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"JURIDICAL GYROSCOPIC ORIENTATION OF TRANSNATIONAL BUSINESS NEGOTIATIONS" ©

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JURIDICAL GYROSCOPIC ORIENTATION OF TRANSNATIONAL BUSINESS NEGOTIATIONS

ABSTRACT

The hypothesis of our doctorate posits that there is a better manner for law to regulate TBN. We posit to improve legal regulation of TBN that an alternative legal framework is necessary for the regulation of transnational business negotiations [TBN] between private parties in context of international sale of goods. The fundamental premise lies in the manner in which negotiations are commonly misunderstood within the complexity of pluralistic, conflicting or overlapping legal regimes causing inconsistent measurement and enforcement of remedies to business parties. Even the most sophisticated business parties toil with the nebulous line of when and how legal rights and obligations are created. Parties do not sufficiently anticipate obstacles that may arise, and often rely on oral or incomplete agreements which may lead to the misinterpretation of the extent of their rights and obligations to one another. The law has an interest in this innate activity for three reasons: (1) to protect market requirements of efficiency; (2) because of its opportunist nature, to guide conduct between TBN parties; and (3) to support party autonomy. We will be focusing on the expansion of current legal theory of negotiations in search of a new normative theory that could contribute to the improvement of regulation of TBN.

The project will comprise an analysis of current legal negotiation theory to attain a legal portrait of how law views business negotiations. We have observed the poverty of legal tools available to weigh juridical consequences of negotiation movements. Tangible negotiations may reveal themselves in various forms of agreements; some that are recognized by adjudicators if they pass tests of validity of contract while others fail to produce recognition. When agreements appear incomplete, adjudicators are forced to either deny enforcement of negotiating agreements or turn to fictitious rationalizations. Conversely, legal obligations during negotiations may be construed within the general scope of the law of obligations whether they have been intended between the parties or not.

This study is expected to reveal the threats of colliding and conflicting norms as well as factors that reconcile the legal regulatory sources towards a global legal merchant culture. Illuminating a new understanding of negotiations can be accomplished through an interdisciplinary glimpse of business strategies and perception, along with examination of the etic and emic negotiating behavioral sequences identified by behavioral scientists. Factoring patterns of normative sequential business negotiations may provide fundamental elements to expose the intangibility of negotiations by amalgamating normative values emanating from party autonomy. Negotiations are often considered a phenomenon misfit in law; traveling between traditionally separated legal doctrines. Reaching back to historical transformations in search of the roots of the regulatory sources may illuminate negotiations from the "shadow of the law" into a model revealing the expansion into interdependency and cooperation. Comprehension of the factors that influence the normative frameworks that parties presuppose while negotiating together will contribute to our tri-dimensional comparative law analysis. A new critical awareness of the portrait of negotiations will be proposed through the application of Hogg's co-operative theory of contracts to negotiations, opening the door to a fresh vision of negotiations. Setting default standards of conduct through a normative legal negotiation theory may eventually lead to the consideration of sui generis rules to monitor our evolving global society in order for law to provide the securitized efficiency and autonomy required by TBN parties. Meanwhile, party autonomy may seize leadership through new trade mechanisms which we have termed "Bills of Negotiations [BON]", providing TBN parties with transparent standards of communications that operate through expressed party choice to record parties' intentions, which are expected to support business norms and serve law with invaluable empirical data and evidence.

RÉSUMÉ

L'hypothèse de notre doctorat pose qu'il y a une meilleure moyen pour le droit de régler TBN. Pour cet amélioration, un cadre juridique alternatif est nécessaire pour le règlement de négociations commerciales transnationales [TBN] entre des parties privées dans le contexte de vente internationale de marchandises. La prémisse fondamentale réside dans la manière dont les négociations sont généralement mal comprise dans la complexité du pluralisme, contradictoires ou le chevauchement des régimes juridiques entraînant l'incohérence des remèdes de mesures pour les parties commerciales. Même les parties commerciales sophistiquées labeur d'un façon nébuleux de quand et comment les droits et obligations juridiques sont créés. Les parties souvent ne sont pas suffisamment anticiper les obstacles qui peuvent surgir, et comptent souvent sur des accords oraux ou incomplètes qui peut conduire à une interprétation erronée de l'étendue de leurs droits et de leurs obligations les uns envers les autres. La loi a un intérêt dans cette activité innée pour trois raisons : (1) pour protéger les exigences du marché en matière d'efficacité ; (2) en raison de son caractère opportuniste, pour orienter la conduite entre TBN parties; et (3) d'appuyer l'autonomie des parties. Nous mettrons l'accent sur l'expansion de la théorie juridique actuel des négociations dans la recherche d'une nouvelle théorie normative qui pourraient contribuer à l'amélioration du règlement de TBN.

