) General

When we speak of governance through contract here, we consider the situation where private parties themselves create a framework for their (eg, contractual) relationship. Governance through contract is of particular practical relevance where such a relationship is in fact close to organisational structures. Long-term contracts, multi-party contracts and networks are examples. Here, uncertainty (of future developments or preferences) and the com-

137 The law introduced a State-authorized Society for the Management of Musical Autors' Rights (*Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte* [STAGMA]); in some more detail J. Reinbothe, 'Collective Management in Germany', in D. Gervais (ed), *Collective Management of Copyright and Related Rights* (The Hague: Kluwer, 2006) 193, 196 et seq.

138 On the current debate, see only R. Hilty / J. Drexl (eds), *The Law of Collective Rights Management Organisations* (forthcoming, 2009).

139 See, for instance, the country report by G. Lunney, 'Copyright Collectives and Collecting Societies: The United States Experience', in Gervais (ed), n 137 above, 311 et seq; C. Wünschmann, *Die kollektive Verwertung von Urheber- und Leistungsschutzrechten nach europäischem Wettbewerbsrecht* (Baden-Baden: Nomos, 2000); B.C. Goldmann, *Die kollektive Wahrnehmung musikalischer Rechte in den USA und in Deutschland – Eine vergleichende Studie zu Recht und Praxis der Verwertungsgesellschaften* (Munich: Beck, 2001); see also K. Riesenhuber, *Die Auslegung und Kontrolle des Wahrnehmungsvertrags* (Berlin: de Gruyter, 2004) with further references.

plexity of the subject matter often require custom-tailored mechanisms.[140] Contract governance of this sort is in many ways similar to corporate governance.[141] The fact that governance through contract concerns *self*-commitment and *self*-organisation is by no means exceptional, to the contrary. Co-operative regulation as opposed to hierarchical regulation is often considered a distinctive feature of governance.[142]

b) The Autonomous Supplementation of the Legal Framework

Where private parties use contracts in order to set up governance structures for their relation, contract law is the natural starting point too. Let us reconsider the long-term relation: Here, most national contract laws will provide for fundamental instruments of governance. For example, the employers' managerial authority gives a certain degree of discretion to direct the employees' work. German courts consider this discretion to be part of the essential contents of an employment contract,[143] and it is also laid down in § 106 German Industrial Code (*Gewerbeordnung*).[144] Therefore, it applies even if the parties do not explicitly agree upon such a right. More generally, German doctrine and jurisprudence have developed a set of principles and rules which apply to long-term relations (*Dauerschuldverhältnisse*) of any kind (thus partly anticipating the theoretical developments on relational contracts).[145] For example, the general right to terminate a long-term contract for good cause (*wichtiger Grund*), long recognised by courts as a general principle of long-term contracts, has found explicit expression in § 314 BGB in the course of the recent modernization of the law of obligations (*Schuldrechtsmodernisierung*).[146] And, to give a last example, in cases of fun-

140 Grundmann / Möslein, n 4 above, para 474; Grundmann / Möslein, 'Vertragsnetz und Wegfall der Geschäftsgrundlage', in L. Aderhold / B. Grunewald / D. Klingberg / W.G. Paefgen (ed), *Festschrift for H.P. Westermann* (Köln: Schmidt, 2008) 227 et seq.

141 On similarities (and differences): S. Grundmann, 'Die Dogmatik der Vertragsnetze' *Archiv für die civilistische Praxis* 207 (2007) 718, 727 et seq; Grundmann / Möslein (2008), n 140 above, 227 et seq *et passim.* Cf also: G. Teubner, 'Hybrid Laws – Constitutionalizing Private Governance Networks', in R.A. Kagan / K. Winston (eds), *Legality and Community* (Lanham, Md: Rowman & Littlefield, 2002) 311 et seq; furthermore: F. Cafaggi (ed), *Corporate Governance, Networks e Innovazione* (Padova: CEDAM, 2005).

142 Cf Mayntz (in Schuppert), n 6 above, 15 et seq.

143 Bundesarbeitsgericht, *Neue Zeitschrift für Arbeitsrecht* 1992, 795, 796 et seq; Zöllner / Loritz / Hergenröder, n 66 above, § 6 I 8 (62 et seq).

