Soft Law – an International Concept in a National Context

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1 Introduction[1]

There is no universal definition for the concept of soft law. Soft law is described in certain contexts as binding regulations with a vague content that does not place upon its subject any concrete type of obligation (legal soft law).[2] One such example within the area of private law would be § 36 of the Swedish Contracts Act, according to which a contract condition can be mediated if it is considered unreasonable .[3] Soft law is also described as non-legal norms that provide, for example, guiding advice, general guidelines or ethical principles.[4] These non-legal norms (non-legal soft law)[5] are constructed in a manner reminiscent of legal regulations, but they arise outside of the framework for the traditional development of the law. Producers of soft law can be actors outside of the traditional lawmaking processes, for example, industry organizations, academicians, or international private or political organizations. Soft law in the form of a non-legal normative regulation is the object of analysis in this article.

The concept of soft law has its origins in international public law, and it is in the legal scholarship addressing international law in different contexts in which the concept of soft law most frequently arises and has come to be examined from a more universal perspective.[6] In this article it is argued that the characteristics that have been identified with respect to non-legal soft law in an international context can also be applied to the non-legal regulations existing in a national business context. As with international soft law, these non-legal norms are non-binding regulations that by the industry are

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1 Many thanks are directed to associate Prof. Laura Carlson for the translation of the article *Soft law-reglering av försäkringsrätten*, previously published in Juridisk Tidskrift nr 2 2010-11.

2 A. E. Boyle, *Some reflections on the relationship of treaties and soft law*, International and Comparative law Quarterly Vol. 48, 1999, p. 907 f., C. M Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, International and Comparative law Quarterly, Vol. 38, 1989, p. 850, Ann-Charlotte Landelius, *Om soft law på det sociala skyddsområdet – en EG-rättslig studie*, 2001, p. 74, Taudeusz Gruchalla-Wesierski, *A framework for Understanding "Soft Law"*, McGill law Journal, Vol. 37, 1984-1985, p. 44, Jan Klabbers, *The Redundancy of Soft Law*, Nordic Journal of International Law, Vol. 65, 1996 p. 168.

3 Kai Kruger, Norsk Kjøpsrett, 4 utgave, 1999, p. 272.

4 *See* Lena Olsen, *Det konsumenträttsliga regelverket – en överblick över ett dynamiskt rättsområde*, JT nr 4 2001/02 p. 818, Mads Bryde Andersen, *Nordisk retstænkning i et globaliseringsperspektiv*, TfR 4-5/2006 p. 483, Joseph Gold, *Strengthening the Soft International law of Exchange Arrangements*, the American Journal of International Law, Vol. 77, 1983, p. 443, Chinkin, *supra* p. 851, Boyle, *supra* p. 902, Landelius, *supra* p. 76, Gruchalla-Wesierski, *supra* p. 46, Anna Di Robilant, *Genealogies of Soft Law*, American Journal of Comparative Law, Vol. 54, 2006, p. 499 ff., Klabbers 1996 p. 168.

5 Gruchalla-Wesierski, *supra* p. 40.

6 *See* for example Gruchalla-Wesierski, *supra* p. 45, Gold, *supra* p. 443 ff., Chinkin, *supra* p. 850 ff., Bryde Andersen, *supra* p. 483 ff., Morten Kinander, Sondringen mellom tinglige og obligatoriske rettigheter, TfR 5/2003 p. 683 ff., Boyle, *supra* p. 901 ff., Di Robilant, *supra* p. 499 ff., Landelius, *supra*, Jan Klabbers, *supra* p. 167 ff., Jan Klabbers, *The Undesirability of Soft Law*, Nordic Journal of International Law, Vol. 67, 1998, p. 381 ff.

understood to a high degree to be binding and consequently are complied with and respected by it. These norms are not combined with any direct legal sanctions, but can be combined with indirect sanctions. These norms can be questioned from a legal source perspective and are tied to similar problems with respect to legitimacy as those experienced with international soft law norms.

The object of the study is the insurance field. Parties wishing to resolve insurance law issues cannot simply stop at taking into consideration only the traditional sources of law. In the field of insurance law, there is an extensive normative non-legal regulation of different character and authority. These norms are generated outside of the traditional lawmaking process, for example by governmental authorities, industry organizations and different types of councils or boards. These norms are understood as binding to a greater or lesser extent by the actors who also follow up compliance with these norms. A party wishing to have a more complete picture of the state of the law in the field of insurance law, regardless of whether that person is a drafter of an insurance contract, an insurance adjuster, legal counsel, lawmaker, judge or academic, also has to take into consideration even these outside of the law normative regulations, the soft law.

2 The Concept of Soft Law

As already stated, there is no universal definition of the concept of soft law. Neither will any positive definition of this concept be given here. Instead, certain characteristics of those norms typically considered to be soft law will be highlighted.

Characteristic for the norms typically referred to as soft law is that they are generated by organizations considered to have a certain, informal, authority to create norms. Any party cannot simply create soft law - the organization must be considered to have a certain authority in relation to the addressees who are to be governed by the norms. The European Commission, the International Chamber of Commerce, academic groups, industry organizations or the United Nations can be producers of international soft law. The norms created in the international context that are seen to constitute soft law can be, for example, codes of conduct, policies, recommendations, resolutions and non-ratified conventions.

Universal for all soft law further is that these norms are not considered to be binding in a traditional legal sense.[7] The failure to follow soft law does not in itself constitute a violation of a legal obligation.[8] A party cannot argue a case before a court simply with the support of soft law.[9] States can freely choose to

7 Gruchalla-Weisierski *supra* p. 40, Boyle, *supra* p. 901, Chinkin, *supra* p. 862, Ole Lando, *En nordisk restatement*, TfR 4-5/2009 p. 496, Landelius, *supra* p. 77, Di Robilant, *supra* s.499, Klabbers 1998, p. 385.

8 Gold, *supra* p. 443.

9 Klabbers 1998, p. 382.

not adopt or not follow the rules. Therewith, it is not being said that soft law is never binding for any party. These norms can be binding for certain organizations. Guidelines are not binding for the addressees, but the authority that has drafted the guidelines, however, can be deemed to be bound by them.[10] If an international organization has drafted a soft law document, the organization in its internal actions is also bound by these norms. The norms do not necessarily bind members but rather the organization or institution itself may be assumed to have given expression to a consent to follow them.[11] The norms in their formation are often similar to binding legal regulations, as the regulations encourage a certain course of action or decision in a manner comparable to a judicial decision. One could say that soft law often borrows its symbolism from the applicable law.

