

**Podcast title:** Adventures in Entrepreneurship Law

**Episode:** How to prevent disputes? Proactive law in practice.

**Podcast guest:** Petra Hietanen-Kunwald, LL.D., Aalto University, Business Law.

**Length of recording:** 33 minutes and 30 seconds

**Transcription notes:**

N1: Narrator 1

N2: Narrator 2

N3: Narrator 3

Host 1: Kalle Airo

Host 2: Moritz Scherleitner

Episode guest: Petra Hietanen-Kunwald

**Other information about the text:**

**[text]** = a sounds or not transcribed parts are written with square brackets e.g. [laughs] or [interview paused due to a phone call]

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[recording starts]

**N1:** Aalto University podcast.

[Intro music]

**N2:** In the adventures in entrepreneurship law podcast series Petra Hietanen-Kunwald and Kalle Airo from Aalto University, explore business law from an entrepreneurial point of view with expert guests. In some episodes, their co-host is Moritz Scherleitner. The podcast content is meant for education and is not intended to constitute legal advice.

**N3: How to prevent disputes. Proactive law in practice. Our guest is Petra Hietanen-Kunwald, Doctor of Law, Aalto University Business Law.** Entrepreneurship-law, with Petra and Kalle.

Litigation in courts is a time consuming and expensive process and can be a significant risk for startups who often have limited resources. In this episode Kalle and Moritz talk with Petra Hietanen-Kunwald about how to prevent legal disputes and how to take a strategic proactive approach to conflicts. We learn about the archetypes of dispute resolution in civil and commercial matters, litigation and arbitration on the one hand, and negotiation and mediation on the other.

**Kalle Airo:** So, when you do business, especially grow any business, you sometimes run into conflicts. And often you think of these conflicts as legal disputes only, but there are other dimensions of course, the legal dimension, but also economic and business dimension, and then the human dimension. And today, we will discuss this with an expert, who you already know relatively well. So, Petra, welcome in your new role to the hot seat.

**Petra Hietanen-Kunwald:** Thank you.

**Kalle:** So, why is this dispute resolution so hard, especially in courts?

**Petra:** I think I will take this from a larger angle to explain this. But I'm very fond of system theory which deals with different systems in which we are acting. And so, we have for instance, a business or economic system that's here, we have arts as a system, and we have the legal system and many others. In addition, we have this human dimension. So, when we have a legal dispute, very often or normally it has or is handled only within this legal system, which means that it is presented in a way that the legal system, the courts can decide the issue, which means that I have to present the case in a way I have to make claims that the court can decide and they will decide only about these legal issues.

Very often though the dispute also has this other dimension, it has a business dimension, it has a human dimension, it has other dimensions. So the court cannot see all these other dimensions, but needs to handle this dispute only within its own rationality, which means that when we have the outcome, the court decision, it completely makes sense within the legal system. So, it is according to the law, the decision, and they have handled all the relevant claims and you get your money or not. But it does not necessarily make sense in other systems.

So, while we are perfectly happy within the legal system, you can be very dissatisfied with the solution in other systems, it doesn't make sense in a business system, for instance, or it doesn't make sense from the human dimension. You can be very unhappy with the outcome even though you think that the court will now give you satisfaction or justice which is often not the case. And this is where it makes - why handling within only the legal system makes it so difficult to understand for people.

**Moritz Scherleitner:** This reminds me a bit about the system theory from Niklas Luhmann. Do you think that this is a powerful way to describe this setting?

**Petra:** Yeah, I think this is the very powerful way, the system theory from Niklas Luhmann. And he is exactly describing these different dimensions and these different systems. And when you observe what happens in the courts, they have to filter the reality they have to communicate in their own way. It exactly, it corresponds to this system theory. And that's exactly what it is built on.

**Kalle:** How do people actually end up in these legal disputes?

**Petra:** So legal disputes, you don't wake up one morning and say, now I'm going to go to court and have a claim or sue this person. What is maybe still important to say is that we talk about systems about civil law system, so not about criminal law. We talk about business conflicts and business disputes. So the thing is that, when we have a legal dispute, it is at the end of an escalation, that starts from a conflict. And, as I told you, the legal dispute is quite a narrow concept, because we have to convince the court that we are right. - It has also other elements, but it's difficult to describe all other elements.

But anyway, it starts from a conflict. And a conflict is very much different from a dispute, it's much a broader concept. And a conflict starts when somebody - there are different

definitions - , but usually it starts when somebody thinks that you or some other person frustrates your interests or concerns. So you think, for instance, or a person thinks that they are entitled to some resources, to money, to reputation, to recognition, to something else, and you as the other person, don't give it to them. So this is the conflict. And it's a very, very broad concept, and you will have conflicts every day, in different situations which do not escalate to legal disputes.