144 On this point R. Wank, in P.J. Tettinger / R. Wank (eds), *Gewerbeordnung* (7th ed, Munich: Beck, 2004) § 106 GewO para 1 et seq.

145 M. Martinek, in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (Berlin: Sellier/de Gruyter, 2006) vor § 675 para 77–81.

146 On the latter, see only S. Grundmann, 'Germany and the Schuldrechtsmodernisierung' *European Review of Contract Law* 1 (2005) 129–148; and the in-

damental changes, the *clausula rebus sic stantibus* (*Störung der Geschäftsgrundlage*), now laid down in § 313 BGB, applies. Following the predominant opinion, it grants a judicial right to adapt the contract;[147] others advocate an obligation of the parties to re-negotiate.[148]

Employee participation in undertakings or businesses has a hybrid character from a viewpoint of contract governance. It can be regarded as an aspect of governance by means of contract law where the focus is to enhance employee participation. We have considered the Works Council Directive and employee determination in the European Company earlier (*supra,* 3 b)) in this context, given that the EC legislator (finally) opted for a negotiation mechanism to achieve this (potentially) extra-contractual aim. If we focus on the employment contract as a long-term relationship, employee participation can also be considered as an offer for the parties (as groups) to deal with the adaptation of the contract over time. Employee participation has thus been considered an 'institutionalised form of helping the contract parties' ('*institutionalisierte Vertragshilfe*').[149]

These are elements of the legal framework which, consisting predominantly of default rules, is open to supplementation of the parties. Thus, the parties are entirely free to agree upon a unilateral right to determine the contents of the contract or to stipulate a duty to re-negotiate under certain circumstances (see also *infra,* c). Contractual and legal instruments of governance are in many ways similar. And where the legal framework has the form of a default rule, it is open to contractual adjustment. Governance through contract and governance by means of contract law (as a default standard) can, from this

troduction by R. Zimmermann, *The New German Law on Obligations – Historical and Comparative Perspectives* (Oxford: Oxford University Press, 2005) 30 et seq.

147 G.H. Roth, in F.J. Säcker / R. Rixecker (ed), *Münchener Kommentar BGB* Band 2 (5th ed, Munich: Beck, 2007) § 313 para 79 et seq, 93; specifically for networks of contracts: Grundmann / Möslein (2008), n 140 above, 227, 236 et seq.

148 C. Grüneberg, in P. Palandt (ed), *BGB* (67th ed, Munich: Beck, 2008) § 313 para 41; H. Eidenmüller, 'Der Spinnerei-Fall: Die Lehre von der Geschäftsgrundlage nach der Rechtsprechung des Reichsgerichts und im Lichte der Schuldrechtsmodernisierung' *Juristische Ausbildung* 2001, 824, 829 et seq; H. Eidenmüller, 'Neuverhandlungspflichten bei Wegfall der Geschäftsgrundlage' *Zeitschrift für Wirtschaftsrecht* 1995, 1063 et seq; K. Riesenhuber, 'Vertragsanpassung wegen Geschäftsgrundlagenstörung – Dogmatik, Gestaltung und Vergleich' *Betriebs-Berater* 2004, 2697 et seq.

149 C. Windbichler, 'Betriebliche Mitbestimmung als institutionalisierte Vertragshilfe', in M. Lieb / U. Noack / H.P. Westermann (eds), *Festschrift for Wolfgang Zöllner* (Cologne/Berlin/Bonn/Munich: Heymanns, 1998) 999–1009; Windbichler (2005), n 3 above, 507, 529; see also V. Rieble, 'Mitbestimmung zwischen Legitimationslast und Modernisierungsdruck', in V. Rieble (ed), *Zukunft der Unternehmensmitbestimmung* (Munich: ZAAR-Verlag, 2004) 13 seq.

perspective, appear interchangeable. In substance, however, there is a difference with respect to the regulatory effects of default rules.[150] Furthermore, the range of governance is different, given that governance through contract can, due to the privity of contract, only affect the relationship of the parties as such, and, as a matter of principle, it will not cover the initial negotiation of a contract. However, self-commitment by means of governance through contract has the potential to go beyond the individual contract or the relation of the parties. The former is the case where the parties agree on a framework contract that substantially shapes the design of individual contracts agreed upon in execution of the framework.[151] The latter, ie an influence beyond the relativity of the contract relation, can be achieved where parties make a promise for the benefit of third parties. The promise to adhere to a principle of non-discrimination in relation to employees and applicants under the 'non-discrimination certificate' (above, 3 b)[152] is an example.

c) Crafting Instruments

This is the basis for a wide variety of instruments of governance through contract with regard to the specific interests of the parties.[153] Governance structures may, in particular, play an important role where the parties want to take care of unforeseeable events in the future or where they want to install incentive mechanisms so as to enhance the successful performance of the contract.