In order for a norm to qualify as soft law, it is further assumed that it is understood as binding and enforced by the addressees of the norm. There probably are no empirical studies as to the closer effects of soft law on the international level. In the scholarship, however, there is an understanding that norms designated as soft law are often understood as sufficiently binding to be followed and respected by those who in some manner have agreed to follow them.[12] This actual agreement can take many different forms, consisting for example of a membership or a connection to an international organization or an express intent to follow certain norms. States accepting a soft law instrument are expected to treat the contents seriously. In the international arena, it is not sufficient to take into consideration the existing hard law, but it is also necessary to take into consideration the soft law. In the international context, soft law is deemed to receive its effect as interpretive data with the interpretation of international treaties, contracts or national law.[13] Soft law is also seen as constituting a presumption as to acting in good faith[14] or a "standard of best practice".[15] Soft law legitimizes or recognizes a certain action as acceptable. Soft law can also have an effect on those who have not assumed an obligation to follow it. A state that has not recognized a soft law norm, for example, could find it very difficult to maintain that another state that has recognized the norm, and acts in accordance with the norm, therewith acted unlawfully.[16]

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10 Gruchalla-Wesierski, *supra* p. 52 f.

11 Klabbers 1998 p. 388 f., Landelius, *supra* p. 86.

12 Gold, *supra* p. 443, Gruchalla-Weierski, *supra* p. 46 ff., p. 65 ff., Chinkin, *supra* p. 860, Boyle, *supra* p. 901, ADM Forte, *Soft law Regulation of Insurance Contracts in the United Kingdom and the General Insurance Standards Council Codes: Cause for Complaint?*, South African Mercantile law Journal, 2002, p. 1 ff., Landelius, *supra* p. 79, Klabbers 1998, *supra* p. 390, Ulf Bernitz, *Reformen av EG:s konkurrensrätt: vad blir effekterna för den nationella konkurrensrätten?*, ERT nr 3/2006 p. 441.

13 Gruchalla-Wesierski, *supra* p. 65, Landelius, *supra* p. 77 at footnote 111.

14 Chinkin, *supra* p. 866, Gruchalla-Wesierski, *supra* p. 62.

15 *See* Boyle, *supra* p. 905.

16 Chinkin, *supra* p. 866.

One explanation for why these norms are understood as binding, in addition to the authority existing with the party creating the norm, is the existence of a normative intent underlying these regulations.[17] These regulations have the objective to affect the actions of the addressees in different manners. Soft law often contains encouragements or recommendations to act in different ways. Another explanation for why these norms are understood as binding is that although soft law may not be followed directly by legal sanctions, an actor cannot assume that there are no sanctions for a failure to follow soft law. Jan Klabbers describes it as a question of "soft liability" or "soft responsibility", the actual content of which is first determined with any eventual "soft settlement".[18] One aim of soft law can be creating incentives for following the norms or withdrawing any rights following from the soft law.[19] It can be difficult to predict the sanctions that can follow from soft law. An action in violation of soft law can lead to spontaneous enforcement mechanisms such as poor publicity.[20] There is also a risk for "naming and shaming"- effects that can be difficult to predict,[21] or for the risk of becoming an object for "black listing".[22] Soft law often entails that actors are monitored in different ways by appointed enforcement organizations.[23] Even if soft law lacks direct legal sanctions, it can perhaps in an unpredictable manner still be a burden to the addressee.

The advantages with regulating through soft law are several. Soft law is not binding, which makes it easier to reach agreements between states. As soft law does not bind the states, the regulation can be more detailed. Soft law is produced outside of democratic processes, making it a flexible instrument that can more easily be adjusted upon need.[24] In addition, soft law is considered to meet those needs that communities have of norms and constitute incentives for interactions between different actors on different levels, enabling the utilization of a broad knowledge and experience base.[25] Soft law is considered to fulfil a normative function where otherwise it perhaps would have been impossible to create legal norms.[26]

17 Gruchalla-Wesierski, *supra* p. 46 ff., Landelius, *supra* p. 75, Boyle, *supra* p. 902, Gold, *supra* p. 443.

18 Klabbers 1996, p. 169.

19 Boyle, *supra* p. 909 ff.

20 Landelius, *supra* p. 87.

21 Di Robilant, *supra* p. 508.

22 Jason Sharman, *Small States and Weapons of the Weak in the Global Governance of Tax and Financial Services*, Refereed paper presented to the Australasian Political Studies Association Conference University of Tasmania, Hobart 29 September -1 October 2003.

23 Landelius, *supra* p. 87, Chinkin, *supra* p. 862.

24 Boyle, *supra* p. 903.

25 Di Robilant, *supra* p. 506 f.

26 Gold, *supra* p. 444.

Regulating through soft law, however, is not unproblematic. At the basis of the criticism directed against soft law is the problem of legitimacy. Klabbers perhaps is the one who in the most intensive manner has criticized the idea that soft law can have a normative content.[27] The basis for his criticism is that there is nothing between "hard law" and "no law". In those cases in which a court considers soft law, the consequence becomes either that the norm is classed as no law or is immediately raised to hard law. A norm is either binding or not. An action is either lawful or not lawful. A regulation is either in effect or not. It can never be a question of something in between binding and non-binding regulations.[28] The explanation for why soft law is still considered in different contexts according to Klabbers can partly be found in the concept of soft *law*. This entails that the concept, which could be used only to describe a non-legal phenomena, in a diffuse manner has received a normative content. This is a problem, as such norms lack formal legitimacy.[29] That this is allowed, according to Klabbers, is dependent on the fact that one assumes that the producers of such norms, for example the European Commission, are acting for the purpose of preserving the interests of the community. However, no one can know for certain which interests are being preserved, for example, by the Commission.[30] Other authors have also noted that soft law entails an unavoidable delegation of authority and a capitulation in the face of market forces.[31] In addition, these norms can entail a lack of foreseeability, depending in part on that the often vague formulations in the norms.[32] Another reason can be that soft law is often formed in such a manner that it appears to be binding,[33] which entails that soft law norms often appear as "soft for aggressive and opportunistic actors but hard for weak actors".[34] Klabbers goes so far as to maintain that soft law is harmful. The consequence of the term soft law, according to Klabbers, is that it leads to the misunderstanding that law can have varying normative strengths. As soft law creates uncertainty as to the boundaries for the actual law, soft law contributes to the decimation of the entire legal system. If moral and political matters are permitted to take a space within the legal system, the legal system loses its independence from morals and politics.[35]

A common characteristic for these mentioned criticisms paradoxically enough is that they admit that soft law in and of itself exists as a phenomenon.

