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Towards a Genealogy and Typology of Governance Through Contract Beyond Privity

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Abstract: Contracts are used to extend governance on supply chain and platform actors in ways that could not be envisaged when the foundations of current conceptualizations of contractual privity were laid down in the 19th century. This results in a stark contradiction. Firms use contracts to extend governance on actors beyond privity when it suits their interests, for example for reasons of supply-chain-wide cost-management. At the same time, law offers few means of holding a firm liable for the inadequate governance of social, environmental, cultural, and economic sustainability in its supply chain or platform eco-system. I propose two tools for uncovering the multiple societal tensions that this disjuncture between law and contractual practice entails. The first is a genealogy of how contractual paradigms have contributed to the rise of new forms of production, such as centralized mass production in the 19th century, global value chains in the 20th century, and the platform economy in the 21st century. The second is a multidisciplinary typology of the contractual mechanisms used to extend governance beyond privity. My hope is that these two tools will help us better understand, research, teach, and balance the implications of contractual paradigms on the social, environmental, cultural, and economic sustainability of production.

Résumé: Les contrats sont utilisés pour étendre la gouvernance de la chaine d'approvisionnement et des acteurs de plate-forme, d'une manière inenvisageable au moment où les fondations de conceptualisations actuelles de lien contractuel ont été établies au XIXe siècle. Cela aboutit à une forte contradiction. Les sociétés utilisent les contrats pour étendre la gouvernance d'acteurs au-delà du lien contractuel en cas de congruence avec leurs intérêts, par exemple pour des raisons de gestion de coûts à l'échelle de la chaîne d'approvisionnement. En même temps, le droit offre peu de moyens pour tenir responsable une société d'une gouvernance inadéquate sur le plan du développement durable, économique, écologique et culturel dans sa chaîne d'approvisionnement ou écosystème de plate-forme. Je propose deux outils afin de montrer les multiples tensions sociétales entrainées

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par cette déconnexion entre droit et pratique contractuelle. Le premier correspond à une généalogie de la manière dont les paradigmes contractuels ont contribué à l'augmentation de nouvelles formes de production, comme la production de masse centralisée au moment du XIXe siècle, les chaînes de valeur globales au XXe siècle et l'économie de plate-forme au XXIe siècle. Le second correspond à une typologie multidisciplinaire des mécanismes contractuels, utilisés pour étendre la gouvernance au-delà du lien contractuel. J'espère ainsi que ces deux outils nous aideront à mieux comprendre, chercher, enseigner et mesurer les implications des paradigmes contractuels sur les dimensions de développement durable, sociales, environnementales, culturelles et économiques de la production.

Zusammenfassung: Verträge dienen dazu, die Governance der Akteure, Lieferketten und auf Plattformen in einer Weise zu erweitern, die in der Entstehensphase der heutigen Konzeption von Vertragsfreiheit im 19. Jahrhundert undenkbar gewesen wäre. Dies führt zu einem krassen Widerspruch. Unternehmen verwenden Verträge, um die Governance auf Akteure über bilaterale Vertragsbeziehungen hinaus auszudehnen, wenn dies ihren Interessen entspricht, zum Beispiel aus Gründen des Kostenmanagements in der gesamten Lieferkette. Gleichzeitig bestehen kaum rechtliche Möglichkeiten, ein Unternehmen für die unzureichende Governance der sozialen, ökologischen, kulturellen und wirtschaftlichen Nachhaltigkeit in ihrer Lieferkette oder ihrem Plattformökosystem haftbar zu machen. Ich schlage zwei Instrumente vor, um die vielfältigen gesellschaftlichen Spannungen aufzudecken, die diese Diskrepanz zwischen Recht und Vertragspraxis mit sich bringt. Das erste ist eine Genealogie dessen, wie Vertragsparadigmen zum Aufkommen neuer Produktionsformen beigetragen haben, darunter die zentralisierte Massenproduktion im 19. Jahrhundert, globale Wertschöpfungsketten im 20. und die Plattformökonomie im 21. Das zweite ist eine multidisziplinäre Typologie der vertraglichen Mechanismen, die zur Erweiterung der Governance über bilaterale Vertragsbeziehungen hinaus eingesetzt werden. Diese Analyse soll dazu beitragen, die Auswirkungen von Vertragsparadigmen auf soziale, ökologische, kulturelle und wirtschaftliche Dimensionen der Nachhaltigkeit heutiger Produktionsbedingungen besser zu verstehen, zu analysieren, zu vermitteln und schließlich abzumildern.

1 Introduction

The idea of governance through contract beyond privity is diametrically opposed to the classical ideal of contract as an institution creating benefits and obligations

only to its parties. At the same time, extending the governance effect of contract beyond its legal-institutional boundaries is exactly the kind of a radical paradox that has helped enable new forms of economic production. These range from the rise of centralized mass production in the 19th century and the fragmentation of centralized production entities into global value chains in the 20th century to the further fragmentation of global value chains through the rise of digital platforms in the 21st century. All these new forms of production have utilized new technologies and ideologies of governance to extend the governance effects of contract beyond privity. At the same time, the development of all these new forms of production has been aided by law's ignorance of how they can be governed, which has served to limit liability for various social, environmental, or economic contingencies.