The adaptation of the contract in the case of an unforeseen change of circumstances is particularly important in long-term relationships. Standard mechanisms are the termination by means of a dissolving condition or a contractually agreed right of termination. The parties thus agree upon recourse to the market. Alternatively, the parties may uphold their contractual relation and adapt its terms. They may, for example, agree upon a variable price that is being raised in certain intervals or following a certain index.[154] Or they may stipulate a right of one party or a third person to adapt the conditions over time. Re-negotiation clauses[155] are of considerable practical importance

150 See references above, n 117.

151 More extensively the monograph by H.C. von der Crone, *Rahmenverträge: Vertragsrecht – Systemtheorie – Ökonomie* (Zurich: Schulthess, 1993); for practical examples of legal drafting cf furthermore W. Gass / K.W. Lange, *Rahmenverträge für moderne Produktionsformen – Einführung und Gestaltung* (Munich: Beck, 1999).

152 See references above, n 115.

153 With respect to drafting of contracts, for instance, G. Ritterhaus / C. Teichmann, *Anwaltliche Vertragsgestaltung* (2nd ed, Heidelberg: CF Müller, 2003).

154 §§ 557 et seq BGB; on this point B. Weitermeyer, in V. Emmerich / J. Sonnenschein (eds), *Miete Handkommentar* (9th ed, Berlin: de Gruyter, 2007) § 557a para 1, § 557b para 1.

155 On this point mainly: Nelle, n 133 above; Eidenmüller (1995), n 148 above, 1063 et seq; Horn, n 133 above, 255 et seq.

too, for example in energy supply contracts,[156] loan agreements[157] or in licensed dealer agreements.[158] A general duty to re-negotiate may be supplemented by an agreement concerning the negotiation process.[159] Thus, the parties may agree to negotiate on the basis of an expert opinion or the market price; they may provide for an obligation of exclusivity or a general duty of good faith and fair dealing.[160] Finally, we may consider the allocation of risks in a contract as part of a governance structure. Under German law, for example, such allocation of risks plays a central role when one of the parties invokes the *clausula rebus sic stantibus* of § 313 BGB.

With regard to incentive mechanisms, the agreement of goals is a prominent instrument of governance through contract. Such agreements are now widely used in employment contracts[161] but also in other areas, for example, in engineering or architects' contracts (goal not to exceed a certain cost limit).[162] Where the agreement of goals amounts to a positive incentive, we can, conversely, conceive liability rules as a negative incentive mechanism.

d) Methods of Structured Analysis and Research

Frequently, parties have specific knowledge or intuition that helps them in structuring the framework for their relation. In practice, we can find numer-

156 J. Baur, *Vertragliche Anpassungsregeln* (Heidelberg: Verlag Recht und Wirtschaft, 1983) 30 et seq; W. Harms, 'Zur Anwendung von Revisionsklauseln in langfristigen Energielieferungsverträgen', *Der Betrieb* 1983, 322 et seq.

157 C.-W. Canaris, 'Nichtabnahmeentschädigung und Vorfälligkeitsvergütung bei Darlehen mit fester Laufzeit', in W. Hadding / K.J. Hopt / H. Schimansky (eds), *Vorzeitige Beendigung von Finanzierungen – Rating von Unternehmen (Bankrechtstag 1996)* (Berlin: de Gruyter, 1997) 3, 41 (n 67: 'fruitful enrichment of private law instruments', our translation); Nelle, n 133 above, 53–56 with further references.

158 N. Horn, 'Vertragsbindung unter veränderten Umständen – Zur Wirksamkeit von Anpassungsregeln in langfristigen Verträgen' *Neue Juristische Wochenschrift* 1985, 1118, 1122; Nelle, n 133 above, 52 with further references.

159 More extensively: Bachmann (2006), n 33 above, 393–402.

160 For a structured approach cf also the comments on conflict-resolution clauses and on termination- and exit-rules (for instance *Russian Roulette*-mechanisms und *Texan Shoot Out*-clauses) in Winkler, n 42 above, 43, 60–64.