So the conflict is a very broad concept. And I also want to stress that the conflict as such is not a bad thing. So we have many conflicts in life. And very often, they contribute to the development of society, it's not about the conflict that is bad or negative or has negative effects. Sometimes it has sometimes it does not have. Very often it contributes to changes that are important. But what is important is that we handle this conflict well, because if we do not handle this, it will escalate. And then at the end of the day, we might have a legal dispute that we need to bring to court who does not really know how to handle this whole thing.

So we have very different models of how this escalation takes place. And this is also very important to understand that in the beginning - for instance there's Glasl's model on the escalation of conflicts - ... in the beginning, people still can talk to each other, they talk and you still can relate to each other. And they still are interested in the real conflict, what is the issue, what are my interests, what are my goals, and so on. But the more you get into this escalation, the less important are the real interests, but then the dispute becomes often more important than their interests, which were originally at stake, then they will only want to have right and wrong and - I need to get this through, I need to get this money, but they don't think about this early stage, about the interests, about what they are really interested in.

And this is the problem when we have a higher escalation of the conflict into a legal dispute. So at the end of the day, you do not have any more the interests that are important, but some kinds of positions, it's only - I want this, I want that but the real goals, they're not important anymore.

**Kalle:** Okay, so this actually reminds me of something that Aalto University wants everybody to learn. So it's called entrepreneurial mindset, and basically having agency and owning your own work. And there's one of the big things that if you see a problem that's almost on your turf, you should take care of that before it actually grows and the situation escalates.

**Petra:** Exactly, you have more agency, the lower you are in this escalation circle. The higher it goes, then usually you'll start to outsource the conflict, for instance, to lawyers, who will then take it to court, you don't have any agency anymore, for instance. And this is why intervention at early stages is very important.

**Moritz:** So what does an entrepreneur has to know about legal disputes?

**Petra:** What is important to know, apart from this escalation thing - that conflict tends to escalate - is to understand for the entrepreneur, that also a business conflict, a business dispute, a legal dispute, it's never only about the law, the legal dispute, it's always about the

business or about something else. So that's very, very important to understand for the entrepreneur. What is also important is that when you make claims, it's much easier, - it's even when you sell goods or services - it's much easier to just show your position. So we have kind of an iceberg model. And what we see is very often only the tip of the iceberg. So we see only the position and if it's an escalated dispute or a high escalation, we see very small positions, what they present, claims for damages or something.

What is important to understand is that behind - below, what you cannot see, there are a whole lot of other things of interests and needs, that people, even in business life do not show. We speak about the difference of positions and interests, and we can have in conflict management and conflict theory - and we can have - very different interests and basic needs that are not shown to the other party, to the other person. But for the entrepreneur, it is important because, if you want to solve, for instance, a conflict at the lower stage, you need to know that behind this tip of the iceberg, we have quite a lot of interests. And these interests can be about resources, about how to share profit, about how one person wants, for instance, dividends, the other one wants to grow the business, so there can be substantive interests.

There can be psychological interests, so you would have some kind of relation you would like to have, or you want to have cooperation. In reality, you want to have cooperation, but you don't show it. There can also be some kind of procedural interests - what I'm very interested in, because it's at the basis of procedural law - that very often people just want to be heard, they just want that somebody sees their concerns and talks to them, and then they can open up and very often, when you only look at the positions, all these other aspects are forgotten about.

So again, it is important to see these different dimensions, you have the legal dimension, you have positions, you have the business dimension, you have the human dimension, and you may have many others. So it could be arts, what is art, somebody wants to have recognition as an artist, for instance, which can be behind all these positions that are presented. And this is important to understand, because if I as an entrepreneur understand that there are other, it's not about - even when you are in business law here - it's not about the law, it's about many other things that are underneath and that should be taken into account when we have conflict management.

**Moritz:** So, to summarize this, you mean that what we see this tip of the iceberg we see for instance, that one shareholder wants the dividend distributed and the other one wants to leave the money in the company, but this is just kind of the effect or kind of the outcome of much more, which is behind this claim, much more which has informed the person's to say this or that. In conflict management, we have to try to take into account as far as possible also, what is behind the relative claims. Okay, interesting.

**Kalle:** So, when you see other people behaving in some way and communication is behavior, of course, you can only infer what they are thinking, what they are feeling. So these are kind of the things that are hidden. And even if you think that you know what the other person is feeling, or what the person is thinking, you in reality, do you not know that.

**Petra:** Exactly, because the thing is that the person communicates in a certain way. And this communication, what they show, what they say, might be very different from what they really feel or what they really want. And it's good to make a difference. And it's also good to not infer from the behavior a certain mindset or certain opinions or something like this.

