

CONTRACT-MANAGEMENT DUTIES AS A NEW REGULATORY DEVICE

LORENZ KÄHLER*

I INTRODUCTION

The question of how to manage contracts is as old as the idea of contracts itself. When contractual obligations are not instantaneously fulfilled, the parties must arrange their decisions in a way that will achieve this aim. In recent years new technical opportunities and new management techniques have emerged that dramatically change the way contracts are dealt with. New information technologies enable companies to create, monitor, and implement their contracts in a new way. This has not only made the management of contracts easier, but it has also changed the impression of what it means to be contractually bound. Contract management has therefore become a dominant theme in the practice of contracting.¹ New concepts like contractual lifecycle,² senior responsible owner,³ and visibility of contracts⁴ symbolize these changes. Contract law scholarship has hardly reacted to these developments.⁵ However, these developments do not take place outside the sphere and reach of the law. New opportunities to regulate contracts have emerged hand-in-hand with new technical possibilities and management practices. Legislators have used them in

Copyright © 2013 by Lorenz Kähler.

This article is also available at <http://lcp.law.duke.edu/>.

* Professor of Private Law, Civil Procedure, and Jurisprudence at Bremen University, Germany. For helpful comments I thank Dave Hansen, Matthias Kopp, Franziska Ritter, and the participants of the PLT conference in Loveno Di Menaggio.

1. See Robert Loo, *Working Towards Best Practices in Project Management: A Canadian Study*, 20 INT'L J. PROJECT MGMT. 93, 94 (2002) (reporting results of a project management study in which effective contract management ranked in the top group of best practices); BEARINGPOINT, CONTRACT MANAGEMENT 2010, at 8–9 (2010), available at http://www.bearingpoint.com/de-de/download/0553_WP_EN_Vertragsmgt_final_web.pdf (summarizing the results of a study demonstrating trends in contract management).

2. See, e.g., ANUJ SAXENA, ENTERPRISE CONTRACT MANAGEMENT: A PRACTICAL GUIDE TO SUCCESSFULLY IMPLEMENTING AN ECM SOLUTION 12–15 (2008); ENPORION, INC., CONTRACT LIFE-CYCLE MANAGEMENT 3 (2008), available at http://www.enporion.com/media/whitepapers/Enporion_CLM_white_paper_Oct2008.pdf.

3. See, e.g., NATIONAL AUDIT OFFICE, GOOD PRACTICE CONTRACT MANAGEMENT FRAMEWORK 8 (2008), available at <http://www.nao.org.uk/idoc.ashx?docId=9FDA2AB5-F7BF-4962-88A7-E7075701E64B&version=-1> (listing important areas for contract-management planning and governance).

4. See Kirk Krappé & Gopi Kallayil, *Contract Management Is More Out of Control Than You Think*, J. CONT. MGMT. 3, 4 (April 2003) (reporting results of study regarding importance of contract visibility).

5. See Will Hughes, *Contract Management*, in COMMERCIAL MANAGEMENT OF PROJECTS 344 (David Lowe & Roine Leiringer eds., 2006).

various ways. For example, there are a growing number of regulations worldwide, such as the Sarbanes–Oxley Act of 2002⁶ in the United States or a similar law passed by the European Parliament in 2004,⁷ which require the establishment of a risk-management system to which, partially, the management of contracts belongs. Thus, how one manages contracts is not merely a business decision. Besides, even without the interference of the legislator, contract law might adapt itself to these changes and develop new standards of care, such as a duty to establish a risk-management system.

This article examines whether contract management can be a legal issue, that is, an object of regulation. This could be so if contract-management duties were introduced by regulation. To understand the character and repercussions of such regulation, it is first necessary to describe briefly the rise of contract management⁸ and the general possibilities to regulate it.⁹ Only then is the interplay between a direct regulation of contracts and an indirect regulation via contract-management duties understandable.¹⁰ Furthermore, the advantages as well as disadvantages of such duties then become visible.¹¹ These advantages and disadvantages show why the regulation of contract management should only cautiously be employed.

II

THE RISE OF CONTRACT MANAGEMENT

In recent years, contract management has developed into a major business phenomenon.¹² In particular, transnational companies increasingly professionalize the negotiation, implementation, termination, and review of contracts by using standardized procedures based on information technology. Contract managers who are responsible for such contracts are now their own profession with its own knowledge, techniques, literature, and vocabulary.¹³ A clear sign of the growing professionalization is the rather young International Association of Contract and Commercial Managers (IACCM), which currently comprises more than 10,000 companies worldwide.¹⁴

6. Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (2002).