161 On this point, see only K. Riesenhuber / R. von Steinau-Steinrück, 'Zielvereinbarungen' *Neue Zeitschrift für Arbeitsrecht* 2005, 785 et seq; U. Preis, in R. Müller-Glöge / U. Preis / I. Schmidt / T. Dieterich / P. Hanau / G. Schaub (ed), *Erfurter Kommentar zum Arbeitsrecht* (8th ed, Munich: Beck, 2008) § 611 BGB para 504 et seq; more generally Windbichler (2004), n 3 above, 190, 195 (with explicit reference to 'contract governance'). In management theory P.F. Drucker, *The Essential Drucker* (New York: Harper-Collins Publishers, 2001) 112 et seq ('Management by Objectives and Self-Control').

162 Cf § 5 Abs 4a German Official Scale of Fees for Services by Architects and Engineers (*Honorarordnung für Architekten und Ingenieure*).

ous examples of how different instruments of governance are being used. Practice also illustrates how corporate governance and contract governance converge in this respect. In fact, recognition of the fact that the borders of enterprise are not in every respect fixed is the basis for one of the central challenges of management, to optimally allocate the various areas of entrepreneurial activity (outsourcing). What is at stake here is the choice between organisational and contractual structures.[163] The issue has gained increased importance in recent years due to the advancements of information technologies. Management experts aptly speak of an 'expansion of corporate boundaries'.[164]

Governance through contract is, however, not merely a matter of contractual practice but at the same time open to academic analysis. Again, economic theory, on the one hand, and behavioural economics, on the other, promise to be particularly fruitful tools for this task. Take as an example of governance structures for the issue of a subsequent change of circumstances in long-term contracts. Here, parties will often be faced with the problem of specific investments which only pay off in the individual contractual relation.[165] In these circumstances, the parties will *ex ante* often attempt to foreclose exit options. Consequently, they are faced with the need of internal governance mechanisms such as an adaptation of the terms. To a certain degree, this may result in a restriction of competition. This latter effect will often be reinforced, given that people tend to overrate sunk costs that result from such specific investments *ex post* and that they will thus tend to adhere to the contract even where this is not rational from an economic point of view.[166]

Behavioural economics may also be useful in drafting goal agreements, e.g., in employment relations. Consider, for example, that following the so-called endowment effect, people tend to be more afraid of losses than they would esteem equivalent gains. Here, negative incentive mechanisms might prove to

163 Similar Windbichler (2004), n 3 above, 190, 195 (with respect to employment relations).

164 R. Wigand / A. Picot / R. Reichwald (eds), *Information, Organization and Management – Expanding Markets and Corporate Boundaries* (Chichester: Wiley, 1997).

165 Path-breaking R.H. Coase, 'The Nature of the Firm' *Economica* 4 (1937) 386 et seq; cf furthermore: Williamson, n 3 above, 233, 240; O.E. Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985) 32–34, 60–62 and *passim*; for a survey H. Eidenmüller, 'Kapitalgesellschaftsrecht im Spiegel der ökonomischen Theorie' *Juristenzeitung* 2001, 1041, 1042.

166 Cf, above all, C. Jolls / C.R. Sunstein / R. Thaler, 'A Behavioral Approach to Law and Economics' *Stanford Law Review* 50 (1998) 1471, 1482 et seq, 1492 et seq; for a survey Eidenmüller, n 33 above, 216, 219.

be more effective than positive ones.[167] Thus, the positive effects of goal agreements may fade where liability risks are higher than the expected premiums. And conversely, there may be instances where a *malus,* such as a decrease in payment or a contractual penalty may exert more effective influence than a *bonus.* The present global financial crisis, attributed by many to (wrong) incentives created by compensation schemes, dramatically illustrates the importance of designing an adequate governance framework in employment contracts.[168]

III. The Potential of Contract Governance – An Interim Conclusion

The aim of this paper was to sketch contract governance as a field of academic research. In conclusion, we thus do not attempt to present any results. Rather, we should like to enquire whether contract governance promises to open new perspectives.