27 Klabbers 1996, p. 167 f. and Klabbers 1998, p. 385 f.

28 Klabbers 1998, p. 388.

29 Klabbers 1998, p. 385.

30 Klabbers 1998, p. 391.

31 Landelius *supra* p. 87, Di Robilant, *supra* p. 508.

32 Daniel Stattin, *Skandaldriven och problemdriven reglering, Regelfrågor på en förändrad kapitalmarknad*, 2009, p. 161, Landelius, *supra* p. 87.

33 Landelius, *supra* p. 87.

34 Di Robilant, *supra* p. 508 with references.

35 Klabbers 1998, p. 385.

Landelius in her work gives an account of the soft law existing in the area of social protection, Di Robilant describes soft law from a legal historical perspective and even Klabbers maintains that there are guidelines drafted by the European Commission that in and of themselves have been referred to by the EU court.[36]

3 Soft Law Regulation within the Field of Insurance Law

3.1 Introduction

The characteristics, problems and advantages shown above with to non-legal soft law in an international context can also be applied to the non-legal regulations existing in a national business context, the insurance business. In the legal literature, the non-legal norms within the insurance field are often referred to as self-regulation, supplemental norms or co-regulation. None of these concepts have any uniform definitions, which means that the concepts used is not of decisive significance. None of these concept encompasses all of the non-legal norms existing in the insurance law field. To generally speak of supplemental norms within the area of insurance law would be misleading. Non-legal norms to a certain degree have a supplemental function. The Swedish Financial Supervisory Authority's general advice on that deemed good insurance brokerage practices has such a purpose. However, all of the non-legal norms within the area of insurance law do not have a supplemental function but rather can also constitute the only norms within the area. One could also contemplate using instead the concept of self-regulation generally in order to illustrate the non-legal norms within the area of insurance law. However, non-legally binding norms issues by for example the Swedish Financial Supervisory authority cannot be considered as self-regulation. Neither does the concept of co-regulation encompass all of the non-legal norms within the field of insurance law. This concept focuses more on the actual processes, in other words, when the non-legal regulation is generated in consultation with official organizations. However, the majority of conflict resolution organizations work without any interference by the State and even much of Insurance Sweden's work occurs internally within the industry.

The concept of soft law in a broad sense however, encompasses all of the non-legal norms existing in the area of insurance law. An evaluation of all the non-legal norms within the field of insurance law is not possible within the context of this overview. A selection of the Swedish non-legal regulations with respect to the area of insurance agreements will be illuminated from a soft law perspective below. The soft law that is examined is the Swedish Financial Supervisory Authority's general advice, the Road Traffic Injuries Commission's help tables, Insurance Sweden's recommendations, as well as industry council decisions. All of these chosen norms bear all of the

36 *See* Klabbers 1998, p. 390.

characteristics of soft law, non-binding norms that to a high degree are respected and enforced by the industry.

3.2 The Swedish Financial Supervisory Authority's General Advice

The Swedish Financial Supervisory Authority issues regulations and general advice that primarily regulate questions concerning the insurance industry, but also regulations and general advice within the private law area. Establishing soft law norms in the form of general advice has certain advantages. The dissemination of such regulations becomes simpler, the process goes more quickly and they can more easily be changed upon need than legal regulations.

While legal regulations are binding for those parties to whom the provisions are directed, general advice is not binding. Despite this, in actuality the general advice is understood as binding norms and the actors also follow this advice to a high degree. That the general advice is understood as binding depends in part on the formulation of the norms. It is common that the norms issued by the Swedish Financial Supervisory Authority are issued in the form of regulations and general advice. This is the case, for example, with the regulation of the annual reports for insurance companies in which the general advice follows the respective paragraphs in the government regulations.

It is not possible in certain cases to delegate normative authority to the Swedish Financial Supervisory Authority. This has the consequence that the Swedish Financial Supervisory Authority can create parallel normative documents – one with the designation "regulations" and the other with the designation "general advice". Thus, the regulation of one particular business contains rules *and* general advice, while the regulation of another particular business contains only general advice. The documents are identical with the difference comprising that all of the rules state that the party in charge of the operations *shall* act in a certain manner while the general advice states that the party in charge of the operations *ought to* act in such a manner. The same regulations consequently are seen as binding regulations for one actor and non-binding regulations for actors in a different industry.

In the international soft law legal scholarship, it has been noted that it can be difficult for an actor to assess the normative strength of the general advice.[37] Certainly, there are no direct sanctions for a violation against the general advice, while a violation of the regulations can entail indirect sanctions. The Swedish Supreme Court in a number of cases has tried the issue of what the legal effects of the general advice are. For example, in the Supreme Court case, NJA 1990 p. 163, three siblings had entered into a general suretyship. As security for two of the lines of credit, the bank received a floating charge. The issue was whether the bank had fulfilled its information obligations as against the sureties. The Court referred to the Bank Supervisory Authority's recommendations with respect to the obligation to provide insurance and found that these entailed a duty that the bank must observe.[38] The general advice can

37 Chinkin, *supra* p. 866.

38 *See* further Korling, *supra* p. 535 f.

in addition have an effect with respect to the burden of proof and its placement concerning damage liability. If an actor chooses to deviate from the general advice, the burden of proof can be shifted to that actor who has to demonstrate that its actions were not negligent and did not cause the injured party's harm. The injured party therewith can more easily prove negligent behaviour against the background of a presumption of negligence as to a deviation in following the general advice.[39]

Another explanation as to why the Swedish Financial Supervisory Authority's general advice is followed and enforced to a high degree by the actors encompassed by it is that the rules are issued by the governmental authority exercising control over such operations, as well as that the general advice has a normative purpose. The Swedish Financial Supervisory Authority expects that the general advice is to be followed.[40] The Swedish Financial Supervisory Authority has adopted a "follow-or-explain-principle" entailing that an actor certainly can choose alternative approaches, but has the burden of explaining when the different approaches are chosen. For an actor, the regulations must in practice be understood as binding in a manner eradicating the border towards binding regulations.

