COMMERCIAL RELATIONS, CONTRACT, AND LITIGATION IN DENMARK: A DISCUSSION OF MACAULAY'S THEORIES

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The concept of thematization—the process by which actors select a frame of reference for their communications—captures an aspect of dispute resolution that is fundamental to Macaulay's description of noncontractual commercial relations and to many recent dispute resolution studies. Thematization both describes the identification of events as relevant to relations between the parties and links these events to special resources and sanctions. In the thematization process managers apply their knowledge of commercial relations and of transaction structures to ensure freedom to choose between modes of handling matters. A pilot study of Danish firms illustrates the workings of the process. The author's preliminary analysis suggests that thematization within the firm determines how various forms of norms are applied at different times. Businessess continue to employ laws and litigation when other forms of governance of economic relationship fail. Thus law is still an important source of power in business.

I. INTRODUCTION

Stewart Macaulay's examination of the effects of continuing relations on the mobilization of law has been a starting point for studies of dispute resolution, and remains an important source of insights for contemporary research. More than a quarter-century has passed since the publication of Macaulay's article on noncontractual relations in business (1963), yet surprisingly few theoretical advances have been offered that extend, refine, or deepen Macaulay's analysis of continuing relations and law, termed "preliminary" by Macaulay even at the time (but see the special 1985 issue of the *Wisconsin Law Review* commemorating the publication of Macaulay's article). In particular, little research has considered the continuing relations hypothesis in the setting in which it was originally described, namely, commercial transactions

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between business firms. This essay will report further consideration of Macaulay's continuing relations hypothesis in light of the formation of contractual relations by decisionmakers in larger firms.[1]

I begin with a concept borrowed from the general sociological theory of Niklas Luhmann (1981, 1982), thematization, which is the process by which actors select a frame of reference for their communications. I suggest that this concept captures an aspect of dispute resolution that is fundamental to Macaulay's description of noncontractual relations, as well as to many recent empirical studies of dispute resolution. I then apply this concept to the theory of the firm, arguing that the concept captures how managers apply their knowledge to decisions about commercial relations in a way that gives due weight to the structure of the manager's role, to the course of dealing between firms and, importantly, to the freedom to change modes of dealing.

These principles are illustrated using results from a pilot study of Danish firms. Finally, I suggest how this preliminary analysis of the thematization of decisionmaking within the firm may affect the relationship between private governance in commercial transactions, law and litigation over time.

II. THEMATIZATION OF BUSINESS RELATIONS

In his 1963 article, Macaulay conceived of transactions and disputes in commercial relations as *actor* problems. To understand why business relations follow certain patterns, one must grasp the reasons that underlie a manager's decisions to do business, to make a claim, or to litigate a dispute. Thus, the task for the researcher is to understand why a particular frame of reference has been chosen for decisions made in the course of business dealings.

Niklas Luhmann, a major European sociologist, called this process of framework selection *thematization*.[2] Thematization is a potentially useful concept in the study of dispute resolution, for it

[1] Exploration of the link between dispute resolution in commercial transactions and the internal organizations of the firm will lead to better understanding of issues that are often overlooked in dispute-processing research (see Mather, 1990), among them, the role of organizations as actors and the effects on dispute resolution of ideology and unequal power. Equally important, knowing how business firms create and maintain relationships with other entities will help us comprehend the evolution of a pervasive form of private governance, namely, commercial transactions, and their relationship to law. Such comprehension promises, in turn, to contribute to our understanding of changes over time in the content and frequency of trial court litigation and may also provide a larger picture of change in the role of the judge and the courts in modern society.

[2] Niklas Luhmann has (1982) described the creation of interaction systems (actor-actor dealings over time) as a process of selecting mutual responses from among possible alternatives. The selection of appropriate forms of interaction from a theoretically infinite set of mutual responses in social interactions must be focused on a more limited range of responses by the actors' need to achieve mutual meaning in the face of an incomprehensibly complex

describes a process that includes both the identification of an event as relevant to interaction between particular actors and the linking of that event to special resources and rules that seem appropriate for use in the interaction. Thematization includes the formation of initial perceptions of an event by a single actor, but more importantly it also includes the subsequent communications and interactions with others by which the event takes on meaning and becomes part of the flow of events between actors or between firms. Thus, in thematizing business relations, the manager's professional ideology, experience and organizational role, the management structure, the interactions with the other businesses in the exchange, and the legal and economic cultures of the society all play a part.