Le projet comprendra l'analyse de la théorie de la négociation juridique actuel pour atteindre un portrait de la façon dont le droit juridique vues négociations d'affaires. Nous avons observé la pauvreté des outils juridiques disponibles pour peser des conséquences juridiques de mouvements de négociation. Négociations tangibles peuvent se révéler dans diverses formes d'accords; certains qui sont reconnus par les arbitres si elles passent des tests de validité du contrat alors que d'autres omettent de produire la reconnaissance. Lorsque des accords apparaissent incomplètes, les arbitres sont obligés de refuser l'exécution des accords de négociation ou se tourner vers les rationalisations fictive. À l'inverse, des obligations juridiques au cours des négociations peut être interprétée dans le cadre général du droit des obligations qu'elles ont été prévues entre les parties ou non.

Cette étude devrait mettre à jour les menaces de se heurter et normes contradictoires ainsi que des facteurs qui concilie les sources de réglementation juridique vers une culture marchande juridique mondial. L'éclairage d'une nouvelle compréhension des négociations peut être accompli par le biais d'une approche interdisciplinaire des stratégies opérationnelles et de perception, de même que l'examen de l'étique et les séquences comportementales de négociation émique identifiées par les scientifiques du comportement. Les patrons d'affacturage de négociations commerciales séquentiel normative peut fournir des éléments fondamentaux pour exposer l'intangibilité des négociations par la fusion des valeurs normatives émanant de l'autonomie des parties. Les négociations sont souvent considérées comme un phénomène inadapté en droit; voyageant entre les doctrines juridiques traditionnellement séparées. Remontant aux transformations historiques dans la recherche des racines des sources de réglementation peut s'éclairer les négociations à partir de " l'ombre de la loi " dans un modèle révélant l'expansion vers l'interdépendance et de la coopération. La compréhension des facteurs qui influent sur le système normatif que les parties présupposent tout en négociant contribueront ensemble à notre tridimensionnelle analyse de droit comparé. Une nouvelle conscience critique du portrait de négociations seront proposés par l'intermédiaire de l'application de Hogg's co-operative theory of contracts à des négociations, ouvrant la porte à une vision nouvelle de négociations. Configuration par défaut de normes de conduite par le biais d'une théorie de la négociation juridique normative pourrait éventuellement conduire à l'examen de règles sui generis pour surveiller l'évolution de notre société globale afin de la loi de fournir de l'efficacité et l'autonomie nécessaire titrisés par TBN parties. Entre-temps, l'autonomie des parties menant grâce à de nouveaux mécanismes de commerce que nous avons appelé "Bills of Negotiation [BON]", fournissant TBN parties avec des normes claires de communications qui fonctionnent à travers exprimé parti choix pour exprimer les intentions des parties, qui devraient soutenir les normes d'affaires et servir le droit d'inestimables de données empiriques et de preuves.

Mots clés: Négociations, transactions transnationales des affaires, bonne foi, autonomie des parties, liberté de contracter, obligations, théorie juridique de négociations, mécanismes de règlement des différends, pluralisme, droit comparé

Key words: Negotiations, transnational business affairs, good faith, party autonomy, freedoms of contract, obligations, legal negotiation theory, dispute resolution mechanisms, pluralism, comparative law

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DEDICATION

To my father, George Alan Frazer, for the initial inspiration and for his love for humanity that motivated a contribution towards peaceful settlements in transnational commercial trade, and to my granddaughter, Hadley Naomi-Rose Hirsch, for her radiant smile that perpetuated the inspiration.

JURIDICAL GYROSCOPIC ORIENTATION OF TRANSNATIONAL BUSINESS NEGOTIATIONS

HYPOTHESIS:

We posit that there is a manner that law could better guide and regulate transnational business negotiations, subject to gaining a greater appreciation in law of the purpose and functioning of negotiations and when legal obligations arise during the processes of negotiations.