7. Council Directive 2004/39/EC, art. 13, 2004 O.J. (L 145) 14–15 (EU).

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Part V.

12. According to a study by KPMG in 2002, 67% of the enterprises were using contract-management tools. KPMG, VERTRAGSMANAGEMENT 11 (2002) (Ger.), available at http://www.sealbase.de/fileadmin/pdf/KPMG_Studie.pdf. According to BearingPoint, this percentage had reached 72% in 2010. See BEARINGPOINT, *supra* note 1, at 44.

13. Evidence for this is the different certifications offered by the National Contract Management Association (NCMA). Michael J. Sofield Jr., *The Attorney/Contract Manager: The Intersection of Two Professions*, 7 J. CONT. MGMT. 41, 42 (2009).

14. The IAACM was founded in 1999. ABOUT IAACM, <http://www.iacm.com/about/> (last visited June 30, 2012). The NCMA, however, has existed since 1959. ABOUT, NCMA, <http://www.ncmahq.org/>

Contract management has a variety of aspects and no uniform procedure. Common features are the electronic documentation of contracts and the main events in the contractual life cycle. These include the conclusion, implementation, and review of the agreements, as well as the maturity of the claims. These events are registered and the main documents electronically stored. Digital storage allows contracts to be negotiated, implemented, and changed in a standardized way, while allowing the documents from all branches of a company to be retrieved worldwide.¹⁵ The standardization even extends to dispute resolution and defense.¹⁶ Contract management partially overlaps with other management systems like customer-relationship management, risk management, project management, service-level management, and enterprise resource planning. This is not surprising, as contracts are the core mechanism of economic exchange and have, therefore, connections to almost all departments of a company. Contract management is also closely connected to compliance, as one of its goals is the fulfillment of contractual obligations.¹⁷ It aims to ensure that contracts are carried out as planned, and that the gap between the contractual practice and contractual obligations is narrowed. According to several surveys, noncompliance with contractual terms and conditions is regarded as a major risk that motivates firms to favor a contract-management system.¹⁸

The regulation of contract management can introduce two kinds of requirements: formal and substantive. The formal requirements prescribe certain procedures that must be observed or introduced in the administration of contracts, like the establishment of customer complaint systems,¹⁹ of risk-management systems,²⁰ or of systems to prevent conflicts of interests.²¹ These procedures do not change the content of the contracts, but rather prescribe the way in which these contracts are administrated. In contrast, substantive requirements concern the contractual content. Depending on the general management of contracts of one party, substantive requirements create contractual rights and duties between that party and its clients. Requirements might, for instance, prohibit cross subsidy between different classes of customers or discrimination by gender, race, or age among a company's classes of customers. Because of the interdependent nature of one contract upon another, these requirements form part of the contract-management regulation and not merely common contract law. The requirements presuppose that

About/ (last visited June 27, 2012).

15. See generally SAXENA, *supra* note 2, at 23–26.

16. Axel Viaene, *Guest Comment* to BEARINGPOINT, *supra* note 1, at 5.

17. SAXENA, *supra* note 2, at 46–47.

18. BEARINGPOINT, *supra* note 1, at 8; Krappé & Kallayil, *supra* note 4, at 7.

19. *E.g.*, Commission Directive 2006/73/EC, art. 10, 2006 O.J. (L 241) 38 (EU).

20. *E.g.*, Council Directive 2004/39/EC, art. 13, 2004 O.J. (L 145) 14 (EU).

21. *E.g.*, Sarbanes–Oxley Act, Pub. L. No. 107-204, § 501, 116 Stat. 745, 791 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (2002); Council Directive 2004/39/EC, 2004 O.J. (L 145) 14, 16–17 (EU).

contracts are systematically documented and monitored. Otherwise, similarities and differences between the contracts would hardly become visible.

