

Prevention is Better than Cure: Fostering the Growth of Dynamic Networked Organisations through the use of Proactive Legal Measures

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1 Introduction

With the growth of information and communications technology (ICT) – not least the Internet – new forms of communication and entrepreneurial co-operation are emerging. Networked organisation, strategic web, strategic/co-operative alliance, virtual organisation: these are but some of the different terms used to describe the novel forms of economic organisations.¹ ICT facilitates speedy, instantaneous collaboration among businesses irrespective of geographical boundaries. It enables everyone – from freelancers, small and medium-sized enterprises to larger businesses to participate in temporary or even longer-term networks. Through such collaboration, the partners pool together their resources and expertise, thus becoming capable of offering a common service to the customer that each of them individually would not otherwise have been in a position to do.

An important feature of these dynamic networked organisations is the underlying basis of trust between the individual partner firms that together form the organisation. Such organisations are built upon trust and function effectively only as long as there is trust between the different partner firms. Nevertheless, a number of fundamental issues need to be discussed and resolved between the partners such as how risk and liability are to be apportioned between them and who owns intellectual property rights to any works created by their collaboration. For these flexible, networked organisations to function, there must be established and accepted between the partners a set of standards – the “rules of the game” – that will govern the transactions between the partners in such organisation and usually laid down in a contract. This is discussed further in section 2 of this chapter.

Very often, the business partners do not specifically or consciously aim or intend to create a new legal person to carry out the tasks of the collaborative network. However, as is examined below in section 3, irrespective of the intentions or wishes of the partners, some jurisdictions may hold that such a co-operating venture would constitute a partnership. The partners need to be aware of the potential repercussions and consequences of such an eventuality.

The aim of this paper is to suggest proactive measures to obviate future difficulties and disputes among partners in such business collaborations. It should be noted that many of these measures are appropriate not just for temporary collaborative networks as described above, but also for other more long-term collaborations.

¹ Holland, C.P., *The importance of Trust and Business Relationships in the Formation of Virtual Organisations*, in *Organizational Virtualness: Proceedings of the VoNet Workshop*, April 27-28, 1998, Simowa Verlag Bern, p. 55.

2 Contractual Issues

2.1 *The Negotiation Stage*

Once a business opportunity has been identified, the business promoter determines the various competencies required to develop the product or service to be provided. Businesses that have the required competencies are then identified and evaluated and the business promoter starts preliminary discussions with them. Mutual interest increases, details begin to be discussed and the parties gain a sense of enthusiasm and urgency. However, risks to the negotiating parties exist even at this precontractual stage. Parties may already need to disclose commercially sensitive information, including intellectual property, at the negotiation stage. This information is likely to constitute the life blood of the respective business, especially where such business is a small or medium-sized enterprise. A business may be reluctant to make such a disclosure to a negotiating group which may include competitors or potential competitors. Moreover, the business promoter may also fear that a negotiating party may leave the group and set up his or her competing team to bid for the business opportunity, and may thus be unwilling to disclose extensive details about the business opportunity or the optimal team he/she has in mind, before there are additional legal safeguards in place.

2.1.1 Precontractual Liability

It should be borne in mind that an important tenet of civil and common law contract law is that parties should be free to decide whether to enter into contractual relations or to choose not to enter into contractual relations, i.e. to break off negotiations at any time.² However, what happens where one of the negotiating parties suddenly and without reason breaks off negotiation or where a party never had an intention to contract at all? What happens where, because of certain blameworthy conduct of a negotiating party at the precontractual stage, the contract is invalid or not perfected?

Some jurisdictions do provide a remedy. A number of civil law jurisdictions such as Germany and Italy developed the doctrine of *culpa in contrahendo* which is based on the notion of good faith. As a consequence of the *culpa in contrahendo* doctrine, damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection in any of the following situations:

- (i) where there is a sudden and unjustified rupture of negotiations,

² Cohen describes the former as “the positive freedom of contract” in that the parties are free to create a binding contract reflecting their will, and the latter as “the negative freedom of contract” which means that the parties are free from obligations so long as a binding contract has not been concluded. *See further* Cohen, N., *Pre-contractual duties: Two freedoms and the contract to negotiate*, in Beatson, J. and Friedmann, D. (ed) *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 1995.