The notion that a contract can be used to extend governance beyond privity is at least as crucial for the organization of production as the idea that a parent company can govern the multiple tiers of subsidiaries in a corporate group. Despite this, governance through contract has remained comparatively unresearched. To offset this, I have two aims in this paper. First, I chart a short genealogy of new forms of production over the last two hundred or so years. In doing so I highlight the contradiction between how new forms of production have relied on contractual boundaries to limit liability and, at the same time, utilized new technologies and ideologies of governance to extend the governance effects of contract beyond privity. Second, I collate a typology of approaches to studying how contracts are used to govern other actors. In doing so I concretize the practical means by which contracts are used to extend governance beyond privity. My hope is that further development of these two tools, the genealogy and the typology, could pave way for research helping us understand the role of law in enabling and regulating new forms of production, such as today's global value chains, and help us overcome their inherent sustainability deficit.

I start in Section 2 with an overview of the development of contractual private ordering within law and its centrality for new forms of production. In doing so I chart a chronological genealogy of new forms of production and their relationship to contract. In Section 3 I compare early approaches to understanding how contracts are in practice used to govern actors beyond privity and, based on these, draw together a basic chronological typology of governance through contract summarized in Table 1. Finally, in Section 4 I flesh out the relevance of continued development of these two tools for future research, in particular in relation to developing our understanding of the relationship of law and new forms of production. While much work remains to be done, I hope that this initial endeavour will help motivate future interdisciplinary research on the topic.

2 The Role of Contract in a Genealogy of New Forms of Production

The history of contract law has to a considerable extent dealt with the question of to what extent private ordering through contract is allowed and, if allowed, what is the relationship of this private ordering to other legal remedies.[1] Classic cases have dealt with questions such as whether the existence of a contract can block other causes of action, such as those sounding in tort,[2] the material scope of contractual private ordering,[3] whether contractual private ordering can extend beyond privity,[4] and whether contract can be used to preclude trial by court for example by shifting recourse to arbitration[5] or other forms of dispute resolution[6] and, thereby, avoid remedies available in national courts,[7] to name just a few. And to make things more challenging, any particular approach to contractual private ordering may work out differently depending on the legal system in question.[8]

The changing parameters of private ordering have played a crucial role in the development of new modes of economic production. The last two hundred years have witnessed, first, the rise of centralized mass production during the 19th century, then the fragmentation of centralized mass production into global value chains formed by transnational corporate groups and contractually organized

1 P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

2 V. Palmer, 'Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright' (1983) 27 *American Journal of Legal History* 85; J. Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *Law Quarterly Review* 249.

3 D. Bernstein, 'Lochner v New York: A Centennial Retrospective' (2005) 85 *Washington University Law Quarterly* 1469.

4 *Dunlop Pneumatic Tyre Co* v *Selfridge & Co* (1915) AC 847 (1915) and M. A. Eisenberg, 'Third-Party Beneficiaries' (1992) 92 *Columbia Law Review* 1358; R. Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (London: Routledge, 2000).

5 A. Tweeddale and K. Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (2011) 77 *Arbitration* 423.

6 M. Pryles, 'Multi-Tiered Dispute Resolution Clauses' (2001) 18 *Journal of International Arbitration* 159; S. Chapman, 'Multi-Tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27 *Journal of International Arbitration* 89.

7 M. Gilles, 'The Day Doctrine Died: Private Arbitration and the End of Law' (2016) 2016 *University of Illinois Law Review* 372.

8 B. Markesinis, 'An Expanding Tort Law—The Price of a Rigid Contract Law' (1987) 103 *Law Quarterly Review* 354; S. Whittaker, 'Privity of Contract and the Law of Tort: The French Experience' (1995) 15 *Oxford Journal of Legal Studies* 327; J.M. Feinman, *Professional Liability to Third Parties* (3rd ed, New York: American Bar Association, 2013).

networks of suppliers during the 20th century, and most recently the on-going fragmentation of global value chains to economies governed through digital platforms in the early 21st century. Each of these transformations is reliant on new technologies and ideologies of governance and how they are reflected in the private law institutions of contract and corporation.

The rise of centralized mass production rested on global distribution networks enabled by new transport technologies, such as steamships and railroads, and an ideology of centralization for bureaucratic control and efficiency.[9] At the same time, then-reigning paradigms of contractual privity and the independence of corporate entities insulated this new form of production from society-at-large. For example, existing common law rules of private law enabled manufacturers to avoid liability for many work-related accidents towards employees,[10] while the notion of freedom of contract could be used to shield manufacturers from regulatory interference in employment relationships.[11] For another example, in the new distribution chains composed of several bilateral contractual relationships there was typically no legally meaningful relationship between manufacturers and users,[12] thus effectively shielding manufacturers from liability for harm caused by defectively manufactured goods.[13] In both cases regulatory and doctrinal developments, ranging from labour and food and drug laws to the torts of negligence and product liability, eventually responded to the problems of centralized mass production.[14] These developments, however, generally required decades and were often limited to specific national regulatory contexts.