INTRODUCTION:

"It is difficult, but not impossible, to conduct strictly honest business."
the words of Mohandas Karamchand Gandhi

Law has an interest in human activities and negotiations are an inherent component of human activity. The purpose of negotiations is to provide communication paths for parties to voluntarily reconcile their own interests and opposing interests into mutually satisfactory goals. While parties struggle to decide matters together, this human intercession is twined with a constant tension between competitive self-preservation *versus* collaborative exertion towards a common relationship. Conduct during negotiations is impacted by the balance between competitive negotiation approaches versus collaborative approaches. Nevertheless, proper behavior during any combination of negotiation approaches must be promoted to enable negotiation parties to preserve the trust necessitated for their business relationship and to meet their mutual goals. Therefore, law has an interest in the proper guidance of human behavior during negotiations and to securitize meaningful arrangements exchanged and relied upon between negotiation parties.

Unfortunately, the innate human activity of negotiations has escaped proper awareness in law, particularly in transnational business settings where a plurality of cultures and legal systems challenge the workings of transnational business negotiations. The current contribution by law to guide the challenges business parties face during transnational business negotiations [TBN] is crippled, causing uncertainty in modern global business. While law has accomplished guidance and regulatory

assistance to other facets of human activity, why has it failed to properly participate in the regulation of negotiations?

This debilitation of law is generated by two key reasons. The first acumen is that law is unable to decipher meaningful communications between transnational business negotiation parties [TBN party(ies)], in other words exchanges between parties doing business from different geographical locations and cultures. Due to cultural roadblocks and the poverty of juridical tools currently available to transparently assess the intentions of negotiation parties to be bound by obligations between one another, adjudicators are left with no other remedies but antiquated contract doctrine and extra-contractual remedies. Since negotiation communications during TBN often fall short of recognition as valid contracts under current contractual doctrine, the only other available legal remedies, which are extra-contractual, are generally unsuitable to the genuine character of TBN, leaving injured TBN parties without proper legal remedy.

Secondly, as TBN parties conduct business from two different geographic regions, they necessarily involve a minimum of two legal jurisdictional sources and therefore a diversity of conflicting laws that compete together producing different categorizations of obligations arising out of negotiations, causing the measurement and enforcement of remedies to be globally inconsistent.

Law has fallen behind. Partly due to the private nature of TBN, the legal regulation of TBN appears to be insurmountable,[1] driving business parties to seek alternative means to settle their disputes.[2] We posit that there is a means to improve the legal regulation of TBN and provide more certainty and guidance to the complex and sophisticated needs developing in the global market. We

[1] Elenor Holmes Norton, "Bargaining and the Ethic of Process", New York University Law Review, Vol. 64(3), June 1989. Norton sums up the difficulty between law and the market: "Bargaining is one of the few market processes that, as a practical matter, must be almost entirely self-regulated. There is no practicable way to monitor the process..." at 494. For a business perspective see Roger J. Volkema, Denise Fleck and Agnes Hofmeister-Toth, "Ethicality in Negotiation: An Analysis of Attitudes, Intentions, and Outcomes", International Negotiation 9: 315-339, 2004.

[2] *See* 3. in Section 3 of Chapter 2, Part I (regarding self-regulated industries). Note that there is an awareness that the manner in which these communities regulate "outside the law" is effective only in small heterogeneous groups that have strong communitarian backgrounds and therefore may not be considered feasible in the context of the global market. *See* Lori Quingyuan Yue, Jiao Luo and Paul Ingram, "The Failure of Private Regulation: Elite Control and Market Crises in the Manhattan Banking Industry." Administrative Science Quarterly 2013 58:37.

propose edge pieces towards a new legal negotiation theory of TBN [LNT of TBN], along with a practical application of this theory that can privately exchange and record TBN communications with transparency and uniformity and sponsor party autonomy. Accordingly, in the event of an unresolved dispute, meaningful arrangements can be recognized as legally binding.