- (ii) where the contract is not concluded because one of the parties had no real intention to contract.³

In such cases, the court takes into account whether the other party had incurred expenses in the preparation and in the expectation of concluding the contract.⁴

In English law, according to many writers, there is no general rule requiring the parties to negotiate in good faith.⁵ This does not mean that there is a free-for-all, with no controls on contracting parties.⁶ The traditional rules proscribing duress, undue influence and fraud, still apply. Other than that, in English law, either party is entitled to break off negotiations at any stage before the final conclusion of the contract. Liability for pre-contractual behaviour is only imposed under limited circumstances such as fraudulent representation or negligent misstatement. In the case of a sudden and unjustified rupture of negotiations or where the contract is not concluded because one of the parties had no real intention to contract, common law judges have also ingeniously provided a basis for recovery, without entering into the notion of good faith, by using the different notions of collateral contact and restitution besides the law of torts as aforementioned. An important factor that the court usually gives weight to, is whether the party carried out works and incurred expenses in the preparation and expectation of concluding the contract, and the extent to which this was instigated or brought about by the other party which then suddenly broke off negotiations.⁷ According to American jurists, similar to English law,

³ Kessler, F. and Fine, E., '*Culpa in contrahendo*', *Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, Harvard Law Review 77(3):401-449, 1964.

⁴ See Weitzenböck, E.M. *Good Faith and Fair Dealing in Contracts Formed and Performed by Electronic Agents*, in *Artificial Intelligence and Law* Vol. 12 Nos. 1-2, 2004, Springer, Netherlands, 2005, p.83-110.

⁵ See further O'Connor, J.F., *Good Faith in English Law*, Ashgate Publishing, Limited, 1990, and Whittaker, S. and Zimmermann, R., *Good faith in European contract law: surveying the legal landscape*, in Zimmermann, R. and Whittaker, S. (eds), *Good Faith in European Contract Law*, Cambridge University Press, Cambridge, 2000.

⁶ As was held in *Interfoto Picture Library Ltd v. Stilleto Visual Programmes Ltd* (1989) 1 QB 433, 439, though "English law has, characteristically, committed itself to no such overriding principle ... [it] has developed piecemeal solutions in response to demonstrated problems of unfairness."

⁷ In *Brewer Street Investments Ltd v. Barclays Woollen Co. Ltd.* ((1954) 1 QB 428), defendants were negotiating the lease of plaintiffs' premises and, in the expectation shared by both parties that a lease would be agreed, defendants had requested that the plaintiffs have certain work done on the premises which was otherwise of no benefit to them. The defendants had, however, expressly undertaken that they would be responsible for the cost of this work. However, before the work was completed, it became clear that the lease would not be concluded. Plaintiffs stopped work and sued for the amounts which they had paid to the contractors in respect of the work carried out. The Court held there was a contract between the parties for the carrying out of the work on the premises, despite the fact that there was no contract of lease concluded. Recovery was granted on the basis of a contractual 'quantum meruit', i.e. a reasonable sum for the work done (which was set at the amount which the plaintiffs had paid their contractors) as the defendants had agreed to pay for the cost of the work. See further Weitzenböck, E.M. *op. cit.* n. 4.

the requirement of good faith in American law does not apply to contract negotiations.⁸

Thus, issues such as precontractual liability as abovementioned, good faith/fair dealing and confidentiality are to be borne in mind, as well as their different treatment in civil and common law systems. The negotiating parties, including the business promoter, should exercise caution especially where the negotiating parties are established in different jurisdictions, with the chance that behaviour that may be proscribed in one jurisdiction is permitted in another.

2.1.2 Letter of Intent

One mechanism that the negotiating parties may decide to opt for at this stage to protect themselves against precontractual risks such as breaches of confidentiality, competition and bad faith, is a letter of intent. A few preliminary comments on letters of intent are opportune at this stage.