The regulations that arose as a response to the ills of centralized mass production were offset by the rise of a new form of production, global value chains, in the 20th century.[15] Global value chains are the result of new communication technologies that enable the control of production from afar[16] and an ideology of pro-

9 R. Baldwin, *The Globotics Upheaval: Globalization, Robotics, and the Future of Work* (Oxford: Oxford University Press 2019).

10 J. Stapleton, *Product Liability* (London: Butterworths, 1994) 193–195.

11 Bernstein, n 3 above.

12 Eg in scenarios such as *Mazetti* v *Armour & Co*, 135 P 633 (Washington 1913), *Donoghue* v *Stevenson* [1932] AC 562 (UK House of Lords, appeal from Scotland) and *Henningsen* v *Bloomfield Motors* 161 A 2d 69 (New Jersey 1960).

13 Stapleton, n 10 above; S. Whittaker (ed), *The Development of Product Liability* (Cambridge: Cambridge University Press 2010).

14 For the example of product liability, see Stapleton, n 10 above; Whittaker, n 13 above.

15 Baldwin, n 9 above.

16 Eg T. Dietz, 'Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry' (2012) 37 *Law and Social Inquiry* 25.

duction highlighting a focus on core competences instead of trying to bundle production under one roof.[17] Under global value chains, the effective *value-chain-wide* governance of outsourced production, for example in relation to product quality, target-market standards, cost efficiency, and research and development, is a condition precedent for outsourcing to work efficiently.[18] At the same time, this governance is focused primarily on the 'internal' efficiency of production: there is no obligation to extend such governance to the social, environmental, cultural, and economic contingencies of outsourced production.[19] The result is that global value chains outsource not only production but also the negative consequences of production to actors and jurisdictions that may be less-well equipped to deal with them.[20] Only over the last decade or so have we begun to witness a rise in regulation and doctrinal developments imposing on lead firms a requirement to govern their value chains with regard to the so-called externalities of production.[21]

Now, in the beginning of the 21st century, digitalization via algorithms and telepresence and an ideology of privately governed markets, ie 'platforms', are fragmenting global value chains by giving rise to ubiquitous blue- and white-collar labour forces that transcend national borders.[22] Under the earlier global value chain model, buyer- or producer-type lead firms had a primary interest in organiz-

17 C.K. Prahalad and G. Hamel, 'The Core Competence of the Corporation' (1990) 68 *Harvard Business Review* 79; Baldwin, n 9 above.

18 For some examples, see G. Gereffi, J. Humphrey, and T. Sturgeon, 'The Governance of Global Value Chains' (2005) 12 *Review of International Political Economy* 78; P. Kajüter and H.I. Kulmala, 'Open-Book Accounting in Networks: Potential Achievements and Reasons for Failures' (2005) 16 *Management Accounting Research* 179; R.J. Gilson, C.F. Sabel, and R.E. Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration' (2009) 109 *Columbia Law Review* 431.

19 There are examples of successful private governance mechanisms related to for example governing labour conditions throughout a value chain, but these are generally voluntary and thus in many ways limited for example in personal, material or geographic scope. J. Salminen, 'The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66 *American Journal of Comparative Law* 411.

20 P. Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 *Indiana Journal of Global Legal Studies* 29. For an example of how local outsourcing may also displace regulations, see D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge: Harvard University Press, 2014).

21 J. Salminen and M. Rajavuori, 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis' (2019) 26 *Maastricht Journal of European and Comparative Law* 1 <https://doi.org/10.1177/1023263X19871025>; J. Salminen, 'From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production' (2019) 23 *Competition & Change* 420.

22 Baldwin, n 9 above.

ing and governing production that they had outsourced to their value chains.[23] Under the platform economy, governance itself is outsourced from buyer- or producer-type lead firms to platform operators. This democratizes production by enabling anyone, even private individuals, to become both 'lead firms', who source production to others via digital platforms, *and* 'producers', who sell their products or services via the same digital platforms. The involvement of platform operators results in a tripartite structure where a buyer and seller agree to transact not only with one another but also under the general terms and conditions set by the platform operator. This tripartite structure displaces earlier regulations that require buyer- or producer-type lead firms to govern the social, environmental, and economic contingencies of their value chains.[24] There are early regulatory and doctrinal signals that platform operators are increasingly facing legal obligations requiring the adequate governance of platform users.[25] Nonetheless, we are still a long way from generally requiring platform operators to govern externalities more generally, for example platform users' carbon footprints as they use platforms to outsource production.[26]

Under all these three forms of production a paradox arises. In the case of centralized mass production, manufacturers were in the best position to govern labour conditions and defect-free manufacturing. Contractual organization allowed them to escape liability for *not* doing so. In the case of global value chains, lead firms are in an excellent position to ensure that not only internalities of production, such as product quality and the cost-efficiency of production, are effectively

23 G. Gereffi, 'Shifting Governance Structures in Global Commodity Chains, With Special Reference to the Internet' (2001) 44 *American Behavioral Scientist* 1616.