The rise of contract management can be traced to at least four factors.²² First and foremost, the sheer number of contracts makes central and standardized management necessary. Especially in companies with a great number of clients, it is impossible to individually negotiate, monitor, and implement every contract. Therefore, companies with a great number of clients or vendors and, correspondingly, a huge number of contracts extensively use a computerized contract-management system. Such is the case, for instance, in the telecommunications industry. For decades, the standardization and rationalization of contracts has been achieved by the usage of boilerplate (that is, standardized) terms and conditions.²³ Contract management aims to extend this standardization to all contractual processes, from the preparation of contracts to their review and termination. By the standardized monitoring of contracts, companies raise their awareness when deliveries, services, and payments are due, and when their contracts need to be reviewed. Automatic reminders ensure that the contract is implemented. Analysis of the contracts can show the patterns of customers and clients so that large-scale effects become visible and more usable in the negotiations. Software might even be used to read and process the contracts.²⁴ By these means, contract management increases the visibility of contracts,²⁵ that is, of the awareness about the number and character of the existing contracts in the daily operations of a company.

A second factor contributing to the rise of contract management is the growing length and complexity of contracts.²⁶ Contracts might contain hundreds of paragraphs, especially in areas such as the construction industry.²⁷ The technical specifications as well as the main clauses are so long and detailed that businesses can hardly make reference to the hard copies. Instead, it becomes necessary to have electronic versions through which companies can more easily search and that better show the links between the agreed-upon clauses. The conclusion of such contracts might very well take place with the traditional means of a joint signature on paper. However, to understand the emergence

22. A factor not addressed here is privatization, which creates the necessity for a public agency to oversee the activity of the private contractor. See STEVEN COHEN & WILLIAM EIMICKE, *THE RESPONSIBLE CONTRACT MANAGER* 46–47 (2008). Cohen and Eimicke conclude that “contract management is an essential part of effective public management.” *Id.* at 215.

23. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–36 (2002); Robert B. Ahdieh, *Production of Boilerplate: The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1071 (2006).

24. For example, the software program OPLE was developed to automatically read publications licenses. OPLE SOFTWARE, <http://www.editeur.org/22/OPLE-Software/> (last visited June 30, 2012).

25. SAXENA, *supra* note 2, at 39. According to Krappé & Kallayil, the accessibility of contracts is a problem for 81% of the surveyed companies. Krappé & Kallayil, *supra* note 4, at 3.

26. SAXENA, *supra* note 2, at 11.

27. As to the length of contracts, see generally Thomas Lundmark, *Verbose Contracts*, 49 AM. J. COMP. L. 121 (2001), and Claire Hill, *Why Contracts are Written in “Legalese,”* 77 CHI.-KENT L. REV. 59 (2002).

and implementation of such contracts, one has to consider the standardized procedures by which these contracts are created and carried out. A variety of people participate in these processes. They can work on the same document only because of its electronic accessibility. This has repercussions for the interpretation of the clauses that are formulated in the context of such procedures. For instance, the intent of the drafters becomes less important as it is hardly possible to trace back an individual clause to the person who formulated it. Instead the established procedures of contract creation and revision become more important in the interpretation of the contractual clauses. The parties might presuppose and describe these procedures by agreeing, for instance, to use reporting systems in a standardized electronic format that fits the particular contract-management system software.

In addition to the number and length of the contracts, it is, third, their vague content that gives rise to a standardized contract management. Especially in quickly developing areas like the software industry, it is often impossible to know in advance the exact actions necessary to achieve the contractual goals. The demands and best practices in a certain industry might change during the lifetime of the contract. Therefore, parties frequently abstain from prescribing all details of the promised goods and services. Instead, these details are either completely left out of the agreement or described with vague terms. If a company orders, for instance, machines that are to be delivered in about five years, neither party can say at the time the contract is formed which CPUs and what features will then be the standard of choice. Therefore, the parties will not specify them. Contrary to the traditional picture of parties who know at the signing of the contract exactly what they owe each other, parties often embark on an unknown adventure by signing the contract. The more technical details there are to be agreed upon after the conclusion of the contract, the more it is necessary to agree upon, at least, the procedures of this specification. These procedures are a central part of contract management. Each party has to adapt its routines towards these procedures. This holds true as well for contract modifications that parties request.