The terminology regarding letters of intent varies. Some other designations of a letter of intent are "heads of agreement", "memorandum", "memorandum of understanding", "agreement on principles" and "aide-mémoire".⁹ These documents may be very short or they may be around three to four pages long, depending on the details included. Whatever such document is called, a letter of intent is, in general, not intended to bind the parties signing it as regards the proposed final agreement, but is designed to indicate the likelihood of a contract being made in the future. However, it cannot be assumed that parties dealing on the basis of a letter of intent will not be contractually bound as regards the contents or some of the contents of the letter of intent itself. One would therefore need to study the contents and terms of the letter of intent and take the surrounding circumstances into consideration, to see if the parties are contractually bound and to what extent.

In England, it was held in *British Steel Corp v. Cleveland Bridge and Engineering Co Ltd*¹⁰ that there were two possible types of contract that might arise following a letter of intent. The first type was an ordinary executory contract, under which each party assumed reciprocal obligations to the other; the second type was the so-called "if" contract, i.e. a contract under which A asks B to do something and promises him that if he does so he will receive something, usually remuneration, in return. The latter type is really nothing more than a

⁸ The Uniform Commercial Code (UCC) provides in section 1-203 that "[e]very contract ... imposes an obligation of good faith in its performance or enforcement." This is mirrored in § 205 of the Restatement of Contracts Second which states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Good faith is defined in the UCC (§ 1-201(19)) as "honesty in fact in the conduct or transaction concerned". In the case of a merchant, the UCC (§ 2-103(1)(b)) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

⁹ Wolf, R.C., *A Guide to International Joint Ventures with Sample Clauses*, 2nd ed., Kluwer Law International, London - The Hague - Boston, 1999, p. 19.

¹⁰ [1984] 1 All E.R. 504.

standing offer which, if acted upon before it lapses or is lawfully withdrawn will result in a binding contract.¹¹

The most important issues that a letter of intent should address are the following:

1. *Objectives*: There should be a reference as to what the co-operation is about and what the proposed organisation shall do.
2. *Exclusive co-operation*: Another concern of each negotiating party is to ensure that the other firms that he is negotiating with will continue to co-operate and negotiate exclusively with him as regards the future project. The risks here might be that one of the other businesses might decide to join forces with third parties and bid for the project together with them rather than as part of the proposed networked organisation. Furthermore, one of the parties, such as the business promoter, could have already incurred some expenses in having identified the business opportunity and drawn up the work processes and structure – costs which might otherwise be difficult to recover.
3. *Non-competition*: This is linked with the above notion of exclusive co-operation. By disclosing information about the market opportunity, the business promoter may be exposing itself to the risk that some of the other negotiating parties will suddenly break off negotiations and decide to compete in that market.
4. *Confidentiality*: A major concern for the business promoter is that information disclosed to the other negotiating party regarding the business opportunity and the work processes, is kept strictly confidential. Similarly with regards to any other commercially sensitive information and intellectual property that may be disclosed by any of the parties at this stage. It is important that this obligation is also extended to the employees and sub-contractors of such party. This could be done by placing an obligation on this party to bind such other third parties (i.e. employees, sub-contractors, etc.) to whom it may need to disclose such information to, in turn, keep that information confidential. As regards employees, this could be a standard term in the employment contract. In the absence of such a standard clause, the employees should be bound in a confidentiality agreement which echoes the obligations specified between the business promoter and the other business (the employer).
5. *Negotiation in good faith*: Similarly, each business party will want to ensure that the other negotiating parties act in accordance with good faith and fair dealing with a view to eventually reach a definitive agreement. In particular, the promoter will want to ensure that none of

¹¹ See further the report on England by Allen, D.K., in *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law; Montreal, Canada, 18-24 August 1990*, Hondius, E.H. (ed.), Kluwer Law and Taxation Publishers, Deventer – Boston, 1991, pp.139-141.

the other negotiating parties is merely pretending to negotiate (in order to discover sensitive commercial information) and has no real intention to contract.

6. *Costs*: Mention should also be made as to how the costs and expenses in connection with the preparation and conclusion of the agreement contemplated in the letter of intent are to be split between the parties, e.g. each party could bear its own costs, or costs could be shared between the parties, etc.
7. *Duration*: A date should be set by which the final, definitive agreement is to be reached.
8. *Jurisdiction and choice of law*: Though the parties may be based in different jurisdictions, the ease of communication through ICT facilitates cross-border collaboration. However, if a dispute were to arise, it may be difficult for a court seized of the matter, to determine whether it has jurisdiction to hear the case and, if so, which law is to be applied to resolve the dispute, in the absence of express jurisdiction/arbitration and choice of law clauses.