24 Recent transnational sustainability laws that are a response to the sustainability deficit of global value chains may become moot with consumers increasingly using platforms located in foreign jurisdictions to outsource their purchases, for example by designing clothes the manufacturing of which is then automatically outsourced to Chinese or South Asian factories. In Sweden this has recently led to a renewed focus on automatically taxing consumer shipments arriving from outside the EU, which together with administrative fees considerably increases the price of low value shipments. See Postnord, 'Moms på Kinapaket', https://www.postnord.se/om-oss/en-foranderlig-varld/moms-pa-kinapaket.

25 See, eg, the European agenda for the collaborative economy, COM(2016) 356 final; *Uber BV & Ors* v *Aslam & Ors* [2018] EWCA Civ 2748; ECJ rulings C-434/15 and C-390/18; and K. Conger and N. Scheiber, 'California's Contractor Law Stirs Confusion Beyond the Gig Economy' *New York Times*, 11 September 2019.

26 For example, the reporting of environmental effects of transport to platform users is still in its infancy. S. Sankari, 'Product information on freight emissions for consumers—changing the market towards sustainability', in E. Eftestøl-Wilhelmsson, S. Sankari and A. Bask (eds), Sustainable and Efficient Transport: Incentives for Promoting a Green Transport Market (Cheltenham: Edward Elgar, 2019).

governed throughout the value chain, but also the environmental, social, cultural, and economic externalities of production. However, contractual organization allows them to escape liability for not governing production related externalities. In the case of platform economies, the same applies once again: governance is outsourced to platform operators who are best situated to govern the transactional parameters between buyers and sellers, but contractual organization allows platform operators to focus on governing the economic efficiency of the buyer-seller transaction rather than its social, environmental, or economic externalities.

Effective control is a prerequisite for the fragmentation of production. At the same time, control is also a burden and potential liability. Actors are generally interested in developing effective value chain governance only when it suits their interests, for example when it adds to their bottom-line by increasing productive efficiency or by countering media fallout, or when they are required to do so, for example by regulation requiring that end products are in line with target market product safety or emission requirements. More recently, these debates have extended to cover general duties of lead firms to govern their contractually organized production in relation to 'externalities' ranging from human rights violations and environmental degradation to tax evasion. But to show how exactly governance through contract works, a clarifying typology is needed. This is my focus in the next section.

3 A Typology of Governance through Contract Beyond Privity

3.1 Beyond Markets and Firms: A Marriage of Macneil's Abstractions of Contract Law and Williamson's Transaction-Cost Economics

The distinction between two modes of governance, markets and firms, is a long-standing classic in economics.[27] One side of this distinction, corporate and corporate group governance, has grown into a massive scholarly endeavour spanning several disciplines.[28] The other side, governance through contract, has garnered comparatively little research. While it has been reflected upon also in legal scho-

27 R.H. Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

28 D. Levi-Faur, 'From "Big Government" to "Big Governance"?', in D. Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012).

larship,[29] there does not seem to be a focused juridical approach to the different contractual *mechanisms and techniques* by which governance can be extended beyond contractual boundaries. It is easy to see why because the very idea of governance through contract beyond privity is, from a legal perspective, a stark aberration of currently reigning paradigms of contractual privity.

At the same time, it is clear from the above genealogy of new forms of production and their relationship to law that we need a better understanding of how contractual mechanisms and techniques are used to govern beyond privity. One early attempt to systematically go beyond the firms and markets distinction is Williamson's work on contract governance as part of transaction-cost economics.[30] Williamson specifically based his approach on Ian Macneil's abstraction of contract and thus a brief excursion to Macneil's work is necessary.[31]

Macneil proposed a differentiation between three phases of development of contract law, these being classical contract law, neo-classical contract law, and relational contract law.[32] Underlying *classical contract law* was the idea that business (and other) relationships could be reduced to contracts that were insulated from any externalities and perfectly reflected the relationship of the parties. This was the stereotypical market contract through which a judge could easily decipher the rights and obligations of parties in any given contingency. *Neo-classical contract law* arose following the problems of classical contract law in dealing with changed circumstances particularly in the context of long-term contracts. Instead of a perfect contract insulated from any externalities, contracts were tied to external parameters by incorporating third-party standards or experts. *Relational contract law*, finally, would dissolve the paradigmatic primacy of classical contract. Instead, contracts would become starting points from which to analyse the parties' relationship, with focus being placed on the relationship itself as it evolves outside the four corners of the contract. Instead of focusing on the contractually defined rights and obligations of parties, Macneil proposes that relational contract law focuses more on the evolving common interests of actors.

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29 Eg P. Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 191; F. Möslein and K. Riesenhuber, 'Contract Governance – A Draft Research Agenda' (2009) 5 *European Review of Contract Law* 248; S. Grundmann, F. Möslein, and K. Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford: Oxford University Press, 2015); P. Zumbansen, 'Private Ordering in a Globalizing World: Still Searching for the Basis of Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 181.