If we look at research in the field of governance, contract governance appears to be an important and indeed necessary complement to corporate governance. Contract and organisation are certainly distinct forms of cooperation,

167 R. Thaler, 'Toward A Positive Theory Of Consumer Choice' *Journal of Economic Behavior & Organization* 1 (1980) 39, 44; D. Kahneman / J.L. Knetsch / R.H. Thaler, 'The Endowment Effect, Loss Aversion, and Status Quo Bias: Anomalies' *Journal of Economic Perspectives* 5 (1991) 193, 194 et seq; summarized, again, by Eidenmüller, n 33 above, 216, 218. A nice practical illustration is the so-called 'StickK' programme, initiated by I. Ayres, D. Karlan and J. Goldberg; see www.stickk.com; on this point P. Weiler Grayson, 'Dieting? Put your Money Where Your Fat Is', *New York Times* 4 February 2009, at http://www.nytimes.com/2009/02/05/health/nutrition/05fitness.html?_r=2&em (both last visited on 20 March 2009).

168 See, above all, the recent reform proposals, for the EU: The High Level Group on Financial Supervision in the EU ('de Larosière-Group'), *Final Report* (Brussels: February 2009) 31 (Recommendation 11: '[…] the Group considers that compensation incentives must be better aligned with shareholder interests and long-term firm-wide profitability'); for the UK: Financial Services Authority, *The Turner Review – A regulatory response to the global banking crisis* (London: March 2009) 8 (sub 17: 'Remuneration policies should be designed to avoid incentives for undue risk taking'); in Germany, a first legislative draft on the adequacy of management compensation has already been prepared (*Formulierungshilfe für ein Gesetz zur Angemessenheit der Vorstandsvergütung* [*VorstAG*], of 7 March 2009). In more detail on causes and consequences: P.O. Mülbert, 'Corporate Governance von Banken' *Zeitschrift für das gesamte Handelsrecht* 173 (2009) 1, 5 et seq and 10 et seq; S. Grundmann / C. Hofmann / F. Möslein, 'Finanzkrise und Wirtschaftsordnung: Krisenursachen, Finanzmarktstabilisierung, Finanzmarktstabilität', in S. Grundmann / C. Hofmann / F. Möslein (eds), *Finanzkrise und Wirtschaftsordnung* (Berlin: de Gruyter, 2009) 1, 32, with further references.

yet, they are complementary and, in some cases, contract and organisation can be alternative instruments for the same goals. These considerations are the starting point for governance research in general and, at the same time, they describe a central issue of business management. Thus, it is rather surprising to find that governance research focuses on corporate governance only – thus fading out the other half of the issue. Networks and long-term contracts in particular are often apt to supplement corporational organisation. It is true that in simple exchange contracts, so-called spot contracts, (hierarchical) coordination is much less important and, instead, market mechanisms are by far the most important governance instrument. Yet, also the market mechanism needs an organisational framework which may exert an influence on the market results and which is open to a governance analysis.

For the theory of contract law, the governance perspective widens the angle for research. In particular, contract governance draws attention to the practical effects of contracts and contract law. Given that contract governance not merely considers the internal structures but also external market forces (fallback procedures), contract law and competition law converge in a contract governance perspective. Furthermore, governance goes beyond positive law and opens up the perspective for incentive and regulatory mechanisms. This view promises to be particularly fruitful with regard to the current development of privatisation of the law.[169] Not least, the governance perspective may enhance international and interdisciplinary research – certainly a desideratum in view of the current europeanisation and globalisation of contract law.

Finally, and perhaps most importantly, contract governance promises to contribute to a theory of law-making that focuses on practical effects. Again, given the current discussion of a codification of contract law in Europe, law-making becomes a central focus of legal research, and, indeed, some have already detected a 'paradigm shift' here.[170] Where governance research focuses on incentives and patterns of behaviour, it may contribute to a better understanding of the effects of regulation which legislators often seem to grasp intuitively at best, sometimes rather naively. Governance research can thus enhance 'better regulation' and, for example, help avoid misdirected regulation and counter-intentional effects. In addition, the governance perspective opens an eye for soft mechanisms of governance and for governance through self-regulation (governance through contract). Contract governance may thus help preserving individual freedom and it may contribute to less

169 Reference above, n 5.

170 In this sense Eidenmüller, n 31 above, 53.

intrusive regulation.[171] This alone would seem to make the effort worthwhile: Contract governance appears to be a promising field of research.

171 Reference above, n 90.