Soft law of this type of character is very close to binding legal regulations. If the addressee of a regulation is the insurance company, one can assume that the insurance company knowing of these norms also has the ability to distinguish between the differing characters of these norms. On the other hand, if the addressee is a less experienced party, it is not as equally self-evident that they can see the difference between these norms, but rather perhaps understands both to be binding to the same degree. The general advice, and for that matter also the general regulations, are often criticized by practitioners for having a lower standard of quality, for being products of haste that are difficult to interpret and apply. This can partially be explained by the fact that this type of norm is generated in a shorter period and without the review process that legislation undergoes. However, if the general advice are not clear, and it is not clear which indirect sanctions follow from a breach of these regulations, there is a risk that the advice instead of creating foreseeability creates legal uncertainty among the norm's addressees.

3.3 Help Tables

In cases of nominal damages, it is the lack of objective measurements that makes it difficult to individually determine a damage amount in order to compensate the party injured. In Denmark the choice is made to determine such amounts by legislation.[41] In France and England, judicial precedent gives

39 Korling, *supra* p. 567.

40 *See* the Swedish Financial Supervisory Authority's decisional memorandum PM 2009-12-11 p. 3.

41 Jens Møller and Michael P. Wiisbye, *Erstatningsansvarsloven*, København, 2002 p. 98 ff.

guidance.[42] In Swedish law, tables have been used for a long time. The first joint industry invalidity tables are deemed to have arisen at the end of the 1800's in the compensation norms applicable in German private accident insurance. The intent with these tables was not in itself to determine medical invalidity in the sense of loss of function, but rather instead to have a measurement as to compensation levels with different types of injuries.[43]

These tables are only recommendations and do not constitute binding norms. The introduction to Insurance Sweden's table as to degrees of medical invalidity based on sickness states that its "use is naturally entirely voluntary." The introduction to the help table as to degrees of medical invalidity states that the tables are only guidelines and must be used in combination with practical clinical assessments. From its Circular No. 2 – 2010, it can be seen that the Road Traffic Injuries Commission has retained the right to recommend a different compensation when specific reasons exists than that which follows from a strict application of the current tables. The Road Traffic Injuries Commission's help tables are consequently not binding even for the Road Traffic Injuries Commission. The Commission has also in a small number of cases with mitigating circumstances, awarded a higher compensation than that which can be seen from the tables.[44]

The help tables have been applied in Sweden for over a century and enjoy strong legitimacy in Swedish law. These regulations can when necessary be changed relatively simply without having to go through a burdensome legislative process. It consequently has been the industry that for over a century has determined the levels of compensation for nominal damages for personal injuries. A question that can be raised is whether this has meant that the industries' interests have therewith been prioritized through a more restrained development of compensation levels. However, the help tables have been accepted by the Swedish Supreme Court, by Swedish legal scholarship and even politically. There are no plans to abandon the system with pre-determined compensation as established in the tables.

3.4 Insurance Sweden's Recommendations

In addition to the above-named tables, Insurance Sweden, the insurance industry representative organization, has a large amount of normative materials in the form of guidelines and technical recommendations, of which only a few are addressed here. The recommendations concerning good practices for insurance on the Internet establish general principles for insurance companies offering consumers insurance policies via the Internet. The recommendations are adapted to be in conformance with the spirit of the provisions found in the EEC directive as to electronic trade. The recommendations constitute interpretive data when interpreting § 1:1(a)3 of the Insurance Operations Act,

42 Roos, *Ersättningsrätt och ersättningssystem*, 1990, p. 155.

43 *See* the introduction to the Tables: Gradering av medicinsk invaliditet, 2004.

44 Madeleine Randquist *et al.*, *Ersättning vid personskada*, 2009, p. 104.

according to which operations are to be conducted in accordance with good insurance standards. This provision is applicable to insurance operations in their entirety.[45] The regulations as to the practices for insurance sold via the Internet consequently supplement the rules in the Insurance Operations Act. Insurance Sweden has in addition drafted a document, Fundamental Principles for Processing Injury Claims. These principles, or ethical rules, contain provisions as to processing claims, for example that insurance companies are to provide service actively, and investigations are to be conducted as soon as possible. These ethical rules were created in the 1980's in order to rebut the then intense criticism directed against the industry in the media, and several of these provisions have comparable statutory provisions.[46]

These rules are not binding but rather constitute simply recommendations. However, the industry has assumed the obligation to follow the principles with respect to the processing of claims.[47] A normative intent underlies these recommendations. There are no direct sanctions for deviating from these norms, but these fundamental principles can constitute interpretive data for § 1:1(a)3 of the Insurance Operations Act that is applicable to the processing of claims.[48] The term "good insurance standard" is not more precisely defined in the legislative preparatory works. There it is only stated that this term is to entail that it is a question of a satisfactory standard qualitatively for a representative circle of insurance providers.[49] According to the preparatory works the term "good insurance standard" is to be supplemented primarily through enforcement decisions and the general advice issued by the Swedish Financial Supervisory Authority. Actual custom and usage within the circle of insurance providers can also be deemed to give a certain amount of guidance with respect to the application.[50] The Swedish Financial Supervisory Authority has not issued any general advice as to that which constitutes good insurance standards with respect to the processing of insurance claims. Instead, Insurance Sweden's fundamental principles for the processing of insurance claims constitute the supplement to the regulations in the Insurance Operations Act.

3.5 The Decisions by the National Board for Consumer Disputes

A large part of insurance disputes are resolved within the framework for the National Board for Consumer Disputes as well as different joint industry boards. The National Board for Consumer Disputes and the joint industry

45 Legislative bill 1998/99:87 p. 409.

46 Gunnar Löf, *Försäkring – en introduktion*, 2006, p. 31.

47 Löf, *supra* p. 31.

48 Bertil Bengtsson, *Försäkringsavtalsrätt*, 2006, p. 302. Previously the processesing of insurance claims fell within a principle of fairness. This principle did not apply to the issue of whether there was an insurance case, but rather to the routines in the claims processing, *See* legislative bill 1998/99:87 p. 182, legislative bill 2003/04:150 p. 127.