30 O. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22 *Journal of Law & Economics* 233.

31 See, in particular, fn 26 in Williamson, n 29 above.

32 Eg I.R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854.

Macneil's narrative is extremely abstract, and Williamson found it stimulating exactly due to its power to abstract the complexity of real-world contractual relationships.[33] Building on it, Williamson proposed that Macneil's three phases of contract law would reflect different contexts of transaction under Williamson's transaction-cost economics approach. Macneil's description of classical contract law would correspond to the classic idea of 'market governance' as it provides a functional foundation for the comparatively straightforward, recurrent or non-recurrent transactions that are most efficient when governed by market-price mechanisms. If, instead, we are dealing with *non-recurrent complex transactions* that require transaction-specific assets, then 'trilateral governance' would be a more efficient mode of governance. Macneil's neo-classical contract law represents such trilateral governance because third-party standards and experts are incorporated to help govern the transaction. Finally, when dealing with *recurrent complex* transactions Williamson sees that we are in effect talking about relationships. Depending on the amount of uncertainty, suitable governance modes would be either the type of relational contracting proposed by Macneil, which Williamson calls 'bilateral governance' due to its focus on the parties instead of market-price mechanisms or third parties, or the classic Coaseian firm, which Williamson refers to as 'unilateral governance' to highlight its nature as a single entity absorbing all aspects of governance under its wings.

While highly abstract, Macneil's relational contract law and Williamson's bilateral governance are also reflected in so-called 'network' or 'hybrid governance' focusing on the role of social relations in creating mechanisms of governance.[34] The legal relevance of such network or hybrid governance has been disputed,[35] but at the same time other scholars have been apt to point out that it need not be a traditionally construed contract or a sui generis legal concept through which any new form of governance finds reflection in law—legal relevance can arise under other, for example, tortious theories even if they are founded on a distinctly contractual relationship.[36]

This brief and simplified description of Macneil's and Williamson's work highlights the roles that different contractual mechanisms and techniques have in governance. In particular, it makes a distinction between market-price con-

33 Williamson, n 29 above, fn 26.

34 W.W. Powell, 'Neither Market Nor Hierarchy: Network Forms of Organization' (1990) 12 *Research in Organizational Behavior* 295.

35 R.M. Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149 *Journal of Institutional and Theoretical Economics* 698.

36 G. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-Time in Sozialwissenschaftlicher und Juristischer Sicht* (Baden-Baden: Nomos, 2004).

tracts, contracts that involve third party standards or experts and contracts that use advanced relational techniques to enhance the parties' private ordering. At the same time, all these approaches, save perhaps the firm, are necessarily founded in contract. From a legal perspective, this kind of analytical differentiation between different kinds of contractual governance is highly novel. It differentiates between abstractions of *contractual technique* (ie what kind of mechanisms are involved) instead of, for example, more traditional differentiation between contractual setting in the form of 'contract types' (eg between property transactions, mandates, lease agreements, dispute resolution agreements, and enterprise agreements). In effect, it opens up a technique-founded typology within the traditionally unified field of commercial sales transactions.

3.2 From Bilateral Governance to Contractually Organized Supply Chains: The Governance Analytic of Global Value Chain Theory

Williamson's and Macneil's work focused, at least on the face of it, on bilateral relationships. Following the precedents of world-systems theory and global commodity chain theory, under global value chain ('GVC') theory the focus is instead on production organized as chains of corporate entities connected by contractual or equity relationships and coordinated by a lead firm.[37] Gereffi, Humphrey, and Sturgeon propose looking at how lead firms extend governance throughout their value chains through specific modes of governance, thus asserting the centrality of different modes of governance for production.[38] Instead of the 'recurrence' and 'asset-specificity' of transactions that Williamson focused on, Gereffi, Humphrey and Sturgeon propose sorting transactions according to the *complexity* of information required for a transaction, the possibility of *codifying* this information so that it can be shared, and the *capabilities* of the supply base in relation to transactional requirements.

37 J. Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Competition & Change* 153; J. Bair, 'Global Commodity Chains: Genealogy and Review', in J. Bair (ed), *Frontiers of Commodity Chain Research* (Stanford: Stanford University Press, 2009). On the international prominence of GVC theory, see eg G. Gereffi, 'Global Value Chains in a Post-Washington Consensus World' (2014) 21 *Review of International Political Economy* 9; WTO, 'Global Value Chain Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World' (2019).

38 Gereffi, Humphrey, and Sturgeon, n 18 above.

Despite differences in analytical approach and its ostensible focus on chains of suppliers, ultimately the 'governance metric' of GVC theory is extremely similar to that of Macneil and Williamson. In addition to markets and firms, Gereffi, Humphrey, and Sturgeon refer first to *modular governance*, based on external standards that can be used to codify transaction specific information and spread this throughout the value chain. In essence this is identical to the focus on third-party standards in Macneil's neoclassical contract law and Williamson's trilateral governance. Second, Gereffi, Humphrey, and Sturgeon refer to *relational governance*. Here informational content is so particular that it cannot be fully codified into a contract and thus is instead dependent on for example personal relationships. A joint venture for product development serves as an example. Relational governance is clearly related to Macneil's relational contract law, Williamson's bilateral governance and work on hybrid/network governance.