There is a relationship between different types of thematization and the use of different types of rules for dispute resolution. Through thematization a transaction is linked to special resources and rules, including a particular type of dispute resolution. In this regard, consider the differences between legal thematization and economic thematization. The thematization of a business relation in classic legal terms leads to the relationship being formed in light of applicable contract law. Thematization in an economic framework leads to structuring the relationship through such economic means as ongoing adjustment of performance to achieve economic goals. Further, legal thematization implies that a dispute arising from the transaction would activate the legal system with its institutional resources and sanctions. A dispute arising from a transaction thematized in economic terms, on the other hand, would activate economic reasoning and involve use of resources which draw on economic power relations.[3]

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environment. This is made possible through the existence of systems of thought or ideology, like law,

> systems that, in an inordinately complex environment, hold constant a less complex network of expectations and that are thereby able to orient action. . . . In social systems thus defined, positive law and ideology acquire the function of reducing the complexity of the system and its environment. (Luhmann, 1981: 92–93)

According to Luhmann, other major systems of meaning compete with law, for example, economics. The process by which actors through mutual communication arrive a framework that provides mutual significance for the interaction is called *thematization*. In addition to the ordering provided by law and economics, which are fundamental to Luhmann's theory, other frameworks for thematization are conceivable as well, drawing on other sources of normative order and both folk and formal, utilitarian and spiritual (e.g., Greenhouse, 1986; Friedman and Ladinsky, 1967; Moore, 1978).

[3] In much of the dispute-processing literature, an event is initially thematized as an injury or a grievance and an event is assumed to have been perceived as the initial stage of a conflict. Thematization describes actor selection among a potentially broader array of perceptions of events, including frameworks that make particular events problematic as well as frameworks that may make the event unproblematic for relationships with other actors. An actor's perception may often be plural in that competing alternative responses are perceived (e.g., Engel, 1984; Yngvesson, 1985a; Friedman, 1985).

III. THEMATIZATION OF CONTRACTUAL RELATIONS IN THE BUSINESS FIRM

Macaulay's description of the role of the manager in a firm's economic transactions may be refined in two ways, both inspired by his original article. First, Macaulay addressed the question of how transactions were structured from the perspective of the individual manager. If we are to take a conceptually more sophisticated approach to understanding this behavior, we should think in terms of the complex organization of the firm rather than in terms of the individual manager. While it is beyond the scope of this article to detail how this might be done, here I will set forth a few of the issues raised by this approach. In particular, I will argue that the thematization of content and form in business transactions occurs through the influence of at least two closely related structures within the firm: managerial role and interdepartmental organization.

Second, while Macaulay carefully considered the reasons why managers employed or failed to employ contract doctrine as the model for the formation and maintenance of business transactions, the broader question is how any content or form is given to a transaction. In particular, not only must the manager determine the appropriate substance of a transaction; he or she must in addition establish its *governance structure*—the means selected by the parties for maintaining their relationship over time. The range of possible governance structures is great, and the issue may be not whether to consider formal contract terms and remedies but rather which of many alternative means—legal, economic, or mixed—to employ. Contract law itself is now broader than the classical contract doctrine that served as the reference point for the 1963 article (MacNeil, 1985; Williamson, 1985; Macaulay, 1985). In Part IV of this article I discuss types of governance structure.

A. Managerial Role

The manager's job is to establish meaning in a situation mostly characterized by information overflow. In a potential sales situation, for example, the manager must sort out, filter, and organize communications from other firms and from within the manager's own firm; the manager, alone or in concert with others, also must fashion meaning from them (MacCall and Kaplan, 1985). The manager may use a network of internal contacts to obtain a range of alternative choices or to obtain a rationale to use as a basis for his decision.