Although a letter of intent is not usually meant by the parties to bind them to reach a final, definitive agreement on issues that are still subject to negotiations and which may still need to be clarified, the negotiating parties may still desire certain parts of the letter of intent to be binding, irrespective of whether a final, definitive agreement is reached or not. This is because of the important commercial/business implications and repercussions that may ensue where such a final, definitive agreement is not reached – in particular where important confidential information has been disclosed. Hence, for example, the need for binding clauses regarding matters such as disclosure of confidential information and the exclusive nature of the co-operation. Moreover, a number of the provisions of the letter of intent should also survive the expiration or termination of the letter of intent itself, e.g. duty of confidentiality, intellectual property protection.

2.2 *The Operation Stage*

Where negotiations are fast and concluded swiftly, there is likely to be no need for a written preliminary agreement. Nevertheless, issues such as competition between the parties, intellectual property protection and confidentiality – crucial questions during the precontractual stage – should also be regulated between the parties during the operation of the networked organisation. As abovementioned, for flexible, networked organisations to function, there must be established and accepted between the partners a set of standards – the “rules of the game” – that will govern the transactions between the partners in such organisation and usually laid down in a contract.

Of course, these issues need to encompass the stage of operation of the networked organisation as well as what happens after termination and dissolution of the organisation. For example, with regards to intellectual property, the parties should distinguish between intellectual property which pre-existed the networked organisation but which is made available by the owning

contracting party to the organisation (through a mechanism such as licensing, etc.) and intellectual property that is developed, found, produced or made by any party in the course of the collaboration. The parties may also wish to have the right to licence the latter type of intellectual property to a subsidiary or third party. In such a case, they should agree beforehand on the main licensing terms such as, for example, whether there should be payment of a licence fee.

Similarly, just as exclusivity regarding the scope and object of the collaboration should be ensured between the partners during the negotiation stage, it is also important to be safeguarded during the operation of the networked organisation. This helps to foster the relationship of trust between the partners. However, where the collaborative organisation is made up of partners who together have a significant market share, care should be taken not to be construed as a cartel under competition laws.¹²

Another important issue that needs to be regulated between the parties is dispute settlement. Since trust plays such a crucial role in the proper functioning of dynamic networked organisations, there should be an effective dispute settlement mechanism in place from the creation of the collaborative organisation. For example, as a first stage there could be a mechanism for the amicable settlement of a dispute (such as mediation in front of an expert in the field) failing which, the dispute would be submitted either to arbitration or to the ordinary courts. There is much to be said in favour of arbitration as a dispute settlement mechanism as opposed to proceedings in front of the ordinary courts of the land. Arbitration is likely to be faster, less costly and more conducive to maintaining a good co-operating spirit among the partners (as opposed to a belligerent, adversarial spirit). Moreover, the parties may also select an arbitrator who has experience in their field of business.

The parties should also discuss and agree on the operation and management of the collaborative network, and who is to represent the collaboration with clients or other third parties. One should remember that while corporate joint ventures operate against the backdrop of rules laid down by statute and the courts, the draftsman of an agreement establishing a collaborative enterprise has to make express provision for the internal running of the organisation.

The parties should also agree on the methods to be used for electronic data exchange and communication. This could be done in a technical annex to the main contract (and therefore also having binding force) and should contain matters such as details of the technology to be used, if and what kind of data should be signed by an electronic signature and what kind of electronic signature should be used, and the procedure to be followed when sending and receiving electronic messages: when is a message to be deemed to have been sent and

¹² For example, Article 81 of the Treaty establishing the European Community proscribes “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; ...” OJ C325, 24 December 2002.

received, whether there should be acknowledgement of the receipt of a message, etc.