Third, and here deviating from earlier approaches, Gereffi, Humphrey, and Sturgeon propose 'captive governance' as a possible fifth mode of governance between relational governance and the firm. The primary defining factor of captive governance is a severe power asymmetry resulting from:[39]

> *...low supplier competence in the face of complex products and specifications requir[ing] a great deal of intervention and control on the part of the lead firm, encouraging the build-up of transactional dependence as lead firms seek to lock-in suppliers in order to exclude others from reaping the benefits of their efforts. Therefore, the suppliers face significant switching costs and are 'captive'. Captive suppliers are frequently confined to a narrow range of tasks – for example, mainly engaged in simple assembly – and are dependent on the lead firm for complementary activities such as design, logistics, component purchasing, and process technology upgrading. Captive inter-firm linkages control opportunism through the dominance of lead firms, while at the same time providing enough resources and market access to the subordinate firms to make exit an unattractive option.*

Captive governance is thus characterized as a severe power asymmetry between lead firms and comparatively incapable suppliers in the production of easily codifiable complex goods. Focusing on power asymmetries is certainly a valid point to make. However, it may also highlight a problem in contractual abstractions far removed from law. From a legal perspective it would seem natural that power asymmetries are part of all contracts and thus all forms of governance—even relational ones. Thus perhaps 'captivity' could be seen less as an independent mode of governance but rather a possible aspect of all forms of governance.[40]

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39 Gereffi, Humphrey, and Sturgeon, n 18 above, 86–87.

40 Gereffi, Humphrey, and Sturgeon admit that not all combinations of their three factor approach lead to specific forms of governance. Gereffi, Humphrey and Sturgeon, n 18 above, 85, n 10.

The governance metric of GVC theory highlights two important issues of governance through contract. One is the effect that governance has beyond bilateral relationships, for example when lead firms require the whole value chain to adhere to specific standards, even if Gereffi, Humphrey, and Sturgeon's focus is still primarily on the first few tiers of suppliers.[41] The other is the role of power asymmetries in governance. Despite these very salient perspectives and a difference in how the modes of governance are justified, from a practical level the GVC governance analytic differs surprisingly little from the work of Macneil and Williamson. However, both the issues of chain governance and power asymmetries have received more focus in recent empirical work on private governance in supply chains as discussed next.

3.3 The Empirical Study of Governance Through Contract Beyond Privity: Richard Locke's Work on Private Power in Supply Chains

Richard Locke's extensive empirical research has focused on the effects of private power in relation to the governance of labour standards of suppliers in the global garment and electronics industries.[42] Locke separates four evolutionary phases of private governance that he identifies on grounds of broad ethnographic and empirical studies. Evolutionary, because each new phase of private governance seems to rise from the failure of previous ones. Again, Locke's different phases of private governance seem to bear a considerable resemblance to the work of Macneil, Williamson, and Gereffi, Humphrey, and Sturgeon.

The first of Locke's evolutionary phases is an implied 'zero governance' phase. Here, actors simply do not focus on governance, trusting that actors independently follow relevant standards and have included compliance costs in the market-price that they have offered. This reflects Macneil's classical contract law and the market governance of Williamson's and Gereffi, Humphrey, and Sturgeon's models. The second phase, which Locke calls 'private compliance', focuses on ethical standards that lead firms cascade throughout chains of contracts so that they cover all relevant value chain actors. According to Locke, such standards are generally coupled with third-party monitoring and auditing and various sticks and carrots related to how well they are complied with. Thus private compliance

41 Gereffi, Humphrey, and Sturgeon, n 18 above, 98.

42 R.M. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge: Cambridge University Press, 2013).

very much resembles Macneil's neoclassical contract law, Williamson's trilateral governance, and Gereffi, Humphrey, and Sturgeon's modular governance.

Locke's third evolutionary phase, 'capability building', focuses on the means by which lead firms in practice can help suppliers comply with required standards. Instead of focusing on one-sided standard setting, capability building emphasizes transparency between actors. Transparency allows lead firms to direct technical, social, cultural, or other assistance to suppliers as needed. From this perspective capability building aims to build a deeper relationship between actors which, due to the context-specificity and comparative unforeseeability of required governance measures, transcends simple contracts and thus very much resembles Macneil's relational contracting, Williamson's bilateral governance and Gereffi, Humphrey, and Sturgeon's relational governance.

Finally, and as what could perhaps be characterized as a fourth phase of development, Locke proposes two additions for making capability building more effective. The first of these is a more profound level of partnering between lead firms and their suppliers, for example by committing to comparatively foreseeable long-term relationships. This would be important to provide stability to buyer—supplier relationships so that both actors can focus more on developing governance than responding to rapidly changing production quotas. The second is a more profound level of integration between private and public governance. This would allow private mechanisms to better integrate into public governance frameworks so that both could support one another in ensuring effective governance. This fourth phase, which could be called for example 'partnering', is in essence a more intense form of capability building that more tightly ties together the fates of lead firms, suppliers, and public regulation. Thus Locke's third and fourth evolutionary phases could perhaps be seen as two subcategories of relational governance.