49 Legislative bill 1998/99:87 p. 193.

50 Legislative bill 1998/99:87 p. 409.

boards constitute alternative dispute resolution organizations to the general courts in the area of insurance. The boards apply the current law. The internal corporate boards also have a function as an alternative dispute resolution organization to these public boards and to the courts. Common for the decisions of the boards is that they are not binding on the parties, but rather constitute only advice on how a conflict ought to be resolved. A question is whether this advice has a normative value. Can the decisions of these boards be seen to constitute a soft variation of a judicial decision, in part for the parties, in part for others in the form of guiding precedent?

The National Board for Consumer Disputes is a public agency established in 1968. Its tasks are to try disputes between consumers and commercial actors. The Board's work is regulated by a government regulation (2007:1041) with instructions for the National Board for Consumer Disputes. The Board only tries claims brought by consumers as against commercial actors. In addition, there are a number of joint industry councils. These are private in the sense that they are tied to industry organizations or companies. These councils are not regulated by any statute but rather by internal rules. Within the area of personal injury there are three councils that are tied to the larger collective liability insurance, namely road traffic insurance, patient insurance and pharmaceutical insurance. The oldest of these, which also issues the largest number of decisions, is the Road Traffic Injury Commission. In its previous form as the Road Traffic Insurance Authority (Trafikförsäkringsanstalternas nämnd), it has existed since 1916.

In addition, there are a number of councils not tied to any specific type of insurance, but rather focused on different types of injuries. The decisions by these boards are not formally binding, not even for the parties. Disputes can be tried by the general courts and then a party can even present new claims, new objections and new evidence.[51] No legal sanctions can be imposed upon a party for refusing to follow a decision of a board.

On the other hand, a decision by one of the boards can entail certain indirect sanctions. A decision by the National Board for Consumer Disputes can have an evidentiary value in subsequent litigation,[52] and there is reason to assume that a decision by a joint industry board can have the same effect. A decision by the National Board for Consumer Disputes is combined with follow-up by the Swedish Consumer Agency. If a commercial actor refuses to follow the decision, it can be placed on the Swedish Consumer Agency's blacklist that is published in the magazine "Råd och Rön", and on the Swedish Consumer Agency's website. That a commercial actor can also end up here when it is a question of litigation can be discussed from the viewpoint of legal certainty. Here are examples of "naming and shaming" and blacklisting as also highlighted in the international soft law scholarship.

Even if the decisions are not formally binding, they are followed to a high degree by the parties. Approximately 800 insurance matters are brought to the National Board for Consumer Disputes annually. In approximately 15% of

51 *See* Lars Heuman, *Reklamationsnämnder och försäkringsnämnder*, 1980, p. 732.

52 *See* Heuman, *supra* p. 636.

these cases, the insured, in other words, the customer, prevails as against the insurance company. The insurance companies follow the Board's decisions in almost all of the cases.[53] The website for the Pharmaceutical Insurance Association (Läkemedelsförsäkringsföreningen) states that all of the pharmaceutical insurance companies always follow the decisions by that board.[54]

One explanation for this degree of compliance is that the companies are obligated in certain cases to have issues assessed by the boards, which also makes it natural that they would follow the decisions. The companies consequently in certain cases must refer issues to the Road Traffic Injuries Commission or to the Personal Insurance Board. It can also be assumed that the organizations that created these boards expect that the parties would follow the decisions. This can be seen from the bylaws of the board in which it is stated that the companies are obligated to notify the Board if they choose to deviate from the decision. Also here, as with the Swedish Financial Supervisory Authority's general advice, one can find the principle "follow or explain."

One issue that can be raised is whether such decisions have any normative value for persons other than the parties involved. The answer to this must be it depends. Clearly there are not even indirect sanctions when party to the dispute does not follow a decision by one of these boards. Such decisions are often very brief. It is not always possible to understand the background of the conflict and the object of the conflict from the decision. In a number of decisions by the National Board for Consumer Disputes concerning issues of contractual interpretation, it is not possible to even determine which insurance terms and conditions are the objects for the interpretation.[55] The decisions of the boards in such cases cannot be seen to have any normative value. Another problem with these board decisions is that at times they are so poorly motivated that it is not possible to determine any principle or rule to follow. An additional problem is the status of the persons sitting on the board. In some of these boards, the majority of the directors are appointed by the insurance industry, which in itself constitutes a problem with respect to legitimacy.

The status of board decisions within the framework for the traditional sources of law is debated,[56] but insurance lawyers attest that they are cited in actuality. Relevant decisions by the boards are taken into consideration with the processing of insurance claims and given as a basis for interpretations of contracts as well as contract drafting. In this manner, the decisions appear to directly affect courses of conduct and have an actual certain normative value. As with international soft law regulations, there can be a normative intent underlying the decisions of the boards that is directed at others than those involved in the dispute. The boards expect that the decisions will come to be used as general guidelines, which is characteristic for soft law. In order for this to occur, the decisions must be available.

53 "www.arn.se/Statistik-och-remissvar/Statistik/".

54 "ly.eddy.se/".

55 Marcus Radetzki, *Orsak och skada*, 1998, p. 151 with references.

56 Radetzki, *supra* p. 151.

Even if it is doubtful whether the decisions by the boards have independent normative value, taken together with other normative instruments these can have an indirect normative value. The decisions of these boards are frequently considered in the legal scholarship.[57] The effect of the fact that the decisions are considered in the scholarship is that they, which have a doubtful independent normative value, in this context receive a certain normative value as part of the legal scholarship. In this context the decisions can have a function in the development of the law.

The effect can be said to be the same when the Swedish Supreme Court requests opinions from the boards,[58] refers to decisions by the boards,[59] as well as follows the assessments made within the decisions. When the Supreme Court refers to or takes into consideration an opinion by a board, that opinion also contributes to an increased understanding of the decision made by the court. The opinions in such a context perhaps do not have an independent normative value, but they do have a function with respect to the development of the law.

In summary, the operations of the National Board for Consumer Disputes and the joint industry boards have strong positions as conflict resolution organizations within the area of insurance law. The decisions by the boards are followed to a high degree by the parties who perceive the decisions to be authoritative. For those other than the parties involved, the decisions by the boards can have a guiding function and are considered by the courts, the legal scholarship and by the industry with respect to the drafting of contracts and the processing of insurance claims. There is a normative intent underlying the decisions of the boards as they are published for the purpose of serving as guidelines. Certain boards keep statistics with respect to enforcement that are made public. The decisions of the boards can in conclusion be considered to be a soft model of the decisions by the courts.