The manager's professional experience and role (MacNeil, 1980: 40) will exert a strong influence over these decisions. Ma-

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The perception of alternatives and the necessity for choice among them creates an important source of change in continuing relationships and patterns of conflict resolution over time.

caulay (1963) describes the influence of a manager's professional role on the decision to employ contract law as an orienting framework for a commercial transaction. For example, sales managers will favor an interpretation and an ongoing structure that maximizes the opportunity for continuing sales relationships, while financial managers will want to maximize fiscal accountability within each transaction and lawyers will prefer a structure that maximizes successful dispute resolution and defense of rights in transactions.[4] Managers who have different training and perform different functions will favor normative structures that place priority on different types of transaction outcomes.[5] In the thema-

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[4] Macaulay (1963: 66) describes these orientations for different roles in the firm's decision structure:

> The decision whether or not to use contract—whether the gain exceeds the costs—will be made by the person within the business unit with the power to make, and it tends to make a difference who he is. People in a sales department oppose contract. Contractual negotiations are just one more hurdle in the way of a sale. Holding a customer to the letter of a contract is bad for "customer relations." Suing a customer who is not bankrupt and might order again is poor strategy. Purchasing agents and their buyers are less hostile to contracts but regard attention devoted to such matters as a waste of time. In contrast, the financial control department—the treasurer, controller or auditor—leans toward more contractual dealings. Contract is viewed by these people as an organizing tool to control operations in a large organization. It tends to define precisely and to minimize the risks to which the firm is exposed. Outside lawyers—those with many clients—may share this enthusiasm for a more contractual method of dealing. These lawyers are concerned with preventive law—avoiding any possible legal difficulty. They see many unstable and unsuccessful exchange transactions, and so they are aware of, and perhaps overly concerned with, all of the things which can go wrong. Moreover, their job of settling disputes with legal sanctions is much easier if their client has not been (too) casual about transaction planning. The inside lawyer, or house counsel, is harder to classify. He is likely to have some sympathy with a more contractual method of dealing. He shares the outside lawyer's "craft urge" to see exchange transactions neat and tidy from a legal standpoint. . . . Yet, the house counsel is more a part of the organization and more aware of its goals and subject to its internal sanction . . . . He must sell his services to the operating departments, and he must hoard what power he has, expending it on only what he sees as significant issues.

[5] A manager's function and training influence selection among transaction goals, or more fundamentally, among systems of thought that govern interpretation of and responses to actions of others, even before transaction goals become specific. At same time, these choices call for decisions that are not determined by position or training alone. At one time, a manager has many problems on his desk that may call for different decision styles. A long-term discussion about entering a new market calls for one type of argument and timing unlike that called for by a critical situation on the factory floor which quickly could develop into a strike. Further, different strategies employed at different times for handling a single issue in a continuing relation may call for different thematizations to support the strategies (Yngvesson, 1985a). Further, a manager's thematization of communication with another firm may be complex. The manager may use a legal vocabulary while suggesting an economic strategy. Legal rights may be surrendered as a gesture of solidarity with the other firm (S. Macaulay, 1987, personal communication; Moore, 1978).

tization process, actors draw on their *knowledge and ability* to activate relevant available *resources* and *rules* from the organization or the society at large (Luhmann, 1981).

B. Internal Organization of the Firm

But it would be misleading to focus on decisions by business firms as if they were the decisions of individuals. The manager's position within the firm is crucial. The position itself may call for activating different ways of thematizing transactions. The selections made initially by the single manager link the decision to other roles in the firm. The selection of frame of reference is then discussed—thematized—in a reference group, communication that may be structured by both formal and informal organization within the firm.

