

## Of Legal Foxes

[Carl Baudenbacher](#) ♦

The Greek poet [Archilochos](#) wrote in the 7<sup>th</sup> century BC: “*The fox knows many things, but the hedgehog knows one big thing.*” For business operators and their legal advisors, the phrase is understood to mean that there are generalists and specialists. The hedgehog is a rigid thinker who has a single organising principle in mind, while the fox uses different strategies and draws on a wide range of experience. Although the legal market has in recent years seen a certain “hedgehogisation” through Anglo-Saxon influence, foxes remain key players.

The best in-house lawyers and (most) judges tend to be **generalist** foxes. Among lawyers and of counsel, on the other hand, hedgehogs seem to dominate, especially in the Anglo-Saxon world. This is mitigated by the “*consigliere* principle”: The *consigliere* is available to the client day and night as a contact person and breaks through the specialisation. Members of English [barristers’ chambers](#) also often refrain from excessive specialisation. The same applies to law firms in Latin countries such as Italy, Spain, and France as well as in South America, where foxes continue to play the decisive role. Specialisation is, moreover, typically something sought by clients with deep pockets. But even clients with big wallets have begun questioning the efficacy of multiple lawyers reviewing the same dossier.

An example of an area in which the hedgehogs have taken over in many countries is antitrust law. Here, lawyers not only focus on mergers, distribution agreements, or public companies, but specialise even further, *e.g.*, by industry. Others deal exclusively with a particular form of public issue of bonds or shares, or with loan agreements, excelling particularly in documentation. There will always be a need for hedgehogs in the legal profession. The following considerations, however, deal with the foxes who consciously or by instinct refrain from specialising.

### Core Issues in Business Law

From a microeconomic perspective, the starting point in [business law](#) is the question: what do companies need to know about the **national, regional, or global**

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♦ Partner, Nobel Baudenbacher Attorneys at Law (Zurich | Brussels); Door Tenant Monckton Chambers, London; Visiting Professor London School of Economics LSE; President of the EFTA Court 2003-2017.

**legal framework** in order to operate successfully in a given market? Business law takes a transaction-specific approach. It focuses on the exchange of the production factors goods, capital, and services, with persons constituting a special case in a cross-border context. The emphasis lies on entrepreneurial freedom, on the possibility of shaping the law within the framework of mandatory norms by drafting legal documents such as contracts and statutes. The protagonists of business law understood in this manner are primarily private operators who create wealth, *i.e.*, manufacturers, traders, employees, investors, financial actors, and consumers. Their activities are of legal relevance, and a legal fox must know about them comprehensively.

Another discipline of business law is managing [legal and compliance risks](#) which affect the whole enterprise. This requires a global, cross-network view with an eye on relevant areas outside of the strict letter of the law, *e.g.*, the reputational risks of a liability or tax dispute. A successful internal and external **risk communication** is often run by true generalists.

### **Methodology, General Clauses, General Principles**

The dichotomy of private law and public law, which continues to play a decisive role in university education, is of limited practical relevance. A legal fox must be able to play the keyboard of **methodology** in every area of the law. Jurisprudence is not

an exact science, but a hermeneutic or an interpretive one. To be successful, one must master the art of argumentation. In doing so, one must be able to assess whether a possible line of thought could convince the addressees, be they private parties, arbitrators, or representatives of the state. Here, [Switzerland](#) takes on a particular role with Article 1 of its Civil Code, which openly recognises the incompleteness of the written law and authorises judges to fill gaps *modo legislatoris*. Nevertheless, judicial activism is rare, particularly in business law. This may be grounded in the fact that judges are only elected for a specific term with the possibility of re-election. This approach differs considerably from other European legal systems and their methodological concepts.

The generalist must moreover be versed in applying **general clauses** such as good faith, abuse of rights, good morals, or good cause. Again, different traditions exist in different jurisdictions, and interpretative arguments may be gleaned from each of them. For example, English judges tend to be less inclined to take corrective action on the [content of contracts](#) than French judges. This may be one explanation for the popularity of English law in B2B relationships. The same applies to Swiss judges and the popularity of Swiss law.

Another asset of generalists is their knowledge of [general principles](#) such as legal certainty, equal treatment, the prohibition of arbitrariness, the protection of legitimate expectations, the right to be

heard, or the principle of proportionality. These maxims are pertinent in constitutional, administrative, and private law. In practice, especially complex cases are frequently won based on general legal principle arguments.

[Roman law](#) concepts can also be of importance. Roman law was market law. The notions that “*Dolo agit qui petit quod statim redditurus est*” (“*He who requests that which he will have to return immediately due to another reason acts deceitfully.*”), or “*Qui tacet consentire videtur ubi loqui potuit et debuit*” (“*He who is silent seems to consent when he could and should have spoken.*”) remain relevant today, particularly in business law.