Dispute resolution by the boards is combined with problems of legitimacy. Insurance conflicts are resolved primarily by industry experts and not by the general courts. Representatives for the insurer's collective can be found on the boards, resulting in that it is representatives for the industry that determine how insurance conflicts are to be resolved. This in itself constitutes a problem with respect to legitimacy. In addition, decisions by the boards are often scarcely motivated, which entails that there is a limited possibility to see how all insurance conflicts are resolved. This lack of insight in the resolution of these conflicts is a problem from the perspective of sources of law, as there is simply

57 *See* for example Bertil Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden*, 1960, Jan Hellner, *Försäkringsrätt*, 1965, Edvard Nilsson and Erland Strömbäck, *Konsumentförsäkringslagen*, 1984, Carl Martin Roos, *Ersättningsrätt och ersättningssystem*, 1990, Harald Ullman, *Försäkring och ansvarsfördelning*, 1999, Radetzki, *Orsak och skada*, 1998, Bengtsson, *Försäkringsavtalsrätt*, 2006, Jessika van der Sluijs, *Direktkrav vid ansvarsförsäkring*, 2006, Peter Lagerström, *Företagsförsäkring*, 2007.

58 *See* for example NJA 1996 p. 639 in which an opinion was obtained from the Road Traffic Injuries Commission and the personal injury liability council of Insurance Sweden.

59 *See* for example NJA 1994 C 6 in which the Swedish Supreme Court referred to a decision by the Insurance Terms and Conditions Council in its decision to grant a leave to appeal.

a poor body of case law that can serve as guidance with respect to the application of the legal rules within the area of insurance law.

4 The Legal Pluralistic Approach

From a strictly legal positivistic perspective, soft law as discussed above does not constitute law. Soft law norms have not been generated in the traditional lawmaking processes and have no formal status as a legal source. Despite this, as shown above, soft law has great significance in the area of insurance law, as it is invoked in the practical life of the law but also even is considered by the courts, legislature and in the legal scholarship. The recognition of sources other than the traditional legal sources does not necessarily give rise to a fundamental criticism of the traditional legal sources, but rather can be argued to mean that the number of legal sources can vary depending upon the field of law. An acceptance of that there are different practices with respect to the issue of legal sources in the different areas of the law is supported from a legal pluralistic perspective.

Pluralistic or polycentric (polycentrism can be described as a variation of pluralism) [60] theories have their bases in the assumption that human beings belong to, or feel associated with, different types of groups and perceive themselves to be bound by those norms that govern these different groupings.[61] Such groups can be seen as states, countries or municipalities, but also ethnic groups, religious groups, industry organizations or associations.[62] The law is produced not only by the law producer but also by other non-legal organizations.

Legal pluralism entails among other things that there are several different overlapping legal systems and different types of parties applying the law who have different sources and methods for their application of the law. The law cannot be perceived as a harmonic organized system but rather is characterized by variations in several different aspects. The application of the law is not uniform and the legal culture varies greatly. The different legal sources have different scopes and addressees. The consequence of this type of legal pluralism is that the system is open, with different possibilities for interpretation and the freedom of the parties for interpreting great. Therewith, the opportunities are many for those parties wishing to use the system for their own purposes.[63]

According to legal pluralism, norms bind different subjects in different ways. A statement made in the legislative preparatory works is not binding for a court, but on the other hand, it can be seen as binding for those politicians who have drafted that work. A further example can be that a state agency's

60 Claes Sandgren, *En social avtalsrätt?* JT nr 3 1992/93 p. 457.

61 Paul Smith Berman, *Global Legal Pluralism*, Southern California law Review, Vol. 80, 2007, p. 1169 f.

62 Berman, *supra* p. 1170.

63 Sandgren, *supra* p. 457 f. with references.

guidelines and recommendations are not binding for the agency, but are still followed slavishly as binding regulations. An authority can consequently affect other organizations without having the competence or jurisdiction to issue binding regulations.[64]

Legal pluralism has its origins in scholarship conducted at the beginning of the twentieth century, when jurists with an anthropological focus studied overlapping normative systems arising with respect to colonization.[65] These studies of legal systems and colonized countries demonstrated that the domestic and European legal systems existed side-by-side. British law consequently was integrated into the domestic legal systems. The early legal pluralistic studies focused on the hierarchical interaction between that which was understood to be entirely different norm systems. As the objects for the studies were entirely different norm systems, it was possible to demonstrate the effect the one norm system, for example, European law, had on the other system, for example, the domestic legal system.[66] These pioneer works paved the way for a basic understanding of legal pluralism: the recognition of the diversity of normative orders and a focus on the interaction between these normative orders.[67]

Legal pluralism was complicated in three different ways during the 1970's and 1980's. First, the basis in the earlier studies, that the one system dominated the other, was questioned. Instead, it was argued that the parallel systems were often semiautonomous and worked within the framework for the other legal system without being entirely governed by it.[68] This view paved new ground as the focus of the studies was moved from the relationship between the official legal systems to other norm systems tied to the official system, but in many ways still separate from it.[69] Second, the interactions between the norm systems were begun to be perceived of as two-directional with the consequence that the one norm system influenced and even contributed to the development of the other norm system.[70] This was a new perspective in comparison to the former, which tended to focus only on how the official systems affected and developed the other normative systems.[71] Third, the concept of a legal system received a broader content, and began to encompass many different forms of unofficial normative systems. Such unofficial normative systems could be found not only in colonized countries, but also in industrialized countries. The objects for legal pluralistic studies became then not only norm systems in the

64 Henrik Zahle, *Polycentri i retskildelæren*, in Festskrift till Torstein Eckhoff, 1986, p. 753 f.

65 J. Griffiths, *What is Legal Pluralism?* Journal of Legal Pluralism & Unofficial Law, 1986 p. 6 f., Sally Engle Merry, Legal Pluralism, law and Society Review, 1988, p. 870 f., Berman, *supra* p. 1170 ff.