The internal organization of a firm influences the power and relative priority given to particular goals and modes of acting with respect to other firms. The managers initially in charge of decisions may be motivated by the possibility of interference or oversight by a hierarchy of other managers in the firm. This, in turn, may influence their willingness to take risks in business dealings and, once a business relationship has been established, their readiness to acknowledge conflict or disputes with other firms (Macaulay, 1977; Kurczewski and Frieske, 1977). Relations between departments will depend in part on how such relations are structured; for example, whether the firm has in-house or outside counsel will be important, and the formal and informal channels created between offices will affect the influence of each over decisions about transactions. Macaulay reports, and the Danish pilot study confirmed, that while sales managers in many firms may cooperate with lawyers—mostly with house counsel—counsel will rarely participate in the economic negotiations. This may be the result of the way decisionmaking authority has been structured within the firm. Also, as Macaulay (1963) notes, the house counsel learns to survive in the economic system by allowing the sales manager to take the lead.[6]

IV. TRANSACTION GOVERNANCE STRUCTURE

In a study of forms of governance incorporated into private economic transactions, Williamson (1979, 1985) has suggested that a third important influence determining the form of governance is the structure of the transaction itself.

Williamson suggests a fourfold typology of forms of transac-

[6] Different theoretical perspectives and time orientation may offer an explanation. The normative thinking of the sales manager is linked to consequences and future-oriented perspectives. The normative thinking of the lawyer, in contrast, is backward looking in the sense that one applies norms that require analysis of events that have already occurred (Blegvad, 1987).

tion governance. *Market governance* corresponds to classical contract models in which the substance of a transaction is determined entirely by referring to the terms of the contract. Alternatively, parties may specify a *trilateral governance* structure, which allows for later redetermination of key terms of a transaction in light of future contingencies by reference to a supplemental third-party process such as arbitration of, for example, a price term. A third alternative is a flexible *bilateral governance* structure, which leaves open vital terms that must be negotiated but with recognition that both parties want a continuing economic relationship. A fourth type is *unified governance*, in which no terms are specified in advance of a transaction, thereby providing maximum flexibility, but terms are set for each transaction by one party on behalf of both. Unified governance is appropriate where decisions are internal to a single organizational entity.

Williamson argues that each form of governance (i.e., market/classical contract, trilateral/neoclassical contract, bilateral/relational contract, unified/internal) is efficient for a transaction with a particular kind of structure, depending on the frequency of the interaction or exchange, the market replaceability or idiosyncracy of the performances exchanged, and the firms' tolerance for uncertainty in the transaction. Thus, discrete consumer transactions lend themselves to the classic contractual model. Trilateral governance is efficient for transactions that involve idiosyncratic goods or services, or where the relationship itself is costly to establish, thereby creating incentives to continue the relationship even in the presence of potential future disagreements about particular terms. Under these conditions, resort may be made to authoritative resolution of the difference through an additional governance structure. Where a long-term relationship is desirable but involves uncertainty due to the mixture of specific and nonspecific goods or services, a flexible bilateral governance structure may be appropriate provided that the uncertainties it creates can be tolerated by each firm.

> What is needed, evidently, is some way for declaring admissible dimensions for adjustment such that flexibility is provided under terms in which both parties have confidence. This can be accomplished partly by (1) recognizing that the hazards of opportunism vary with the type of adaptation proposed and (2) restricting adjustments to those where the hazards are least. But the spirit within which adaptations are effected is equally important. . . .
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> Quantity adjustments have much better incentive-compatibility properties than do price adjustments. For one thing, price adjustments have an unfortunate zero-sum quality, whereas proposals to increase, decrease, or delay delivery do not. (Williamson, 1985: 76)

V. THE DANISH PILOT STUDY

We have found evidence supporting both Macaulay's theories and Williamson's reasoning about the relationship between transaction type and governance structure in the practices of firms examined in a pilot study of Danish business firms. For example, *Firm #1* of the Danish pilot study has a yearly production of 3,200 machines, 85 percent of which are exported. Sales are conducted by agents; in 1985 the annual gross sales amounted to 60 million Danish kroner.

> In firm #1 98% of all transactions are based on framework agreements. These are based on quarterly forcecasts with a right to change the order one month before the delivery and with a running possibility to adjust the yearly forecasts. If a deal is based on a long-term contract the parties meet at regular intervals for a discussion of prices, costs and forecasts. The general attitude is that, "if the deal cannot carry such discussion, both parties shall have a possibility of getting out of it." (Case report 1: 4, 1986)

The built-in possibility for quantity adjustments in a long-term agreement with no other enforcement than the parties' mutual interest in a long-term relationship is an example of employing a *bilateral* governance structure in such situations.