Finally, globalization increases the need for a contract-management system.²⁸ As companies grow and become active in different markets it becomes increasingly difficult to keep an overview of all existing contracts with their terms, conditions, renewal dates, and so forth. A contract-management system eases the retrieval of this information worldwide. Different people at different locations can thereby access the agreed-upon contract and trust that they are working with the newest version of it. A contract-management system helps to spread information about the existing contracts within companies. Moreover, it makes the number and volume of the contracts visible and helps to understand their peculiarity. Experiences with certain types of contracts can be documented so that they can be considered in similar situations. This is especially important

28. BEARINGPOINT, *supra* note 1, at 10, 13; SAXENA, *supra* note 2, at 214.

for litigation in which the clauses used in a variety of contracts are challenged and interpreted. A contract-management system can help to use this information and, when necessary, to adapt the agreements. It enhances the exchange of information about the existing contracts and shows their interdependency. This becomes even more urgent the larger a company grows and the more global it becomes. Globalization is, therefore, another factor behind the rise of contract management.

III

LEGAL DUTIES TO MANAGE CONTRACTS

The aforementioned reasons to establish a contract-management system are first and foremost considerations of efficiency. Contract-management systems help to better create, monitor, implement, and change contracts. It is a business judgment whether the costs to establish such a system exceed the gains in efficiency.²⁹ As far as the law is concerned, it is necessary and sufficient that a company fulfills its *external* contractual obligations towards other people. Seemingly, it does not matter which *internal* procedures it uses to prepare and secure the implementation of these duties. Each company is free to decide, and the establishment of a contract-management system is, therefore, a voluntary matter. However, the more the existence of a contract-management system aligns with the best practices in a certain industry, the stronger becomes the question whether there is a legal duty to establish one.

The traditional picture that contract law is exclusively concerned with the relationship between the contracting partners³⁰ rather than with the matters inside the parties has become, at least in some places, porous. It is not merely a question of corporate law how a company internally organizes its business but, at least partially, a question of contract law itself. One of the ways in which the establishment of a contract-management system can become a legal matter is through contractual obligation. The parties are free to agree upon not only the goods and services that are to be delivered but also upon the accessory obligations that secure the fulfillment of these principal obligations. For instance, in a construction project the client might want to monitor the main contractor by a reporting system, through which he is continually informed about the negotiation, conclusion, and implementation of subcontracts. For this purpose, the contract might create the duty of the main contractor to establish a contract-management system that allows not only himself, but also his client, to monitor the contractual processes.

But even if the parties do not explicitly agree upon the establishment of such a system, implicit duties to do so might under certain conditions be read

29. As an indicator of the necessary costs to establish a contract-management system, one can consider the results of BearingPoint's report, that 70% of the surveyed enterprises plan to invest up to €100,000 to establish a contract-management system. BEARINGPOINT, *supra* note 1, at 9.

30. As to the privity of contract and exceptions towards it see HUGH COLLINS, *THE LAW OF CONTRACT* 302 (4th ed. 2003).

into the contract. This is the case if the agreed upon duties presuppose the establishment of a contract-management system. If, for instance, a contract requires the management of a great number of subcontracts, an IT-based contract-management system might be the only means to keep an overview of the state of these subcontracts and therefore to fulfill the contractual obligations. Consequently, the failure to establish a contract-management system might under these circumstances constitute a breach of contract.

In addition, the failure to establish a contract-management system might have severe procedural consequences that are especially important in the context of litigation. The closer a contract-management system adheres to industry best practices, the greater becomes its role in the discovery process. The same holds for other means with which the facts of the case are established.³¹ For instance, electronically discoverable patterns concerning how certain contracts are designed and implemented might prove or disprove discriminatory practices. The failure to show such documents might be taken as a sign that the company did not prevent the spread of such practices.

Similarly, a contract-management system can help answer the question whether the failure to perform occurred through the fault of a party. If there is no contract-management system with proper documentation of all steps that were undertaken in the implementation of a contract, the burden of proof might shift or the negligence or even gross negligence of the contracting partner might be assumed.³² For success in litigation, this shift of burden of proof is important, as it can be easier to prove that a proper contract-management system was lacking than that the company could have foreseen a particular event. Rather than focusing on the question whether an event could have been avoided, the parties will argue whether the security measures were in general sufficient. In the context of contractual obligations, this can necessitate showing the existence of a contract-management system connected to a proper risk-management system. The failure to establish a contract-management system might, therefore, have considerable consequences for the evidence of fault and, consequently, for the assessment of damages.

Apart from procedural law, other legal norms might create obligations to establish a contract-management system. This is especially important for the finance industry. The Sarbanes–Oxley Act, for instance, demands the

31. The requirement to produce evidence of how a contract was handled in one's management system might, for instance, be based on UNCITRAL's (United Nations Commission on International Trade Law) Arbitration Rules, in which the tribunal can require parties to produce evidence. UNCITRAL Arbitration Rules as Revised in 2010, art. 27(3) (2011).