66 Berman, *supra* p. 1170.

67 Berman, *supra* p. 1171.

68 Berman *supra* p. 1171 with references.

69 Engle Merry, *supra* p. 873.

70 Engle Merry *supra* p. 889.

71 Berman, *supra* p. 1171.

colonial context, but all forms of social norms which to a varying degree obtained symbolism in the official legal system, but worked in its background.[72]

This new perspective entailed that others besides legal scholars with anthropological interests, for example those interested in political theory, could identify a large number of unofficial norm systems in modern nation states, for example within ethnic groups, religious groups, private normative organizations and a series of institutions. The term "private justice" was coined and applied to unofficial systems, for example, such as discipline boards, industry organizations and other advisory organizations, associations for different professions, and institutions.[73] Organizations, for example such as the church, stock markets, different professions, and the insurance world, are objects for different forms of non-legal norms that often include instruments for resolving conflicts within their own areas.[74]

The most recent legal pluralistic research seldom refers to the anthropological or political theory constructions, perhaps as these theories are instead seen to be founded in a legal sociological theory, more precisely, behavioural law and economics. The more recent studies have instead focused on different norms and standards that establish acceptable behaviour based on custom and usage or membership in different organizations.[75] Even if this development has diluted the traditional focus of legal pluralism on ethnic and religious groups, this more recent focus has the advantage that large transnational groupings in which the regulations are established through long-term negotiations can also be objects for studies on the theoretical level.

Within the application of the legal pluralistic approach can one resolve the endless debate with respect to whether soft law is law in general. In the broader perspective, the debate with respect to law and non-law is less relevant as the key question is the extent to which a certain association perceives itself to be obliged to follow certain norms, rather than that norm's formal status.[76] Ascertaining that the norm exists, is followed and enforced has a value in itself. In this manner, the applicable law can be considered in a larger context. One can more easily see how norms gain legitimacy over time with the support of legal pluralism and get past the idea that norms other than official norms lack significance.[77]

"Not all law takes in place in courts" posits Sally Engle Merry. A legal pluralistic approach can explain the gap between "the law in the books" and "the law in action".[78]

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72 Engle Merry, *supra* p. 874.

73 Engle Merry, *supra* p. 877 with references.

74 Berman, *supra* p. 1172.

75 Berman, *supra* p. 1173.

76 Berman, *supra* p. 1177.

77 Berman, *supra* p. 1177.

78 Engle Merry, *supra* p. 890.

5 Conclusions

5.1 The Soft Law Phenomena from a National Perspective

The characteristics, effects, advantages and problems that have been identified with non-legal soft law in the international context can also be found to be true with respect to the non-legal regulation existing in the field of Swedish insurance law, which arises for example in the form of general advice from the Swedish Financial Supervisory Authority, general advice in the form of the help tables from the Road Traffic Injury Commission and Insurance Sweden, Insurance Sweden's recommendations and even the operations of these different boards with respect to conflict resolution. In all of these cases, there is a normative intent underlying these norms. To in more general terms determine the effects of soft law is not possible, as the different norms vary in their strengths. It is clear that the domestic soft law addressed above is to a high degree considered and complied with by those to whom the norms are addressed. Soft law in the field of insurance law also constitutes interpretive data for the legal regulations, for example, the culpa rule in the Tort Damages Act. Soft law is the concept which in the best manner encompasses all of the non-legal norms existing in the area of insurance law, even if soft law at the same time can be seen to constitute self-regulation, co-regulation and/or supplemental norms.

A relevant question is whether soft law is necessary in the field of insurance law, if it is needed. There is no contract category that is as detailed as an insurance contract, and there is no industry that is so meticulously regulated as the insurance industry, which could mean that soft law in this area is extraneous. Such a question however is not relevant. Soft law is a fact. Soft law exists parallel with binding legal regulations, and in any case has since 1916 been so evidenced in the form of the decisions by the different boards. The non-legal norm creation is a continuously on-going process which in part is beyond the control of the legislature. Internationally, the amount of soft law has increased, which is dependent upon the circumstance that interactions between different states have increased and that several states participate in international cooperations.[79] Mutual dependence entails the need to be able to enter into agreements. Neither on a national level can any tendency be seen that soft law will have a reduced significance in the future. The help tables previously were established by law and even the norms for good accounting practices were statutorily established.[80] A reason for this is that it is flexible to create norms through soft law. It is not necessary to observe all the formal requirements applicable with respect to legally binding regulations. Soft law contributes to pragmatic change and creates regulations where there is a need. The norms are created by those parties who can assess which changes are necessary. Norm creation through soft law constitutes an incentive for interaction on several levels and creates better preconditions, for better or

79 Landelius, *supra* p. 78.

80 Korling, *supra* p. 526.

worse, for experts to affect the norm creating process.[81] Regulation through soft law is a fact that legal insurance experts are forced to address.

That soft law is given a certain legitimacy as well as the fact that certain sanctions follow from soft law is not unproblematic. As certain sanctions can follow from soft law, these norms can be seen as onerous for the individual. Soft law in such cases is less "soft" than many perhaps believe. Soft law creates therewith uncertainty among the addressees. Can a party lose certification for insurance brokerage operations if it does not follow the general advice as issued by the Swedish Financial Supervisory Authority and what happens in the case of an audit?

This is problematic as the regulations have been created in a process outside of the traditional development of law. If soft law regulations are given a high status in these areas, then in practice this is a circumvention of the regulations with respect to delegation as set out in the Instrument of Government. The problem with respect to delegation and soft law is often avoided as soft law is perceived to be interpretive data and not a rule, for example, a norm for what is culpa, which according to the law is a prerequisite for tort liability.

There are viewpoints in the criticism of soft law in the international context that soft law is a capitulation to market forces. A comparable criticism could be directed at the insurance industry. There is also a risk that the legislator loses control over the industry and assigns the norm creating to the experts. An example of such behaviour in Swedish law can be mentioned, the legislator's choice that instead of regulating product liability with respect to pharmaceuticals, to delegate the normative powers in that area completely to entirely private pharmaceutical insurance. One risk with soft law solutions in general is that the norms do not constitute binding law, entailing that the means for forcing an actor to follow the created norms are lacking.