In routine, discrete transactions, such as debt collection, Firm #1 uses lawyers and a more traditionally contract-oriented approach. But even in such short-term relations the firm starts with negotiations, and litigation is rare.

Firm #2 is a subsidiary of a large American firm manufacturing various kinds of computers. The Danish firm functions primarily as a trading company for goods produced in the United States. There are three different Danish units: a software trading department where 50 percent of the products are made in Denmark and the rest imported, a development center which produces programs and systems, and a central computer unit which provides services. In 1985, the annual gross amounted to 314 million Danish kroner.

Some of the trading might be regarded as part of a *unified* governance structure, that is, transactions are removed from the market and organized within the firm. The organizational structure of Firm #2 shows a purposely centralized system with little relation to the other subsidiary firms in Europe but with vertical channels transmitting information up to the parent company, which, in its other relations, has a quite authoritarian structure.

While the internal relationship between Firm #2 and its parent firm represents a unified governance structure, the external relationships with buyers may have bilateral relational or trilateral governance structures.

Table 1. Summary of Relationships Between Culture Thematization, Contract Types, and Governance Structure

Cultural Framework	Type of Executive: Thematization	Contract Type	Governance Structure
Legal	Legal counsel: thematization in legal terms	Classic bilateral	Formal rules of law enforced by courts
Economic	Business manager: thematization in economic terms	Relational	Compromise and cooperation concluded by settlement or arbitration
Mixed	Mixed thematization: dethematization and rethematization	Hybrid: Classic Relational	Mixed governance

> Firm #1 previously used a standardized contract which had too many limitations. The subsidiary firm therefore established a project group with the mandate to draft a more reasonable contract. The group included a representative from the marketing department, the administrative manager and two people from the systems development company. After this group had formulated a draft of a new contract, this was sent to the house counsel for comments. (Case report 2: 7, 1986)

Like Firm #1, Firm #2 uses counsel for formal debt collection but only as a last resort.

Firm #3 operates in the graphics industry and functions as part of a cartel which includes eight other independent firms. In 1985, the annual income was 130 million Danish Kroner.

> Firm #3 uses a standardized contract for routine, nonspecific [goods/services] sales. This was drafted by one of the two "house" counsels. The form is rather brief and contains a confirmation of the order but reserves the power to increase the price until delivery takes place.
> For large, specific sales/services contracts one of the two "house" counsel is used. The sales department, however, usually starts out on its own and reaches an agreement which covers the economic aspects. And the lawyer then is brought in and usually clarifies the legal aspects in cooperation with his opposite number in the other firm. A large contract always passes the desk of the top manager—otherwise these documents are signed by the sales manager. (Case report 3: 4–5, 1986)

Like the other two firms, Firm #3 uses legal counsel for routine debt collection.[7]

[7] Firm #3, like the rest of the graphics industry, has labor problems. The firm's labor relations illustrate yet another type of long-term economic re-

Within each of the three firms studied one finds examples of transactions with different structures and different forms of governance.[8] The question is by what process is a particular transaction thematized as discrete, trilateral, bilateral, or unified within each of these firms? Williamson argues that characteristics of the transaction itself determine the most efficient form of governance. The Danish pilot study shows that there is a correspondence between transaction type and governance structure (cf. Daintith 1986, 1988). Long-term relationships between firms involved trilateral or bilateral governance. The relationship between a subsidiary and parent took the form of a unified structure, while classical contract or market mechanisms were reserved for the most nearly discrete economic relationships, namely, debtor/creditor transactions.

There is play in the selection of governance mechanisms, however, and room for elements of the internal structure of the firm to have their effect. For example, the manager's particular legal/economic orientation toward business transactions may influence assessment of the desirability of longer-term commercial relations with another firm. Such individual perceptions are likely to play an important part at the initiation of a relationship before others on the management team are involved and before exchanges between firms begin to give form to a relationship. Further analysis of data from the Danish pilot study shows how the selection of governance mechanisms is modified by the internal organization of the firm in specific cases.