A major difference between the approaches of Macneil, Williamson, Gereffi, Humphrey, and Sturgeon, and Locke is that the latter focuses on tangible empirical research instead of broader legal, theoretical, or analytical perspectives. Furthermore, Locke's approach specifically discusses contractual mechanisms and their effect beyond privity, providing a potential measure of clarity to the other, often very abstract approaches discussed above. Locke's approach shows that any typology of governance through contract could be further concretized through further case studies highlighting contractual mechanisms for developing transparency and capability building. Just a handful of readily available examples include open books accounting in automotive manufacturing,[43] the governance of foreign IT sup-

43 Kajüter and Kulmala, n 18 above.

pliers,[44] the mechanisms arising out of the ashes of Rana Plaza,[45] and even recent 'carbon pacts', agreements on reducing value-chain-wide carbon emissions.[46]

3.4 Collating a Typology of Governance Through Contract, Beyond Privity

All the four approaches discussed here share the same basic traits. At one end each has market governance, at the other end governance through a firm or corporate group. In between are on the one hand contracts with a focus on third-party inclusivity and on the other so-called relational contracts. Two of the models add additional forms of governance: the captive mode of governance proposed by Gereffi, Humphrey, and Sturgeon and the more integrated capability building proposed by Locke. The results of this preliminary collative exercise are presented in Table 1.

Contract Paradigm	Macneil 1978	Williamson 1979	Gereffi, Humphrey, and Sturgeon 2005	Locke 2013
Classic Privity	Classical Contract Law	Market Governance	Market Governance	Market Governance
3rd Party Inclusivity	Neo-Classical Contract Law	Trilateral Governance	Modular Governance	Private Compliance
Special Relationship	Relational Contract Law	Bilateral Governance	Relational Governance	Capability Building
Increased Intensity of SR	–	–	Captive Governance	Partnering
(Firm)	(Firm)	(Unilateral Governance)	(Hierarchy)	(Firm)

This typology provides a concretization of different techniques and grades of intrusiveness through which an actor can govern others beyond contractual boundaries. At the first level, there is no overt control of actors beyond privity. Nonetheless, the price-mechanism embedded in a contract no doubt extends influence beyond privity by affecting a party's choices on how to organize production for example via outsourcing. At the second level, a lead firm overtly extends a measure of control

44 Dietz, n 16 above.

45 Salminen, n 19 above.

46 For the Carbon Pact between Maersk and BMW, see the videos at http://news.maerskline.com/Carbon_Pact_BMW.

to third parties by requiring that they comply with specific standards that can be monitored through third-party auditors. At the third and possible fourth levels, context-specific action is directed to actors both within and beyond privity on a case-by-case basis to guarantee that required standards are met. The final level, then, would imply the dissolution of entity boundaries through vertical integration.

Each gradient of the typology is no doubt comparatively loose and contains a diversity of mechanisms that could be seen to fall under it. Nonetheless, the typology provides a concise abstraction of different techniques that extend governance beyond individual contracts. The typology would also seem to have broad support. While its constituting approaches are founded in different methodologies, contexts, and research traditions, they are similar in their outcome. Furthermore, the diverse perspectives on governance through contract provided by the different theoretical, analytical, and empirical approaches support and clarify one another through the combined power of their distinct perspectives. Together, they also provide a measure of concretization in face of their abstract starting points. This is especially so with regard to so-called relational mechanisms of governance.

In addition to the second-hand accounts of mechanisms provided by scholars such as Locke, Dietz, and Kajüter and Kulmala and through corporate promotions, it seems we are finally beginning to have actual relational governance contracts openly available for teaching and debate, such as the Accord on Fire and Building Safety in Bangladesh that focuses on transparency, inclusion, and capability building through a plethora of different contractually embedded mechanisms. Together with such practical, concrete examples, the typology highlights the different contractual mechanisms that can be used to extend governance beyond contractual boundaries. While much further research is necessary, developing the typology could provide unprecedented insight into the techniques and theoretical underpinnings of governance through contract beyond privity.

4 The Relevance of Genealogies and Typologies: An Agenda for Future Research in Law, Governance, and Production

Both the genealogy and typology outlined here are bare and preliminary. Further research on the relationship of different modes of production, governance and law is necessary to flesh out not only their overarching tendencies, but also the manifold nuances in detail that have been left out. At the same time, it seems that both the genealogy and the typology are important for developing our under-

standing of both economic production and law. They also have potential for profound societal impact, ranging from increasing our understanding of how production can be made more effective to enabling the spread of new forms of sustainability governance.