**Moritz:** So, how should entrepreneurs manage conflict?

**Petra:** So, first of all, as I said, that there is an escalation, it is very important. We have this kind of movement, like proactive law, and they think - and there are very good scholars here in Finland - but all over the world also. So, proactive law, a proactive approach means that you keep the goals in mind. So, for instance, if you want to have collaboration, you try to use, even though you have a conflict, you try to use this conflict in a positive way. And then try to keep the goals in mind, the interests in mind, and then structure and use the law, or other structural changes to implement these goals.

Proactive law means also that we have a user-centered approach. So you think about the entrepreneur, about the needs of your business partner, for instance, and about your own needs, what is important to them. But in this way, you can find some better outcomes. If you have, for instance, an early intervention, a very simple example would be, for instance, if you have a problem with a business partner, you don't just write messages, nobody understands it, but you should call him or her and discuss this matter. Even in shareholders' agreements, or between shareholders, we very often see conflict. That's very typical, because there is first a honeymoon period, everybody loves the idea, everybody likes what they do. But then at a certain point, people have different interests, they are not so committed, in the same way committed as the other one.

So it is very important in a proactive approach, to not wait until it escalates but to clarify, already, in the beginning, what the interests of the different parties are, different persons, founders, for instance, how much they want to commit, what do we do if the situation changes, it's very often also a change management. So that the dispute does not escalate. And then we do not get into a situation where one partner, one founder wants to leave or has different interests than the other, so it's always good, at the very early stage, to clarify what the goals are, what the interests are, and then try to put this into a shareholders' agreement or other agreement, but also leave open room for changes, for change management, because we all know that life is not the same, it might look very different in five years.

But it's very much that we have changes in life. And we should also be able to talk about these changes. So this is a proactive approach, make clear what people want, use a certain legal frame to implement these desires, have room for early interventions, for instance, talking to each other. And then it's easier to prevent an escalation of conflict, between founders for instance.

**Kalle:** So also thinking about the long term, so not winning as much now as possible in order to be able to play together in the future also with the same players.

Petra [00:19:37]: They're the same players, you also have to think in a proactive law approach, that the same player will be around for the next years and you need to do cooperation for instance. So you also should think about this dimension that it's very important to not just kill the other one, but keep them in the game and cooperate even if you have a conflict or a dispute. So this would be a proactive approach.

Then it is also important to understand that, for most companies, for the majority of companies, conflict or litigation or going to court, that's not the business model. So, they should see again, that if there are conflicts, they are solved at a low level, because there is no reason to go to litigation or go to court, but they should have a strategy, what they are going to do if they have a problem with a subcontractor, for instance. What they have to do, what they will do, if they have a problem with an employee, for instance, you have a conflict, possible conflicts everywhere, it's the employee, it's subcontractors, it's founders, it's your customer. So they could be everywhere. And you need to decide what is important, what I really want, for instance, go to the court, which could be the case, if I have IPR, - intellectual property rights - that are really in the center of my whole business idea, of course, I need to defend this.

So, sometimes it's also necessary to go to court, but it should be a conscious decision of the entrepreneur, and they should know what to do and think about it in the beginning already.

**Moritz:** What does it mean to go to the court? I mean, who bears the costs for this?

**Petra:** Yes. So going to the court, when I said that litigation is not the business model. If you go to court, you need a lawyer, the other party has a lawyer. So it means first of all costs. And these costs, the visible costs are, for instance, the costs that you pay for the lawyer. But then you have time issues, it needs quite a lot of time to go to court. So the whole management will use quite a lot of resources to solve this, to find out what it was about, to get the evidence, and so on.

So there is quite a lot of time and costs that we have, that are not directly visible, but they can be immense in big court cases. So what you lose, you lose focus, you are not focused anymore on the business, on what you want to do. But you're focused on something that maybe has happened in the past and is maybe not so important for you, when you go to the court, you're more or less talking about past issues, not about your future. So there are very many cost factors when you go to court, you lose time, money, resources, focus, and so on. So you really need to think about when it makes sense to go to the court, to go to litigation and when it does not make sense. That's also important to say, sometimes it is necessary, you have to go there. But you should know when.

**Moritz:** So Petra, what ways are there to resolve legal disputes?

**Petra:** Well, depending on the escalation, where we are, we have different possibilities. There are also possibilities, that the entrepreneur can use him or herself. They don't need an outsider. And the first distinction, we have, is that there are consensual dispute resolution methods or forms of consensual dispute resolution, and then there are adjudicative forms of dispute resolution. The first means that I try to find a consensus with

the other one. And this can happen, for instance, through negotiations. So when we have a problem and this is the first thing what you should do, you should negotiate with the other party, you should think, okay, we have this problem, what shall we do about it? And here, what is important is that it's not only a discussion about these positions, but it's also a discussion about these interests. And in negotiations, entrepreneurs should analyze what they really want, and what is the goal, they should not get unprepared to negotiations, but they should analyze, what is the goal, what do I want, what are my interests, what are the interests of the other side. And then they should focus on the common issues, on the interests. And based on interests, there might be other solutions to how you can solve the dispute.