The internal structure of the firm may have an important effect as well. For example, access to direct communication is an essential factor during the life of a long-term, relational contract. A constant, two-way flow of information, of consultation and advice, will also be necessary as part of ongoing bilateral governance. This calls for a managerial structure that will seek and use the various types of information needed and that has the flexibility to allow the relationship to evolve. It is essential that the parties commit themselves "*one after the other*, so that each can base his actions on those of the other" (Luhmann, 1981: 250). This process creates a basis for mutual understanding of the rules of the relationship. Successful maintenance of a bilaterally governed relationship thus

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lationship and a mixed bilateral-trilateral governance structure. As a member of the central employer's association (Dansk Arbejdsgiverforening), Firm #3 must turn these problems over to the association for action. There are, however, large individual differences between graphics firms about the stage of a conflict at which the firm turns to the association. Usually one first tries to read an understanding at the local level. The association holds a firm grip on the situation, however, as it controls the possibilities for financial support if an open conflict erupts (Blegvad, 1986; Case report 3, 1986).

[8] It is possible for a manager to have various types of contracts on his desk simultaneously. Also a transaction within a certain area may start as a discrete contract and become a relational one, as MacNeil reports (1985).

depends on the firms' ability to develop a relationship through this form of economic diplomacy. Further, a transaction characteristic that points to Williamson's distinction between appropriate types of governance is the dimension of uncertainty—the risk that a transaction might result in a costly failure. A firm's internal structure may determine its capacity to tolerate or reduce uncertainty or risk in a flexible economic relationship.[9]

VI. CONTRACTUAL RELATIONSHIPS AND GOVERNANCE PATTERNS OVER TIME

A corollary to Macaulay's discovery that classical contract doctrine was of marginal importance in business transactions was his finding that litigation was likewise of little importance in resolving conflicts. Macaulay also discovered, however, that litigation was not random, but was strongly correlated with the relative power of the parties and their interest in maintaining continuing business relationships.

From this discussion of thematization of economic relations within the firm and of the Danish pilot study, what can we conclude about litigation in business relations? First, the Danish pilot study confirmed that Danish firms employ a variety of types of economic relations. The range of commercial relationships may include new types and greater variation than when Macaulay first wrote. As Macaulay and Williamson recently noted, the new forms that have emerged reflect interest in sometimes maintaining long-term economic relationships, even at the price of autonomy. The formation of such relationships demonstrates a strong preference for economic as opposed to legal structure and for private rather than public governance. If anything, the emergence of these forms of economic relationships should reduce the incidence of certain types of business litigation.

There is some evidence of a shift in litigation in Denmark[10] (see Table 2). The categories of *commercial transactions* (includ-

[9] To understand a firm's capacity for bilateral governance, it is not enough to understand the initial contract-generating situation. The researcher must thus be prepared, like Daintith (1987), to follow the life of a contracting relationship as a "continuing relation" (Yngvesson, 1985a).

[10] The statistics from the Danish high courts are difficult to analyze in detail because of the absence of detailed breakdowns of case types (Blegvad and Wulff, 1984, 1989). We therefore decided to conduct a detailed study of a special court, namely the Danish Maritime and Commercial Court, which functions as a special court for commercial matters. Cases filed with a high court may be transferred to the Maritime and Commercial Court, but the reverse is rare. The high courts are overburdened with a backlog of about a year, while the delay before the special commercial court is from three to six months (Blegvad and Rasmussen, 1975; Blegvad, 1987). The commercial part of the court has a professional judge as chair and two or four lay judges drawn from a panel of fifty people nominated by the large trade organizations. During the period between 1981 and 1985 about 40 percent of the cases entered were called commercial, but today practically any legal problem can be labeled that way if the parties agree to do so.