### Comparative Law

In a globalised world, a generalist must be versed in comparative law. Modern societies and economies face similar life problems for which different legal systems have developed contrasting solutions. A [comparative law](#) analysis must assess contractual practice, legal norms, administrative practice, and court decisions. In particular, the different legal traditions—common law and civil law—must be examined beyond the individual national legal systems. Legal foxes from a continental European civil law state with professional experience in a common law country have an invaluable advantage over their peers. The same applies to common law generalists with experience in a civil law regime.

### Law Enforcement

Legal foxes must be equally cognizant of the opportunities and risks of enforcing substantive law on a national, regional, supranational, and global level. Many international or supranational organisations offer remedies against unfavourable legislation that do not require costly litigation. For example, in the [European Union](#) (“EU”) and the [European Economic Area](#) (“EEA”) individuals may lodge a complaint against a state law or measure to the European Commission or to the EFTA Surveillance Authority by merely showing that a Member State has infringed the respective supranational legislation. EU and EEA law may also be invoked before national administrations and courts, and they may even be petitioned to refer questions of interpretation of EU law and EEA law to the CJEU or the EFTA Court.

Conversely, a company may be targeted by these authorities based on antitrust or state aid rules, which may also impact Swiss companies due to the [effects doctrine](#).

In addition to the enforcement by courts, alternative dispute resolution methods are becoming increasingly relevant, especially through arbitration tribunals.

### Multi-Tier Legal Systems in Europe

Particular opportunities for legal challenges are available where foxes are aware of how different legal systems interact. In Europe, a multi-tier system exists with the Court of Justice of the

European Union (“**CJEU**”) governing over the application of EU law, the **EFTA Court** overseeing the implementation of EEA law, and the European Court of Human Rights (“**ECtHR**”) safeguarding the guarantees enshrined in the European Convention on Human Rights (“**ECHR**”). Each regime guarantees its own—sometimes overlapping, sometimes distinct—rights, and each court has developed its own methodological approach. The CJEU and the EFTA Court have developed a method focused on [teleological interpretation](#). The ECtHR, notably, has expanded its initial mandate from classical human rights to protecting liberties within the business law sphere. The entry into force of the [European Charter of Fundamental Rights](#) on the EU-side in 2009 only strengthened this development. Increasingly, human/fundamental rights claims are raised in business law cases invoking the right to a [fair trial](#) before an impartial judicial body within a reasonable time, or the right to respect for one’s private life in [dawn raids](#). For Swiss financial market operators, the prohibition of retroactivity is particularly relevant in cases dating back to the era of banking secrecy.

### **America’s Long Arm**

The USA has its own relationship to law and conflict resolution. With their rise as a world power after the Second World War, the Americans imposed respective ideas and mechanisms internationally. On the one hand, they exported their law to other jurisdictions, if necessary with force. On the other hand, their courts assumed far

reaching jurisdiction. Peculiarities of American procedural law have played an important role in this. The famous English judge Lord Alfred Thompson [Denning](#) coined the phrase: “*As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.*” Finally, the US has been the champion of imposing economic sanctions since President Woodrow Wilson. A generalist must be familiar with these phenomena.

### **Law and Economics**

A legal decision gains rationality when it is based on an examination that attempts to show—in concrete and comprehensible steps—why the solution sought is not only just, but also efficient, *i.e.*, why it makes people use scarce resources sparingly. A well-known concept is, for example, the proposition that “[moral hazard](#)” must be avoided. “Moral hazard” exists when an economic agent has an incentive to increase his risk because he does not bear the full cost of that risk. Another example is the principle of the “[cheapest cost avoider](#)”. According to this, the party of several parties involved in an external effect should bear the damage that can avoid it most cheaply. A legal fox must know such basics of the economic analysis of law.

### **Communication**

Regulators and courts do not decide in a vacuum, especially not in publicised cases. Legal foxes will know to set up a suitable

[litigation-PR](#) scheme, *i.e.*, a public relations system in which external communication is managed before, during, and after a legal measure. The aim is to support the legal strategy of the lawyers involved, to influence the outcome of the legal dispute with the help of the public (“court of public opinion”), and to avoid reputational damage for the parties involved.

Since even the communication departments of globally operating companies often struggle to convey the legal implications of a case to the public or to defend their employer against unjust media attacks, there is an advantage for generalists to have knowledge in the field of communication.

## Conclusion

Legal foxes usually have many years of experience as judges, university professors, attorneys, in-house counsel, or arbitrators. They certainly have specialised knowledge. Above all, however, they can make cross-references not only within the legal profession, but also to other disciplines. Generalists therefore have an important function for businesses and individuals. If necessary, they will call in specialists to examine certain issues in depth. But the legal fox remains the manager of the project and, thus, the master of the hedgehogs.

Of course, the criticism of specialists by [José Ortega y Gasset](#) is exaggerated. The Spanish philosopher and humanist wrote that “*in politics, in art, in social usages, in the other sciences, [...] [the specialist] will adopt the attitude of primitive, ignorant man; but he will adopt them forcefully and with self-sufficiency, and will not admit of—and this is the paradox—specialists in those matters*”.

Objectively, the generalist, horizontal activity is also satisfying for the fox himself. It is varied and one hardly runs the risk of becoming operationally blind.