32. For instance, according to II.-3:103(3) of the Draft Common Frame of Reference for the European Union, the business bears the burden of proof that it has provided the necessary information to the consumer. Especially in the case of mass contracts, this requires an electronic documentation in a contract management system. STUDY GRP. ON A EUR. CIVIL CODE & RESEARCH GRP. ON EC PRIVATE LAW (ACQUIS GRP.), PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) 253 (Christian von Bar et al. eds., 2009), available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

prevention of conflicts of interest in financial accounting.³³ Similar regulations exist in European law.³⁴ Therefore, banks and investment firms have to check for actual and potential conflicts before they conclude a new contract. For this purpose, they have to document the existing contracts with the concerned interests in a systematized way so that in all branches of worldwide-operating banks the information about possible conflicts is easily available at all times. The same holds true for law firms, which cannot represent clients with conflicting interests. As the number of involved persons increases, the less a firm can rely on a hard copy of a contract and the more an IT-based contract-management system becomes necessary.

Finally, contract-management systems might become necessary due to regulations demanding the establishment of a risk-management system.³⁵ For the nonperformance of contracts is a crucial risk for both the promisor and the promisee. Whereas the promisor loses the promised payments and might have to pay damages, the promisee cannot realize his project and might in turn become liable towards his clients. Therefore, the electronic monitoring of the contractual life cycle can be a crucial part of the risk-management system. It shows the interdependency of contracts and helps to use the experiences in one contract in similar cases. Moreover, a risk-management system has to establish security measures that are to be carried out in case a certain risk has occurred. These measures at least partially depend on other companies, so that the agreements with them have to be documented, reviewed, and kept up to date. This situation also might require the establishment of a contract-management system.

For a variety of reasons the establishment of such a system can thus be legally necessary. The duty to manage contracts in a systematized way might still leave discretion to the concerned companies regarding how their management takes place; the techniques and standards are constantly changing. Although a company's organizational structure—how its sales, purchase, and legal department cooperate—and communication interfaces remain a matter of business judgment, the law can still formulate minimal requirements for these decisions. Insofar as this is the case, the management of contracts becomes a legal issue. These requirements can be summarized as contract-management regulations, that is, as norms a company has to obey in the management of its contracts.

33. Pub. L. No. 107-204, § 501, 116 Stat. 745, 791 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (2002).

34. *E.g.*, Council Directive 2004/39/EC, art. 13(3), 2004 O.J. (L 145) 14 (EU).

35. Sarbanes-Oxley Act, Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (2002); Council Directive 2004/39/EC, art. 13, 2004 O.J. (L 145) 14–15 (EU).

IV

THE INTERPLAY BETWEEN CONTRACT REGULATION AND
CONTRACT-MANAGEMENT REGULATION

In order to give a full picture about the possibilities of contract-management regulations, it is necessary to ask how they relate to existing contract law. At first glance, contract law and contract-management law exist independently of each other because the contractual rights and duties of the parties toward each other remain in place even if the management of contracts is regulated. This impression is increased due to the different background of these rules. Contract law is private law, whereas many rules about the management of contracts are, by their origin, public law. The statutory duty, for instance, to install a risk-management system to prevent the spread of systemic risks might entail the duty to install a contract-management system, thus bringing contract management into the realm of public law. Typically, state or public agencies will oversee the fulfillment of these duties.³⁶

Despite this possible discrepancy between contract law on the one side and contract-management law on the other, both types of rules influence each other, which has repercussions for their creation as well as interpretation. First and foremost, contract-management regulation adds another layer of norms over contracts, thus supplementing existing contract-law norms. Because of this, companies have not only to comply with the agreed-upon terms and mandatory, as well as default, rules, but also with the demands of a legally imposed contract-management system.