We postulate that to improve legal regulation and provide more certainty, it is essential to search for a uniform way that all regulatory sources of law can understand TBN communications so, when required to adjudicate, law can provide a uniform and consistent measurement and enforcement of legal remedies.

http://www.norwich-market.org.uk/Georgian/home.shtm

To identify a solution and open the door to new horizons in international trade,[3] we must use a historical key:

> "All around…people are moving, gesturing, talking…Those men in short tunics and hoods are valets in a knight's household. Those in long gowns with high collars and beaver-fur hats are wealthy merchants. Across the marketplace more peasants are leading in their flocks of sheep, or packhorses and carts loaded with crates of chickens...The rest of the marketplace performs two functions. Producers come to sell fleeces, sacks of wool, tanned hides, furs, iron, steel and tin for resale further afield. The other function is to sell manufactured commodities to local people: brass and bronze cooking vessels, candlesticks and spurs, pewterware, woollen cloth, silk, linen, canvas, carts, rushes (for hall floors),

[3] Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information", (1999) 40 Harv. Int'l. L.J. 221. Riles argues that law must be reconsidered through comparative law approaches: "Globalization, in the popular view, is a condition of interconnected, overlapping legal regimes, a proliferation of information technologies which mediates and engineers an *awareness* of this condition. [However]...This moment of fascination with things global, and the demands that this creates in all aspects of legal scholarship and practice, calls for a reconsideration of the rules…Comparative legal scholarship is thought to be sorely needed both as a tool for solving the new problems of globalization and because law seems to be the key to a wider understanding of global, transnational, or cross-cultural legal phenomena." at 222.

> glass, faggots, coal, nails, horse shoes and planks of wood. Everyone in medieval society is heavily dependent on each other for such supplies, and the marketplace is where all these interdependencies meet."[4]

In comparison, today the global market is the meeting place of interdependency,[5] in a "new field of study that concentrate[s] on the phenomena of conflict and resolution…The infusion of ideas from…game theory and decision analysis, international relations and management" contributing to scholarship, and aligning scholarship with practice.[6]

During medieval times, the primary symbols of authority were "the castle on the hill, the parish church, the town wall or bridge…";[7] yet these powers were indulgent to the development of another category of law, namely merchant law, surfacing amongst a particular class of people. Merchants were a distinct collection of people,[8] not simply peasants performing what is popularly viewed as people haggling over wares at a fair. Due to the long distances merchants travelled, they were necessarily specialized in military tactics and, over time, enhanced by their ability to hold municipal office. They developed merchant rules to regulate standards within their own markets, sanctioned initially through social norms such as reputation and exclusion to enter the market.

Naturally, "scumbageous behavior"[9] in the market place had to be dealt with in medieval markets with the same urgency as today. Cutting corners to obtain more money for goods, such as faulty measurement of goods, wool stretched so that it appeared larger yet later shrank, stones baked into loaves of bread to increase their weight, was no less reprimandable than receiving empty barrels

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[4] Ian Mortimer, author of *Time Traveler's Guide to Medieval England*, A time traveler's guide to medieval shopping. *This article was first published in the October 2008 issue of BBC History Magazine.* http://www.historyextra.com/feature/time-traveller%E2%80%99s-guide-medieval-shopping.

[5] *See* Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Sweet & Maxwell, London, UK, 2013. Chuah enunciates the need for exchange of supplies.

[6] Jacqueline Nolan-Haley, "New Problem-Solving Scholarship: An Historical Tale with a Happy Ending", Negotiation Journal, April 2003, 169 at 170.

[7] Daniel Power, (Ed.), *The Central Middle Ages, Europe 950-1320*, New York, Oxford University Press, 2006 at 10.

[8] Martin Aurell, *Society*, in Daniel Power, (Ed.), *The Central Middle Ages, Europe 950-1320*, New York, Oxford University Press, 2006.

[9] Angela Swan, *Casebook on contracts II*, Winter Term, 2014, Markham, Ontario, unpublished, Chapter 1 at 18. Swan refers to *Texaco v. Pennzoil Co*. (1987), 729 S.W. 2d 768 (Tex. Ct. App.). *See also* Angela Swan, *Canadian Contract Law, 3rd Ed*. Markham, Ontario, LexisNexis Butterworths, 2006.

from across the seas, or quality or quantity of goods less deserved. Non-payment of a fair letter[10] and refusal to honour monetary obligations were not excused in medieval times and, in modern days, protective measures have been set up to secure international trade, such as letters of credit.