Another critical issue is how risk and liability are to be governed and apportioned among the parties. Different measures may be used to govern liability:¹³

(a) contractual instruments: The parties should discuss and consider including in their agreement (i) how third party claims on one partner for actions or omissions of the organisation are to be handled and the rights of recourse that such partner may have on the other partners; (ii) how the grounds of internal allocation of liabilities on the basis of a claim for recourse are to be made such as, for example, in accordance with the allocation of benefits for the distribution of profits, or in proportion to the investment made by each partner, or in accordance with the actions of that partner and thus, the possibility it had to avoid the damage from occurring.

(b) the establishment of a voluntary reserve fund by the networked organisation to be used as a guarantee or otherwise as a means of building trust both in the internal relations between the partners and in its relations with third parties. However, one should be aware of possible tax or accounting implications according to the relevant national laws of the individual partners. The parties should also determine how such an asset is to be controlled and by whom.

(c) exploiting the legal identities of the individual partners: The unlimited liability that may fall upon each partner for the debts and obligations of the organisation is, of course, limited to the total property of such partner. Thus, where a partner is a limited liability company, its liability is limited to the total property of that company.

The above discussion highlights the most important issues that should be agreed between the collaborating partners. They should form the basic framework upon which the collaboration will work. However, there should not be too much regulation between the parties so that the creation and functioning of such flexible dynamic networked organisation would not be stifled.¹⁴ Indeed, some business authors have questioned whether dynamic organisations such as virtual enterprises should be based on a contract.¹⁵ The real question here, it is

¹³ See further Pöyhönen, Juha & Lönnfors, Mirja, *ALIVE Project Deliverable D12: Liability and Insurance* (Rev. 3 dated 07/07/2002) available at “www.vive-ig.net/projects/alive/docs.html” (last visited 14 October 2005).

¹⁴ Some model clauses were developed in the EU-funded ALIVE (Advanced Legal Issues in Virtual Enterprise) project to give negotiating parties intending to set up a collaborative networked organisation a starting point on which to draw up their framework agreement. See the project website at “www.vive-ig.net/projects/alive/” (last visited 14 October 2005). The EU-funded project Legal-IST (“www.legal-ist.org/” - last visited 14 October 2005) looked *inter alia* at some legal issues related to SME clusters and professional virtual communities.

¹⁵ For example, Jägers *et al* have held that contracts are too restrictive on the flexibility of a virtual organisation. See Jägers, H., Jansen, W., Steenbakkens, W., *Characteristics of Virtual Organizations*, in *Organizational Virtualness: Proceedings of the VoNet Workshop*, April 27-28, 1998, Simowa Verlag Bern, p. 73.

believed, is not whether there should be a contract or not, but whether there should be a written contract (as opposed to a verbal one) since the parties should have already, at least verbally, agreed on certain crucial terms when setting up the organisation or business alliance (such as the objects, pooling and sharing of resources, some form of profit sharing, etc.). The difficulty with verbal agreements is an evidentiary one and arises when there is a dispute between the parties. Thus, it is suggested that there should be a written contract setting out the framework terms for the collaboration.¹⁶ Such a contract should not seek to be too detailed with regards to the actual collaboration – in any case, it is often impossible to know beforehand all the minute details of the tasks. If the contract tries to be too detailed, it might be interpreted restrictively on the basis of its specific terms and conditions rather than flexibly in the light of its purpose.

3 Partnership Law Issues

As mentioned in the introduction, in most cases the business partners do not specifically or consciously aim or intend to create a new legal person to carry out the tasks of the collaborative network. Indeed some of the partners may believe that their co-operation on the basis of a mere contractual or verbal agreement would definitely exclude the application of partnership and company law (with their concomitant duties and obligations) to their co-operation. However, as is examined below, irrespective of the intentions or wishes of the partners, many jurisdictions hold that such a co-operating venture could constitute a partnership, and a number of such jurisdictions even hold that such a venture is a separate legal person distinct from its members. Following is a brief look at what happens under English, Swedish and Norwegian law when a general partnership is deemed to have been created.