Moreover, contract-management regulation can support the enforcement of contract law. Due to such a management system, a systematic breach of contracts becomes more visible and hence more easily sanctioned. If such a breach can be proved via the discovery of evidence or the examination of witnesses, a company might face claims by individuals for breach of contract as well as class actions aimed at the abolishment of a certain discriminatory practice. Thus, contract-management systems might be used not only to manage contracts but also to prove certain mismanagements. Conversely, the better a company's compliance with the contractual rights and duties is documented, monitored, and secured, the easier it can defend itself against the accusation of a breach of contractual terms, conditions, or statutory law. Contract-management regulation can therefore serve as a tool to secure the enforcement of contract law. Rather than regulating contracts with another layer of mandatory rules, the legislator might instead regulate the contract management. He might, for instance, demand the installment of a contract-management system in order to check for discriminatory practices or for infringements of

36. For example, the Public Company Accounting Oversight Board was established by section 101 of the Sarbanes-Oxley Act. Pub. L. No. 107-204, § 101, 116 Stat. 745, 750 (codified at 15 U.S.C. 7211 (2006)) (2002). Similarly, the duty to establish a competent authority was established by article 48 of the European Parliament's Council Directive 2004/39/EC. 2004 O.J. (L 145) 32.

competition law. In addition, he could create contractual rights relative to the existing contracts, for instance, by demanding that certain classes of customers not be treated differently from other classes of customers. These rights depend on the comparison between classes of customers and hence on a contract-management system documenting the necessary data of the various contracts.

As contract-management regulations support the enforcement of contract law, contract law might in turn support the enforcement of contract-management regulations. This happens when contract law gives the client of a company a remedy in situations when the company did not install a proper contract-management system. The court might, for instance, grant the other party damages or the right to withdraw from the contract. Thus, contract law creates incentives to establish a contract-management system. This is important not only for the enforcement of contract law but also for other purposes pursued by the contract-management system, like the prevention of systemic financial risks. When used in this way, contract law is a tool to achieve goals that might have nothing to do with the interests of the party but rather with the interests of the general public.

The most interesting relationship between contract law and contract-management regulations occurs when both compete with each other. This can happen for a variety of reasons. One of them is the possible discrepancy between the contractual rights and duties on the one hand and the contractual practices on the other hand. Frequently, the contractual rights and duties diverge from the internal policies of the companies regarding how to solve problems with their customers. The contractual boilerplate serves only as a residual means that is used against customers who go to court or who, in the eyes of the company, make excessive demands.³⁷ In many cases, companies will, “out of courtesy” or goodwill, respond to the complaints of customers and grant them, in a systematic way, certain rights not provided for by their contracts. As a consequence, the contractual practice diverges from the proclaimed rights and duties. These firm policies, portrayed not as obligatory but instead as gratuitous offers, are nevertheless a daily routine carried out according to certain rules. Regulations about contract management might focus on these rules rather than the agreed-upon terms and conditions. They might make the practices obligatory so that no one is arbitrarily excluded from them. The claims of a customer are then not only assessed on the basis of the existing contract but also on the basis of what is practiced in other cases. This requires a comparison between the contractual practices that becomes possible via a contract-management system.

For these reasons the legislator might decide to regulate contract management rather than contracts when he can achieve the same goals by contract-management regulations. Instead of protecting the consumer by

37. As to the strategy of awarding discretionary benefits contrary to the boilerplate used, see Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857, 877 (2006).

certain rights independent of other contracts, he can give them the relative right not to be treated differently than other consumers by the same company. Hence, there is a choice whether to regulate contracts directly by certain rights and duties or whether to regulate them indirectly by requiring one party to manage its contracts in a certain way. The legislator might, for instance, force insurers to offer certain tariffs to all customers or, at least, not to exclude certain classes of customers from these offers.³⁸ Such a duty is more flexible than mandatory requirements about the content of a contract because it depends on the choice the company makes. As long as it does not offer other classes of customers a certain tariff, no duty arises. Although the legislator might combine direct and indirect regulation of contracts, he might also confine himself to one of them if he thinks that this kind of regulation suffices to solve a certain problem. Consequently, the regulation of contracts and the regulation of contract management can support and supplement, as well as compete with, each other.

V

ADVANTAGES AND DISADVANTAGES OF CONTRACT-MANAGEMENT REGULATIONS

The interplay of contract management with contract law allows one to better assess the advantages and disadvantages of its regulation. The greatest advantage of regulating contract management is that the legislator can thereby focus on the place where general decisions about a variety of contracts are made. Especially for mass contracts, this approach tackles the most central decisions: what kinds of offers a company makes and what kinds of offers it will accept. These questions—how the variety of contracts are designed and managed rather than how a particular contract shall be designed—are the most interesting for the management as well as for the totality of customers. The management might care more about these general decisions than about particular customers who come and go and have, individually, a limited economic weight. Regulating contract management, which influences a variety of contracts, rather than directly regulating the content of contracts can, therefore, prove more effective and protect vulnerable customers better than mandatory or default contractual rules.