Table 2. Maritime and Commercial Court Cases by Type of Case for 1982 and 1984

Case Type	1982		1984	
	%	*N*	%	*N*
Commercial transactions	38	87	42	91
Marketing, trademark	28	65	41	87
Transportation	22	51	4	9
Company	3	6	3	6
Miscellaneous	9	21	10	22
All cases	100	230	100	215

ing actions for damages in sales of goods), *marketing and trademarks*, and *transportation* represent actions arising out of bilateral governance where a discretionary aspect of a party's performance has failed and the court is asked to provide a rule to govern the transaction. The litigation statistics reveal a mix of trends that might be consistent with increasing numbers of bilaterally governed relationships. But the evidence is incomplete, and there is no suggestion of increasing preference for the more privatized outcomes of litigation such as out-of-court settlement (Table 3). However, the time period covered by these statistics is short, and at this stage of analysis we do not have a sufficient breakdown of case types to draw further conclusions.

Of equal importance is the way in which the Danish court system has adapted to a world in which private governance of economic relations is strongly favored by the business community. In Denmark, as in the United States, there has been a strong movement toward forms of private governance of commercial relationships that reduce the need for court involvement at all. Even if this movement is not reflected clearly in the short-term fluctuations in litigation statistics we have thus collected far, the interesting point is that the Danish court system has deliberately developed techniques for settlement other than judgment. It is legally institutionalized that a court shall settle a case if possible. This has taken the form of a "notification" formulated by the judges, which then is used as a basis for the settlement. The notification follows an in-court hearing, further procedure, and the exercise of discretion by the court. It is then presented orally to the parties. The judges here function as mediators in the sense that they offer

A brief statistical summary by the chief administrator of the court reports a risk workload even if the figures do not so indicate, because the complexity of the cases has increased (Maritime and Commercial Court of Denmark (1986)).

Table 3. Maritime and Commercial Court Commercial Cases by Type of Dispute Resolution Process

Process	Comm'l Trans.				Marketing				Transport			
	1982		1984		1982		1984		1982		1984	
Out-of-court settlement	24%	(21)	30%	(27)	21%	(14)	25%	(10)	20%	(10)	45%	(4)
In-court settlement	34	(30)	23	(21)	28	(18)	36	(31)	27	(14)	33	(3)
Judgment	31	(27)	25	(23)	37	(24)	26	(23)	35	(18)	22	(2)
Miscellaneous	11	(9)	22	(20)	14	(9)	13	(11)	18	(9)	—	—
All Types	100%	(87)	100%	(91)	100%	(65)	100%	(75)	100%	(51)	100%	(9)

a solution to the problem at hand. It is up to the parties, or rather their lawyers, to use the notification as a basis for settlement.[11]

The adaptation of the court system demonstrates that the business communities' practices that disfavor litigation have had a long-term influence on legal institutions. Some of the reasons for this are apparent from the foregoing discussion of decisions within the firm. Litigation is expensive. Businesses and society have become more cost-conscious. Litigation has also become more time consuming, as the cases are more complex today than in previous times. But as our examination of the firm suggests, litigation is avoided for reasons other than cost. The zero-sum decisions the legal statutes entitle a party to are not what the manager, the financier, the legal agent, or the franchise owner need. What all these relatively new actors in the economic field need are solutions built on a basis other than legal rationality. In this context one finds both parties using economic rationality and economic policy arguments. Daintith (1986) speaks of an "intimacy" between the parties. More and more problems are discussed and treated in a "mixed" (legal/economic) way.

What is often desired in modern business is not application of a past-oriented rule granting a legal entitlement but a future-oriented solution where the disputing parties are defined as parties to a shared situation and where cooperative means rather than legal

[11] This practice has a long tradition in Denmark. Until the 1950s when the practice was abolished, civil cases were presented to special settlement commissions. (In some areas the district courts served as such commissions.) A similar procedure has since been developed that allows more flexible treatment, a procedure that the legal community views as a sensible way of keeping the workload down and the docket short (cf. Von Eyben, 1987). The decisive point is whether cases of fundamental relevance are notified and settled in court, as such outcomes, like the out-of-court settlements, are confidential. They cannot, therefore, be used to generate new legal norms. A balance between the need for clarification of the law as compared with the practical gains for the parties is called for.

constraints are needed. If this description is plausible, it is easier to understand the present role of the Danish Maritime and Commercial Court. The court continues to serve the societal need for regulation. Dispute settlement based on the *relations* between the parties has become the core of its work, displacing to a degree dispute settlement based on formal rules. Equity, rather than predictability of outcome, will be given pride of place and compromises will be the result.