Alas, current measures available for international trade do not adequately meet all the requirements of TBN parties, increasingly necessitating transparency and uniformity in business deal-making. Transparency and uniformity operate best when parties can preserve *security* in their transactions and *autonomy* and flexibility are supported, contributory factors towards the promotion of *efficiency* in TBN dealings.[11]

The intervention of law in these business dealings has been either complaisant,[12] uncertain,[13] or destructive[14] due to lack of understanding of both the full extent of the processes of negotiations entered into by TBN parties and the meaningful arrangements exchanged through communications between TBN parties. Human nature has not changed over time but the way we do business in modern days has revolutionized. Competing in a data-based world is speeding into an innovative, complex and sophisticated era, yet TBN parties' requirements of efficiency, autonomy and certainty remain unaltered, though more difficult to safeguard. Furthermore, party autonomy was, and remains, the preferred regulatory source of law for TBN parties, a notion that must not be forgotten when law regulates this activity.

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[10] Julia Barrow, *Religion*, in Daniel Power, (Ed.), *The Central Middle Ages, Europe 950-1320*, New York, Oxford University Press, 2006 at 130.

[11] *See* 3. in Section 1 of Chapter 1, Part I for further expansion on the discussion of these norms. *See* Martin A. Hogg, "Competing Theories of Contract: An Emerging Consensus?" in Larry A. DiMatteo, Qi Zhou, Severine Saintier & Keith Rowley, *Commercial Contract Law: Transatlantic Perspectives*, CUP, 2013 and Thomas Gutmann, "Theories of contract and the concept of autonomy", Münster 2013/55 for norms of efficiency and autonomy. *See also* Thomas Piazzon, *La sécurité juridique*, Tome 35, Doctorat & Notariat, Collection de Thèses dirigée par Bernard Beignier, Doyen de la Faculté de droit de Toulouse, Tome 35, Editions Defrénois, Lextenso éditions, Paris, 2009 regarding juridical security.

[12] *Laissez-faire* was the general attitude of commercial law during the rise of sovereignty. Woo Pei Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith", 1 Oxford U. Commw. L.J. 195, 2001.

[13] In other words, whether an agreement will be recognized by law or not; whether other legal obligations will be presumed by law to exist between the parties. *See* 1. of Section 3 of Chapter 1, Part I.

[14] *See* 3. of Section 3 of Chapter 1, Part I: interference with party autonomy and the inability of law to provide juridical security, thus interrupting efficiency and invading business negotiation parties' rights.

The influence and intervention of law: Although law has an interest in human activities and negotiations are an inherent component of human activity,[15] if law unduly interferes with TBN affairs, it becomes a "nuisance". "Laws ought to be adjusted to the habits of society, and not to aim at remoulding them."[16] Law and society are intertwined, both dependent on empirical data that evidences normative patterning exposing regularities within a human activity that could be considered, generally, as acceptable standards of behavior in a given community.[17] "[P]eople create law…and the result of these activities…is that law becomes what it becomes and society becomes what it becomes."[18]

While it is true that the King's court was accessible to merchants as an alternative source of legal remedy, this recourse was virtually inoperable due to the lengthy period it took to be heard in the King's court and the ineffectiveness of the remedies that could be procured. Sanctions such as fines, imprisonment, or worse, were not conducive to the collection of money owing and evidenced by fair letters.[19] During the rise of sovereignty, a laissez-faire movement enabled the merchants to develop autonomous legal relations, since states had more pressing issues to attend to, such as the protection of their borders, dodging civil wars, plague and famine, along with labour problems that required the development of legal enforcement mechanisms.[20]

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[15] Pervez N. Ghauri, "A Framework for International Business Negotiations", in Pervez N. GHAURI and Jean-Claude Usunier, (Eds.), *International Business Negotiations*, 2nd Edition, Bingley, UK, Emerald Group Publishing Limited, 2008 at 3.

[16] Christopher Woods, "Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions under Electronic Writing and Signature Legislation" 52 Okla. L. Rev. 411 (1999) 452. Woods refers to England's Justice Stephen's statement in 1885 at 424; Eric E. Bergsten, "Introduction to the Legal Value of Computer Records", 1985 July/August Computer Law & Practice, 205; Amelia H. Boss, "The Evolution of Commercial Law Norms: Lessons to be Learned from Electronic Commerce", 34 Brook J. Int'l L., 673, 2008-2009; David Frisch and H.D. Gabriel, "Much Ado About Nothing-Achieving Essential Negotiability in an Electronic Environment", 31 Idaho Law Review, 1995; Georgios K. Giannikis, "Electronic Commerce Research and Applications", ScienceDirect, Vol. 10 (March-April 2011) 247-267.