This advantage shows itself in the case of antidiscrimination requirements.³⁹ In order to prove discrimination by different contracts, one has to compare

38. This is the case, for instance, for health insurances in Germany. *Versicherungsvertragsgesetz* [VVG] [Insurance Contract Act], Nov. 23, 2007, *BUNDESGESETZBLATT*, Teil I [BGBl. I] at 2631, § 204, last amended by Article 2(79) of the Act on Dec. 22, 2011, *BGBl. I* at 3044 (Ger.).

39. For example, in the United States, the Civil Rights Act of 1964 fought racial discrimination by requiring equal access to public facilities, employment opportunities, and public schools, among other rights. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.). In Europe, Council Directive 2004/113/EC implemented the principle of “equal treatment between men and women” by requiring equal access to and supply of goods and services. 2004 O.J. (L 373) 37 (EU).

them with each other. Discrimination occurs to a considerable extent at a place where management decisions about a variety of contracts are made and certain classes of customers are excluded from particular contracts. Various regulations against discrimination by sex, age, or race prohibit different treatments based on these criteria.⁴⁰ They can also apply to discriminations by contract-management systems. For it hardly matters whether the discrimination happens due to different contractual rights and duties or due to different company policies. Thus, it is legally questionable for a company to grant only men a grace period for nonpayment of fees. The unequal treatment of women and men should not become possible via company policies. Hence, the regulation of contract management has the advantage that such policies can be excluded as well.

Another advantage of contract-management regulation is its adaptability to new contracts and changes of factual circumstances. Contrary to default and mandatory rules, which give the parties certain rights and duties independent of agreements with other parties, contract-management regulations do not necessarily involve such rights and duties. Instead, the regulations either prescribe certain procedures about how to manage contracts or grant rights that depend on the content of the other reached agreements. These requirements can persist even when the contracts have changed fundamentally. Requirements, for instance, that customers have the right to change tariffs with the same provider of services or insurance⁴¹ can stay in place even if the underlying tariffs change fundamentally.

Finally, contract-management regulations can further transparency within companies. By requiring documentation of contract negotiation, implementation, and amendment, it becomes easier to trace who was responsible for a certain decision and what reasons were behind it. Transparency is considerably enhanced by the quick retrieval of information, including which contracts were made and carried out. This is especially important for the management of huge contracts in industrial projects. The better the negotiation and implementation is monitored and documented, the better corruption can be prevented or disproved.⁴² For then, the negotiation, conclusion, internal approval, and implementation of contracts will be transparent throughout the company; it becomes more difficult to manipulate them.

Contract-management regulation is not a panacea for all contractual problems; its advantages come hand-in-hand with a whole set of disadvantages

40. *E.g.*, Council Directive 2004/113/EC, art. 4(1), 2004 O.J. (L 373) 40 (EU).

41. Such is the case, for instance, for health insurance in Germany. *See supra* note 38. The insurance company even has to inform customers about this right. Verordnung über Informationspflichten bei Versicherungsverträgen [VVG-InfoV] [Information Requirement Regulation], Dec. 18, 2007, BUNDESGESETZBLATT, Teil I [BGBl. I] at 3004, § 6(2) (Ger.).

42. Glenn T. Ware et al., *Corruption in Public Procurement: A Perennial Challenge*, in THE MANY FACES OF CORRUPTION: TRACKING VULNERABILITIES AT THE SECTOR LEVEL 295, 319 (J. Edgardo Campos & Sanjay Pradhan eds., 2007); BEARINGPOINT, *supra* note 1, at 26.

and limitations. First, contract-management regulation concerns a limited set of questions. It presupposes that there are contracts to be managed and procedures that can be standardized. For this purpose there must exist either a variety of contracts, as in the case of mass contracts, or a complex contract whose negotiation and implementation require a contract-management system. For many other agreements and questions, contract-management regulation does not play a role. It cannot solve a variety of problems that are not connected to the management of contracts, as is the case for undue influence or mistake. Thus, contract-management regulation cannot replace contract law.

Second, one has to take into account the costs incurred in the installment of a contract-management system. Depending on the circumstances, these costs⁴³ might very well exceed the benefits of the contract-management system. The costs of installing and running a contract-management system might decrease with the growing professionalization of contract managers. Nevertheless, the IT infrastructure as well as the entry and administration of the contractual data cost time and money, so it should remain predominantly a business and not a legal decision whether a company implements a contract-management system.