The discussion of management of business relations by business firms has shown that private governance is an important source of new norms for relationships and for dispute resolution. The evolution of the court's procedures suggests that economic norms may come to replace some official or public legal norms. This development raises profound questions about the long-term relationship between public order and private governance. In particular, are we witnessing the displacement of law by other types of norms, private and/or economic? Or do laws on the books (even if they are not invoked), or the deeply rooted legal culture that they symbolize, cast a more subtle shadow over business dealings?

Luhmann (1983) argues that unless private and economic norms are legalized, the domain of law will be reduced. Earlier studies, like the Danish pilot study, indicated that at the very least the integration of the economic and the legal systems into a "mixed" system leads to such a reduction in the domain of law. But law may not be displaced in all relations between parties to economic transactions. Consider a system where the financing aspects are covered by law. The existence of the legal debt collection system is, at least, a "shadow" resource, e.g., to a seller in his creditor role, because he can fall back on legal remedies if he needs them.

Other aspects of a transaction, say, delivery of goods, where the parties have a mutual interest in maintaining flexible relations, illustrate a need for norms based on economic rationality. The question, therefore, is whether the integration of the legal system into a "mixed system" that includes other systems will diminish the role of the legal system. Or will the role diminish because of a refined parallel use of all three possibilities (legal, economic, or "mixed) based on the advantages of each system for each party under the circumstances at hand (Jacobsson, 1988; Macaulay, 1963; 1988; Williamson, 1985). Economic rules may in such situations acquire greater importance and be regarded not merely as rules that fill out the existing legal system but as norms that rank with law.

The short-term trends in frequency and outcome of litigation before the Danish Maritime and Commercial Court suggest that a complex relationship exists between governance of contractual relations and legal process.[12] The model of intrafirm decisionmaking

[12] Evidence from the United States also suggests that important changes

sketched in this essay may suggest some reasons for these complex changes in litigation patterns, and may thus contribute to our understanding of the continuing role of law in business relations as well as to our understanding of the growing presence of private governance.

While the changing distribution of business relationships may favor bilateral governance and reduced reliance on legal interpretation and enforcement of contracts, it is clear from the foregoing discussion that the success of bilateral governance depends on the firm's organizational capacity to manage risks involved in building a continuing relationship with another firm. The internal organization of business firms will, of course, affect this capacity. Economic relationships and the structure of transactions are affected by the evolution of management ideologies and internal business firm structures (Nobel, 1977). Further, new ideas spread. New forms of economic relationship may emerge through collective "learning" by managers in an industry.

Many external changes will interact with the firm's capacity to form long-term relationships that require a degree of mutual trust, such as changes in business climate that extend or reduce planning horizons, or in the terms offered by the financial institutions underwriting a continuing relationship, or in business planning necessitated by a wave of takeover threats, or in regulation that increase the risks of cooperative undertakings (e.g., changes in tax, banking, patent or antitrust laws). Each of these changes in the environment of decisionmaking by business firms may increase the uncertainty of mutual understandings about continuing or ending a bilateral relationship. Thus, understanding the thematization of business relations requires a careful analysis of the factors that affect managerial decisions and the capacity of a firm to absorb risk efficiently.

It remains open whether, even in light of the widely acknowledged trend toward private governance, the emergence of important new forms for economic relationships in the business community represents a long-term trend away from law. Bigger businesses have meant bigger stakes and bigger, if perhaps less frequent, lawsuits. Businesses seem to have continued to employ law when other forms of governance of economic relationships failed. Thus, law is still an important source of power in the business community, and, as Macaulay noted in his early essay, power and litigation go hand in hand. This and the observation that the law and legal culture continue to cast a complex shadow over many events in society leave many important questions for future exploration.

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may be taking place in the patterns of disputing and litigation arising out of business transactions (Galanter and Rogers, 1988).