And there's a very good book about it that is called Getting to Yes, from the Harvard Negotiation project, it's a very easy read, and you can have a look at this. So these are principle-based negotiations. Sometimes it doesn't work out, for instance, because there are already emotions inside, people don't want to talk with each other anymore, or they don't want to share everything, then you can have an outsider to join the dispute resolution. And in this case, the outsider can assist the negotiation process. And this is called mediation. And mediation, there are very different forms of mediation, and you can have it at a very, very low escalation level of the dispute. You also can have it still when it's already a legal dispute. So currently, for instance, at the courts - even at courts - but also outside the courts, very big disputes can be resolved through mediation.

And then the other side is adjudicative dispute resolution. So in mediation the parties decide what they want, they make a contract in the end if it's successful, and it's consensual. But then on the other side, you have adjudicative processes and here you have, for instance, litigation. So this means going to the court, to the public court, general courts, and civil courts. And then, as an alternative that is very widely used in the business world is arbitration, which means that, it's not in the ordinary courts, in the public courts. But you have an arbitral tribunal, you choose your arbitrator, they often have more business experience. The process is faster, usually, than others, than in litigation. And in business, it's quite common, especially in international business. So these are basically the two main, consensual, adjudicative and then we have negotiation, mediation, litigation, and arbitration. And if you want to have arbitration, you need to put it into a contract because otherwise, you're in the courts, - you have to agree on it.

**Moritz:** So the arbitration tribunal says something and this is then binding, because I signed the contract and I adhere to that.

**Petra:** Yes, so it is that you agree on arbitration, and then the arbitrator is like a judge who imposes a solution, which means that it's not built on consensus between the parties, but it's imposed on the parties, the solution, and it's enforceable, because you have given to the arbitral tribunal the power to make this kind of decisions in your case.

**Kalle:** And then the practical benefits would be that it's secret also and faster.

**Petra:** Often it's faster, it's secret, it's private, so it's not public, people cannot attend. And it's faster than litigation.

**Kalle:** How can you prevent these legal disputes?

**Petra:** So, it depends on the dispute or on the conflict at stake. So, first, it starts with an analysis, what kind of conflicts there might be in this kind of situation. So, it might be that there are different forms, there might be conflicts that relate for instance to data conflicts that people think that they do not have the same data, the same valuation methods, these kind of things, then there might be conflicts about different interests and goals or relational conflicts, communication conflicts. So it depends very much on the conflict.

So first of all, you can analyze what kinds of conflicts there might be in your company. For instance, if you have employment disputes, they usually start because there is a relationship or communication problem in the company. The employees or the partners don't feel treated with respect or they don't talk to each other, and it's very common. So then you have a different kind of resolution method or way to prevent a dispute than in other kinds of conflicts. You'll also have then conflicts that concern structural issues. For instance, in the video from Manne, we will talk about corporate governance, how clear it should be - that for instance, if you create a situation where there are easily deadlocks and people cannot decide and it's unclear who has the power, this may create conflict, and you can address this through corporate governance design.

You can also address conflict through contracts - the contract design. That everybody knows, and we have Jaakko and Matti who talk about contracts and they will explain, that it is very important that the parties know what they are agreeing to, and what their obligations are. So these are kinds of tools that you can use to prevent conflicts. And then it's of course, very important to have a documentation. So that everything is clear and transparent for everybody that is involved.

**Kalle:** So in essence, you need to be fair, and it needs to look like it's fair now. And also when you look back from the future, it needs to look that everything was done in a fair way.

**Petra:** It should be done the fair way. But I also want to stress that you should, even if you try to be fair and try to involve everybody and talk and everything, there should still be the legal as a backup if it doesn't work the way you imagined it would work. So this is what we have, the legal is the default system. If it doesn't work the way you want, then we have the legal side where it really needs to be clear what happens and how it is done. So an entrepreneur shouldn't be too naive and think it works out like this and gentlemen agreements and we don't need to ... , because we talk so nicely, so no problem. But there should be the legal backup.

**Kalle:** Thank you for sharing your wisdom and insight so far, what are the key takeaways you want the viewers to remember from this discussion?

**Petra:** First thing they should think about that legal disputes come from somewhere, it's an escalation. How can I address the conflict? Second is a proactive approach. And the third is, and we haven't talked much about this is, that we have different systems, and the solution needs to address these different systems. And, for instance, a conflict might also be in the



media. So you need also to talk to the media and see how this works out and solve the conflict there and handle it there and not only on the legal side.

**Kalle:** Thank you.

**Petra:** Thank you.

**Moritz:** Thank you.

[Outro music]

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