In English law, the question whether a partnership exists is a mixed question of law and fact.¹⁷ The intentions of the parties are not conclusive in determining whether their relations amount in law to a partnership. Thus, if the statutory conditions for the creation of a partnership are fulfilled, the parties will be treated as being in the relation of partners to each other, even though they may

¹⁶ This is also the view expressed by Odendahl, Reimer and Marzen who explain that the concept of virtual enterprises is based on trust by definition and therefore it would initially appear that a legal framework does not have to be considered. However, these authors continue that the application of such a culture of trust in practice has proved to be a problem, and the culture of trust is opposed to the temporary character of a virtual enterprise because trust can only arise over a certain period of time. See Odendahl, C. and Scheer, A.-W., *The Concept of Virtual Enterprises and its Relevance for the Maritime Domain*, in Guedes Soares, C., Brodda, J., (eds.), *Application of Information Technologies to the Maritime Industries*, Edições Salamandra, Lisbon, 1999. A similar view is expressed by Pletsch, A. *Organizational Virtualness in Business and Legal Reality*, in *Organizational Virtualness: Proceedings of the VoNet Workshop*, April 27-28, 1998, Simowa Verlag Bern, p. 86.

¹⁷ See *Spicer (Keith) Ltd v. Mansell* [1970] 1 All ER 462.

assert an entirely contrary intention.¹⁸ Nor can the parties to a consortium agreement or other contract prevent a partnership arising by a declaration that they are not partners. In *Pawsey v. Armstrong*,¹⁹ Kay J. observed that:

“there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or attempt to superadd, a stipulation that the necessary legal consequences of these conditions shall not follow from the arrangement. In this case, supposing it was proved to my satisfaction that there had been a stipulation that the two persons were not to be partners, I could not regard that as altering the legal relation which they have entered into by making this contract.”

This was supported in *Adam v. Newbigging*²⁰ and, in *Fenston v. Johnstone*,²¹ a partnership was found to exist notwithstanding an express declaration that the agreement between the parties should not constitute a partnership.

What are the repercussions where a partnership has been deemed by a court to have been constituted by the partners, even though the latter may have expressly declared the contrary? Under English law,²² if a collaborative network is deemed to be a partnership, each partner would be treated as an agent of the firm and its other partners for the purposes of the business of the partnership, and every partner who does any act for carrying on in the usual way of business of the kind carried on by the firm of which he is a member binds the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or does not believe him to be a partner.²³ Moreover, each partner would be jointly liable with the other partners for all the debts and obligations of the firm.²⁴

In Sweden, where a simple partnership (“*det enkla bolaget*”) is deemed to have been created, the rights and obligations which arise during the activities of that partnership are the rights and obligations of the individual partners. A contract that is concluded for the partners or under a designation referring to the partners jointly entails contractual rights and obligations only for the partner(s)

18 See further on this Linklaters & Paines with Nightingale, C., *Joint Ventures*, 1st ed. Longman, London, 1990, pp. 22 *et seq.*

19 (1881) 18 Ch D 698.

20 (1888) 13 AC 308.

21 (1940) 23 TC 29.

22 The operative law on partnerships in England is the Partnerships Act 1890. The Act does not confer legal personality on the partnership. The partnership is the aggregate of partners who share profits, have individual authority to bind the firm for transactions in the course of business and are ultimately liable to the extent of their personal fortunes for the debts of the partnership.

23 Section 5, UK Partnerships Act.

24 Section 9, UK Partnerships Act.

who has (have) entered into the contract.²⁵ However, although this is the main rule, certain circumstances may vary it. Thus, if a proxy (which may be given either in writing or orally) was given by another partner, such partner (the mandator) would also be liable. In Swedish law, a proxy may also develop through conduct showing that someone accepts another person as his legal representative through conclusive conduct.²⁶ If, on the contrary, a trading partnership (“*handelsbolaget*”)²⁷ is deemed to have been set up by the partners, such partnership will be liable for its own debts, since it is a legal person. However, all the partners would also be jointly and severally liable for the debts of the partnership.²⁸

It is interesting to note that the Swedish Parliament, in connection with the adoption of the Partnerships Act 1980, discussed in some length one special kind of cooperation, viz. when a number of enterprises enter into a consortium agreement for a special project. Such consortia are sometimes to be characterised as simple partnerships, sometimes – according to earlier rules – as trading partnerships. According to Hemström, in the parliamentary legislative process the following four questions were pointed to as decisive for delimitation purposes in this connection:

“are the activities of the different members of the consortium mainly of the same kind as their normal activities, are the activities of the consortium limited to one project and not intended to continue indefinitely, are the different members of the consortium visible in relation to third parties – do they all, for example, sign all contract documents in connection with the project – and do the parties to the consortium agreement use their own personnel and machinery? If all these questions can be answered in the affirmative, a comprehensive view would probably show that the activities connected with the project were not those of a trading partnership but of a simple partnership ... But if the answer to one or more of the questions is no, it is sometimes likely and sometimes certain that it is a matter of business carried out in common.”²⁹

In Norway, where a general partnership (*ansvarlig selskap* - ANS) is deemed to have been created, each partner is personally liable *in solidum* for all the debts and liabilities of the partnership. However, a creditor must first claim against the partnership. If payment is not made within 14 days from such claim, then the creditor can claim directly from the partners.³⁰ General partnerships in Norway

²⁵ Swedish Partnerships Act, chapter 4, section 5.

²⁶ See Hemström, *Corporations and Partnerships in Sweden*, Fritzes, Stockholm, 1995, pp. 115-116.

²⁷ The difference between a simple partnership (“*det enkla bolaget*”) and a trading partnership (“*handelsbolaget*”) is that the latter is intended to engage in business activities in its own right and is a legal person.

²⁸ Partnership Act, chapter 2, s. 20.

²⁹ See Hemström, *op. cit.* n. 26, p. 114.

³⁰ See § 2-4(2) of the Norwegian Partnership Act 1985 (*lov om ansvarlige selskaper og kommandittselskaper*, 21.06.1985).

are legal subjects³¹ and can thus have rights, obligations and appear in front of the courts and other authorities. This status is deemed to be acquired when the partnership agreement has become binding according to the law³² and not by registration.³³

This brief comparative study highlights an important issue. Different national laws may treat the same issue differently and the parties need to be aware of the consequences of this different treatment in order to be able to evaluate and address the risks appropriately. For example, as discussed above, whereas a partner who does any act for the carrying on of business of the kind carried on by the partnership is presumed under English law to bind the firm and the partners, under Swedish law a partner in a simple partnership is presumed to bind only himself. Among the proactive measures that could be taken is insurance. The parties could check whether it is possible to take out an insurance policy to cover potential liabilities of the networked organisation. In the event that this is not possible, each party should try to exploit its own firm's standard insurance policy. Another measure that could be taken is the use of a limitation of liability clause in contracts with third parties to put a cap on the liability towards such third parties.

4 Concluding Remarks

Business collaboration grows and networked organisations prosper as long as there is trust between the collaborating firms. To foster trust, legal knowledge and proactive legal measures should be applied before things go wrong. This paper has discussed the importance of and need for proactive measures during the setting up and operation of networked organisations, such as the use of legal documents of various kinds, in particular letters of intent and contracts. It has also highlighted how overriding, mandatory provisions of national partnership and/or company law(s) could become applicable and the repercussions these provisions would have on the collaborative networked organisation, so that the collaborating parties could take the appropriate steps to minimise and/or contain risks of potential liability. In conclusion, skills, practices and business procedures can be developed to secure a strong legal basis for the business. Litigation is thus avoided or minimized and the parties would have a clear set of “rules of the game” that should be followed.

³¹ See also R. Knoph, *Knophs oversikt over Norges rett*, 11th ed., Universitetsforlaget Oslo, 1998, p. 33 which provides that organisations and institutions can have rights such as, for example, partnerships, associations, etc.

³² § 2-3 Norwegian Partnership Act 1985.

³³ See Woxholt, G., *Selskapsloven: Kommentartutgave*, 5th ed., Ad Notam Gyldendal, Oslo, 1998, p. 78. According to Norwegian law, all partnerships – whether general or limited – should be registered. This is not a complex matter to accomplish and, in the case of general partnerships requires certain information to be filed (*See Foretaksregisterloven*, § 3-4 and § 3-7). Failure to register a partnership is punishable with a fine. The partnership agreement must be in writing (§ 2-3, first paragraph, Partnerships Act).