5.2 Soft law as a Part of the Applicable Law

What is the normative status of soft law in the field of insurance law? A general answer to this question cannot be given. The starting point is that soft law in the form of non-legal norms cannot be seen to constitute the applicable law in the traditional legal sense. A party cannot turn to the court with claims based only on that the other party acted in violation of soft law. Klabbers maintains that the problem with soft law is that as soon as the court has to observe the norms, there are two results – the court can choose to apply the soft law which means that the rule is raised to hard law, or the court chooses to not apply the soft law which means that the rule collapses into "no law".[82] Several objections can be raised to this view.

The first objection that can be raised against this view is that all law does not occur in the courts. Soft law often is characterized as a law for "doers", or "the law in action" in contrast to "the law in the books". Soft law has great

81 Boyle, *supra* p. 912.

82 Klabbers 1996, p. 179.

significant for these "doers", in other words, primarily claim processors and other actors within insurance companies, who to a high degree apply the norms in daily practical life. There are several explanations for this. One explanation is that it is practical and cost-efficient to follow an adopted standard and to resolve conflicts in boards and avoid allowing conflicts to go to the courts. Insurance companies must process insurance matters on a mass scale. There is a diversity of actors within the insurance industry making it necessary to have standards of different types. Consumers are faced with a commercial industry. Experts meet private individuals who may entirely lack knowledge with respect to insurance. Commercial interests are in conflict with consumer protection and access to compensation. In such a context, a standard that is applicable to everyone is attractive and persuasive. An actor acting in accordance with a soft law norm in any event will not be accused of acting entirely incorrectly.

That the industry to such a high degree complies with soft law is based not only on practical reasons. Another explanation is that the basis of the norms has a certain legitimacy. The production of soft law is often sanctioned from the official perspective. Directors sitting on the boards for the National Board for Consumer Disputes, Road Traffic Injuries Commission and Patient Injury Panel are appointed by the government, strengthening the legitimacy of these operations. The work of these boards has strong political support. The general advice as issued by the Swedish Financial Supervisory Authority can be seen as an extension of legislative power, giving these norms legitimacy. One explanation for the legitimacy soft law has can be seen as derived from self-regulation, that it is produced by the actors concerned themselves. As industry feels a responsibility for and participates in the formation of the rule system, the system's sufficiency, flexibility and legitimacy also often increases.[83]

Soft law certainly is not binding. There are no legal sanctions available to enforce soft law. On the other hand, an actor cannot assume that there are no sanctions for actions in violation of soft law. As shown above, a violation of soft law can be followed by black-listing, a naming-and-shaming-effect or a duty to explain. An actor can be thrown out of a business organisation or increase the risk of have the eyes of the Financial Supervisory Authority focused on it.

The consequence that the norms are complied with by the companies is that they become a part of the applicable law as well as that which is practice in "real life." By way of extension, the norms gain legitimacy as insurance standards, which consequently is the practice arising, in contrast to good custom which as an evaluation ground must be distinguished from bad custom.

The second objection is that a great deal of soft law as existing in the area of insurance law has a function that supplements or provides details to the norms in the legal regulations. The general advice as given by the Swedish Financial Supervisory Authority often supplements the legal regulations in the same area of law. The professional ethical regulations adopted by industry organizations supplement, for example, the culpa rule under the Tort Damages Act. From this perspective, there is reason to be critical of Klabber's view entailing that the

83 Carl Josefsson, L*agstiftning eller självreglering? Olika aspekter på frågan om när och hur lagstiftningsinstrumentet bör användas*, SvJT 2001 p. 217.

consequence of a court observing soft law is that the norm is raised either to hard law or collapses in no law. Assume that the Swedish Supreme Court applies one provision in a set of rules constituting soft law as a basis for decision. What happens in such a case with those other paragraphs that are not expressly applied in the case? According to Klabber, the effect would be that the other provisions retain their status as no law. Certainly the applied rule receives a normative status through the case law. However, there is reason to assume that the fact that the court applies one individual paragraph in the soft law regime affects the entire regime, in other words, even those rules that are not expressly applied by the courts are then considered by the addressees to have a stronger normative status than simply soft law.

The third objection is that soft law has significance for the development of the law. In the international arena, there are many examples where soft law has developed to conventions and other binding law.[84] The space is not available within the framework of this article to investigate the contributions of soft law in its entire extent to the development of insurance law, but the fact that it has had a significant effect must be admitted. Several examples have been mentioned above in which the courts have accepted the assessment by the boards.

In summary, a statement that soft law is not part of the applicable law is a misrepresentation. Soft law has no independent status as a legal source. However, it steers to a certain amount the practical operations within the insurance industry. Soft law has also significance for the development of the law and a study of soft law can give an understanding as to the tendencies in the legal area and constitute a basis for a reasoning as to the future course of the law.

5.3 Final Words

The recognition of sources other than traditional legal sources should not be understood as a fundamental criticism of the idea of a hierarchy/ranking of legal sources, but rather simply as recognition of the fact that the number of different legal sources varies within each legal area. The norms are used quite simply for different objectives and at different levels. Within an assessment of whether a party has the right to motor traffic compensation, the Traffic Injury Act is applied, while with the assessment of the compensation amount, a help table is applied. The norms cannot be understood as either irrelevant or not, but rather as more or less relevant.

Soft law regulation in the area of insurance law is not a new phenomenon. Help tables have been applied since 1901 and the first joint industry board has existed since 1916. The sources of law in practice have never been captured in an exhaustive list, but rather always will be supplemented by or sometimes compete with non-legal norms of different characteristics. Perhaps in the Nordic countries, with their dominant view of legislative preparatory works

84 Boyle, *supra* p. 904, Chinkin, *supra* p. 856, Gold, *supra* p. 444, Landelius, *supra* p. 88, Gruchalla-Wesierski, *supra* p. 60 f.

and legal scholarship as legal sources, a rich growing ground for different soft law instruments to be perceived of as legal sources can be seen to exist.

The phenomenon of national soft law is not unique for the insurance field. I dare to assert that it is a fact in most legal fields. A party wishing to understand construction law is forced to master the norms found in the applicable standard agreements. In the field of banking law, there is extensive non-legal norms issued, for example, by the banking association. With the assessment of landlord-tenant issues, the ethical regulations drafted by the private real estate properties industry organizations have significance.[85] All legal fields have individually relevant legal sources and by way of extension, its own individual hierarchy of legal sources. The boundary between soft law and hard law perhaps can be seen as sharp, however, it is not in every context of interest.

85 *See* Svea Hovrätt in the case no. T-8742-07.