One of the major challenges of legal research on governance is the lack of access to private governance instruments. Corporations treat governance as closely guarded business secrets that are crucial not only for their bottom-line but which may, if openly divulged, open up liabilities. If state-of-the-art governance mechanisms end up at the heart of a dispute, these disputes are almost invariably resolved in closed door proceedings.[47] Thus there is extremely little information available on the state-of-the-art of governance contracts. The one major exception is the Accord on Fire and Building Safety in Bangladesh. This has been made public due to the need for positive publicity following the 2013 Rana Plaza catastrophe in Bangladesh.[48] Otherwise we are reliant on indirect information, for example through business and management researchers reporting on new governance mechanisms, possibly with lesser focus on legal details, such as contract terms, than legal scholars would prefer.[49]

Developing an increasingly detailed typology helps overcome this problem. It collates the information we have about diverse mechanisms into an accessible whole with comparatively clear borders between different ideal types of governance. Once we have gathered enough examples of, say, relational modes of governance and how they operate, we can gain a better understanding of other, similar mechanisms that corporations talk about summarily, for example in their reporting, but do not wish to present openly. Knowing the details of how open books accounting works in German automotive manufacturing and how Bangladesh Accord -like multipolar reflective governance mechanisms work in resolving labour conflicts enables us to extrapolate towards other instruments. For example, Maersk refers to 'carbon pacts' with major customers such as BMW in its sustainability reporting but leaves unclear the majority of details on how they operate. A typology may help us decipher the modus operandi of such instruments.[50]

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47 Public litigation over contractual value chain governance to date seems to have focused primarily on the role of standards and auditing, not relational governance, as in *Doe* v *Wal-Mart Stores, Inc* (572 F 3d 677, 9th Circuit 2009) and *Das* v *George Weston Limited* (2018 ONCA 1053).

48 Salminen, n 19 above.

49 Eg Kajüter and Kulmala, n 18 above.

50 The promotional video available at http://news.maerskline.com/Carbon_Pact_BMW refers to a five year agreement that, based on transparency between Maersk and BMW, allows Maersk to coordinate transport between BMW's 12000 suppliers in 70 countries and thus decrease the GHG

A typology presents the *possibilities* of governance. It shows the diversity of mechanisms that can be used to govern actors beyond privity and thus lets us imagine the possible. This has a profound impact on not only developing and spreading new forms of governance but also in developing their regulation. It provides models and standards of governance for regulation to build on. And in relation to private law doctrine it shows how actors can and do govern their value chains, providing ideas of whether and how a standard of care might be appropriately set. More generally, a typology helps us understand the relationship of law and production. Governance is a multimodal creature. It is founded in contract but transcends the contents and boundaries of contract in multiple ways, as already noted by Macneil. The key to understanding for example relational governance lies in the abstract details that a typology conjures, allowing us to operationalize not only contractual modes of argument but also others, such as the tort of negligence. From this perspective, a typology may help courts to assess the existence of a duty of care based on what is technically and practically feasible.

A typology can have a profound impact on sustainability, not only by helping disseminate best practices of sustainability governance and spreading understanding of the manifold ways in which lead firms can effectively govern their value chains beyond privity. As noted, a typology also has impact on sustainability regulation and private law doctrines of liability for unsustainable production practices. It seems that in several cases suppliers have questioned whether sustainability clauses are in fact real, enforceable contract clauses.[51] In particular, suppliers have argued that they cannot ensure compliance with certainty and therefore such clauses would be unenforceable against them. This leads to the classic unenforceability issue: if private actors (and, for that matter, courts) do not know how to enforce a certain contractual requirement, it is typically moot.[52] Providing a detailed typology of the means by which corporations can and do govern their value chains may help show how this governance is possible.

A genealogy of production and governance, in turn, opens up a whole other set of questions. In particular, it highlights the crucial role of legal institutions of contract and corporation as structural foundations for new forms of production all the way from centralized mass production to global value chains and the platform economy. The relationship of legal form and technologies and ideologies of

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emissions of transport. The pact becomes more comprehensible when read in the light of governance arrangements such as that described by Kajüter and Kulmala, n 18 above, 186–190.

51 Eg M. Gausdal, 'Some Recent Scandinavian Case Law on Fundamental Worker Conditions in Public Contracts-A Contractual Perspective', working paper on file with author.

52 See, eg, the development of enforceability in relation to mediation clauses, for which Pryles, n 6 above, 159–176.

governance that extend beyond this form underscores the role of law in enabling new forms of production. This leads to questions of political economy, such as the extent to which contractual privity has contributed to the development of new and more efficient forms of production on the one hand and how the teaching of contractual privity in law schools as a nigh sacrosanct principle has contributed to the lack of sustainability regulation on global value chains and the platform economy on the other.[53] Understanding and balancing these factors is a major task for future legal research in view of the sustainability of current and future forms of production.

Finally, suppose that governance through contract beyond privity is as common a phenomenon as it would seem to be on the basis of evidence from beyond the law. In that case, a major part of current teaching of and research on contract law would be focused on a paradigm of contract that, in light of extra-legal evidence, is less of a premeditated endeavour and more akin to the rote transmission of a historical relic that happens to convey enormous economic advantages to developing new forms of production. These advantages include the automatic outsourcing of liability for production-related externalities, such as social, environmental, cultural, and economic sustainability. If so, the balance of benefits and costs of our current approach to teaching and researching contract should no doubt be scrutinized in a critical manner.

53 IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 *London Review of International Law* 57.