Contents

List of figures and table xi
Preface xii
Table of cases xiv
Table of legislation xviii

1. Introduction 1
   1.1 New organizational forms – the business reality 1
   1.2 Dynamic networks 3
   1.3 Types of dynamic networks 5
      1.3.1 Spontaneous and temporary virtual enterprises 5
      1.3.2 Enterprise pools and virtual enterprises formed out of such pools 6
      1.3.3 Long-term dynamic networks with a lead partner 8
   1.4 Background: trends of organizational evolution 9
   1.5 Aim, orientation and outline of this book 13
      1.5.1 Hybrids, collaborative contracts and more 17
   1.6 Methodological considerations 21
   1.7 Terminology 23
      1.7.1 Classical contract 23
      1.7.2 Collaborative network, cluster and enterprise pool 24
      1.7.3 Virtual organization, virtual enterprise 26
      1.7.4 Difference from supply chains 33
      1.7.5 Distinguished from joint ventures, alliances, consortia and partnering 34

2. Case studies 39
   2.1 Introduction 39
   2.2 Switzerland 42
      2.2.1 Virtuelle Fabrik 42
      2.2.2 VirtuellBau 46
   2.3 Austria 50
      2.3.1 The Plastics Cluster 50
      2.3.2 Team Santé 51
2.4 Germany 52
   2.4.1 KITD Network (South-West Saxony) 53
   2.4.2 Silicon Saxony 56
   2.4.3 AMZ network: Saxony automotive supplier network 58
   2.4.4 ICM network 59
2.5 Italy 60
   2.5.1 Prato textile district 60
   2.5.2 Promosedia 65
2.6 England 67
   2.6.1 Square 5 Ltd 67
2.7 Norway 69
   2.7.1 The Arena programme – SIVA Norway 69
   2.7.2 Enterprise pools in Norway 70
2.8 The broker: Elance 71

3. The precontractual stage 74
   3.1 Introduction 74
   3.2 Different precontractual phases 74
   3.3 The role of enterprise pools 75
      3.3.1 Introduction 75
      3.3.2 The notion of trust 77
      3.3.3 Providing a framework for trust and cooperation 81
      3.3.4 Legal structures used to set up enterprise pools and clusters 84
      3.3.5 Function of the legal relationship between enterprise pool members 91
   3.4 The creation of a virtual enterprise: the negotiation phase 92
      3.4.1 Introduction 92
      3.4.2 Types of preliminary documents and agreements 95
         3.4.2.1 Introduction 95
         3.4.2.2 Letters of intent 95
         3.4.2.3 Preliminary agreements 100
      3.4.3 Legal concerns at the precontractual stage 103
         3.4.3.1 Introduction 103
         3.4.3.2 Exclusive cooperation/non-competition 103
         3.4.3.3 Confidentiality 105
         3.4.3.4 Costs and private international law issues 108
      3.4.4 Is there a duty to negotiate in good faith? 109
         3.4.4.1 Introduction 109
Contents

3.4.4.2 The principle of good faith 110
3.4.4.3 Culpa in contrahendo and precontractual liability 115
3.4.5 Synthesis on good faith negotiations: three categories of behaviour 121
3.4.5.1 Introduction 121
3.4.5.2 Duty to inform 121
3.4.5.3 Sudden and unjustified rupture of negotiations 128
3.4.5.4 No real intention to contract 136
3.4.6 Conclusion on good faith and fair dealing 137
3.4.7 Importance of good faith and fair dealing for dynamic networks 141
3.5 Negotiations between the virtual enterprise and the client 145
3.6 Long-term dynamic network with a lead partner: precontractual stage 146

4. Post formation of a virtual enterprise: contractual issues 148
4.1 Introduction 148
4.2 The role of contract 149
4.3 The effect of contracts 156
4.4 Why do contracts have the binding force of law? 159
4.5 Theories of contract law 162
4.5.1 The classical theory of contract 162
4.5.2 Neoclassical contract law 165
4.5.3 The relational theory of contract 167
4.6 Utility of the contract theories in interpreting contracts 172
4.7 Doctrinal unrest in modern contract theory 175
4.8 Synthesis: applicability of the contract theories to dynamic networked organizations 179

5. Internal relationship between the parties during performance: good faith as a behavioural criterion 186
5.1 Introduction 186
5.2 Virtual enterprises formed out of enterprise pools 187
5.2.1 Introduction 187
5.2.2 Nexus of contracts 188
5.2.3 Mixture of corporate form and contract 193
'5.2.4 Franchise agreement used together with other legal mechanisms

5.2.5 Why have these legal mechanisms been chosen?

5.3 Long-term dynamic networks with a lead partner

5.4 Nature of the relationship

5.4.1 Introduction

5.4.2 Good faith in the performance of collaborative contracts

5.4.2.1 Good faith distinguished from the notion of abuse of rights

5.4.2.2 Duty to cooperate

5.4.2.3 Duty to provide information/duty to disclose

5.4.2.4 Non-misuse of confidential information

5.4.2.5 Non-competition

5.4.2.6 Contractual provision v general law principles

5.4.3 Good faith in common law jurisdictions

5.4.4 Is there a fiduciary relationship?

5.4.5 Fiduciary duties

5.4.6 Fiduciary duties in dynamic networks

5.5 Final observations

6. Partnership law issues

6.1 Introduction

6.2 Influence of overriding national partnership law rules

6.2.1 Introduction

6.2.2 Formal registration not essential for creation

6.2.3 The intention of the parties is not conclusive

6.2.4 Are all collaborative ventures a partnership then?

6.2.5 Enterprise pools and virtual enterprises under partnership law

6.3 Consequences thereof: liability, fiduciary relationship, termination

6.3.1 Introduction

6.3.2 Liability

6.3.3 Relationship between the partners – fiduciary relationship
6.3.4 Limitations with regard to the expulsion, withdrawal or admittance of new partners, and termination of the partnership 278

6.4 Conclusion 284

7. Contractual networks 285

7.1 Introduction 285

7.2 Results from the case studies analysis on virtual enterprises 286

7.3 Networks of contracts in long-term dynamic networks with a lead partner 288

7.4 Contractual networks 289

7.5 Forms of contractual networks 290

7.5.1 Enterprise contracts, model contracts and framework agreements 293

7.6 The nature of contractual networks 296

7.6.1 Introduction 296

7.6.2 New institutional economics on hybrids: Oliver Williamson 297

7.6.3 Networks as a unitas multiplex 298

7.6.4 Hybrids: between or beyond markets and organization? 301

7.7 Privity of contract 303

7.8 Connected contracts 310

7.8.1 Introduction 310

7.8.2 Usefulness in light of traditional contract law 313

7.8.3 Usefulness in light of partnership and company law 316

7.9 Behaviour of individual firms towards each other 317

7.9.1 Introduction 317

7.9.2 Duties of loyalty and limited fiduciary duties in networks 318

7.9.3 Concluding remarks on loyalty and fiduciary duties 326

7.10 Conclusions and findings 327

8. Conclusion 330

8.1 Main objectives of the book 330

8.2 Main findings 331

8.3 Final words: a full circle? 334
A legal framework for emerging business models

Bibliography
  Books, journal articles and papers
  Other documents
  European Union projects

Index