Furthermore, contract management, as well as its regulation, can increase the bureaucracy inside and outside a company. The more contracts need to be documented and administrated via a central management system, the greater is the need to design corresponding procedures and documents, and to employ contract managers as well as in-house lawyers⁴⁴ who are responsible for them. In this way, the administration of the company grows and the management of contracts becomes dependent on experts who need to be educated, employed, and paid. The focus shifts away from the direct administration of contracts and towards strategic decisions about contractual design and compliance with newly established procedures. Instead of asking how to realize a certain project, the question becomes what the installed contract-management system requires. Contractually defined procedures start to influence the relationship between the parties. The daily routine becomes more juridified. Contract managers' current demand that "work should not begin without a contract"⁴⁵ is a sign of such a juridification.

The more contract management spreads throughout companies, the more questionable the theory that businesspeople are able to cooperate on an informal basis becomes.⁴⁶ The designed procedures can impede such cooperation by standardizing procedures and excluding informal agreements.

43. See *supra* note 29 and accompanying text.

44. Richard Parnham, *The B-Team*, 96 EUR. LAW. 22, 22–23 (2010).

45. BEARINGPOINT, *supra* note 1, at 28.

46. Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAV. SCIENTIST 337, 345 (1980) (describing a phenomenon in which increased regulation inhibits informal practices that are equally effective and less costly). See also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (explaining the diamond industry's reliance on informal agreements). Her example of the diamond industry might very well still be true but, possibly, no longer generalizable.

However, this standardization might also save time and costs because, according to the agreed procedures, certain problems need not be escalated to the highest management level. It depends on the actual circumstances whether contract management's end result aids or impedes cooperation. The costs and benefits have to be weighed against each other. However, the equation changes fundamentally as soon as the law enters the field and demands the installment of a contract-management system. Then its introduction is no longer a business decision. The regulation of contract management complicates the rules to be observed by the contracting parties because their implementation must then be secured as a matter of law. For this purpose, the law can either give one party additional rights, which makes contract law more complex, or create new agencies for the oversight of contract-management regulations. In both cases, the involved costs grow.

A further reason to abstain from the regulation of contract management is its premature state. It is a new phenomenon that is rapidly changing and has hardly reached a settled form. Currently, only nine percent of European enterprises carry out all contract management-related tasks centrally,⁴⁷ which might change in the coming years. Legal rules about the management of contracts should not prevent the search for new types of organizing and managing contracts. Experiments with new forms of organizations are important to discover the most sensible way to organize huge projects.⁴⁸ Regulations about the management of such contracts hamper these experiments, as they influence the decision about who is responsible for the management of contracts and how the contracts should be carried out. Consequently, regulations might impede the development of new types of contracts and contract-management systems. Therefore, in many areas it is too early to regulate the management of contracts, as this is a rather new phenomenon that still needs time for development.

VI

CONCLUSION

In the last decade, the business practice of managing contracts has changed dramatically. More and more, the negotiation, implementation, and review of contracts are carried out with standardized procedures based on information technology. This not only creates new opportunities to organize business but also new opportunities for the legislator to regulate contracts. In addition to the direct determination of the rights and duties of the parties, he might now regulate the way contracts are managed. For this purpose he can create formal requirements such as the duty to install a risk-management system or the duty to document the main contractual events. In addition, the legislator can introduce substantial requirements, such as the duty not to discriminate

47. BEARINGPOINT, *supra* note 1, at 8.

48. For an example from the construction industry, see Hughes, *supra* note 5, at 352–54.

between certain classes of customers. First examples of such regulations have already been adopted.⁴⁹ Contract-management regulations support and supplement the existing contract law. They might also compete with it, as certain rules of contract law are no longer necessary if their aims can be achieved by contract-management regulations. This is at least conceivable for a number of consumer-protection rules. On the one hand, contract-management regulations increase the transparency of companies and influence their decisions at the central level where vulnerable people can best be protected. On the other hand, such regulations can considerably interfere with the internal affairs of a company and increase its bureaucracy. Contract-management regulation should, therefore, only cautiously be employed; like with any other regulatory device, it may be abused.

49. As an example, see the European Council Directive 2004/113/EC, 2004 O.J. (L 373) 37 (EU); see also *supra* note 41.