[17] Catherine L. Fisk and Robert W. Gordon, "Law As…": Theory and Method in Legal History", 1 UC Irvine L. Rev. 519, 2011.

[18] *Ibid*. Fisk/Gordon at 521.

[19] *Supra* note 7. Power.

[20] Ron Harris, "The Encounters of Economic History, 21 Law & Hist. Rev. 297, 2003 at 316.

Formal law and law in action, thus, became divided in common law until merchant custom was integrated into English common law through recognition by Lord Mansfield and Lord Holt,[21] and later by acceptance in international arbitration circles.[22] Judicial recognition of custom is, thus, considered a viable legal source to transform these social dynamics into legal norms.[23] Legislation is also capable of developing legal norms through recognition of customs by the state, or by the creation of institutional mechanisms to regulate economic matters.

For example, in civil law systems, notaries were instituted to guard the security of long-term credit agreements, by keeping authentic records and drafting loan agreements.[24] The input of notaries was intended to sustain juridical security by providing a manner to record transactions between merchants recognized as legally binding by domestic state laws, an improvement to the scant fair letter.

However, in modern global trade, legal intervention has insufficient tools to record the extent of nuanced exchanges that occur in today's TBN communications. There is a need to find other means for law to contribute by joining uniformity between formal law and law in action. Otherwise legal doctrine will be trumped by a new emphasis on the "social significance of law",[25] and the functionality of law in the global market will continue to be challenged.

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[21] *Supra* note 12. Yee at 195. We have focused on the common law as there are more problematics to consider than under civil laws since continental law did not have the same difficulty embracing customary law.

[22] Thomas E. Carbonneau, Cases and Materials on Arbitration Law and Practice, Fifth Edition, MN, Thomson/West, 2007. Carbonneau demonstrates business attraction to international arbitration: "Party negotiations, obviously, should prevail if possible. Third-parties could assist the disagreeing parties in reaching and accommodation. In situations in which the disputes were unresponsive to these efforts and involves large sums of money or were otherwise critical, final and binding adjudication was the only means of unraveling the impasse. Arbitration had always been attractive to the business community." at 105. Carbonneau maintains that arbitration provides an efficient regulation of unresolved disputes: "The fate of a commercial bargain should not turn upon advocacy's traps and ambushes. Disputes should not fester their resolution linger. Expertise, efficiency and effectiveness in dispute resolution suit the commercial spirit." at 106.

[23] Jean-Marie Fecteau, « Savoir historique et mutations normatives. Les défis d'une nécessaire convergence entre droits et histoire » dans Pierre Noreau (dir.), *Dans le regard de l'autre*, Editions Thémis, 2007. Fecteau explains how social norms transform and become recognized as legal norms: « Un savoir aussi tiraillé entre l'interrogation sur le sens de la norme et les contraintes de la pratique sociale, entre la réflexivité et la distanciation propres aux sciences sociale et la nécessité d'administrer la norme dans toute sa matérialité." at 38.

[24] *Supra* note 20. Harris at 321.

[25] *Ibid*. Harris at 325.

Law has been unable to follow all the revolving dynamics of TBN. Legal theory has remained "mainly static, not dynamic".[26] "Legal changes were not considered to have sufficient potential to affect economic change…law [was] viewed as completely irrelevant to the functioning of the market…Law was seen as a constraint on markets, an impediment to efficiency", unable to contribute in any meaningful fashion as a regulator or "facilitator in the functioning of the market."[27] Therefore, the law governing the economy was left to the devices of the merchants themselves who developed their own set of sanctions 'outside' the law, similarly to what is known as self-regulated industries that have branched off in modern days.[28]

Self-regulation within the global market has not been securitized, as there is no infra-structure to guide and protect global trade. While law fumbles to find an appropriate manner to contribute to the proper functioning of the global market, party autonomy faces a threat of a swing in the legal pendulum from under-regulation (due to the laissez faire movement) to over-regulation of law (partly due to the desire for Sovereign states to defend their political boundaries).

Though "critical legal historians reclaimed the relative autonomy of law and the limited relevance of economic change to legal change",[29] modern law and commercial change compete like a strangler fig tree that wraps around its host while each tree struggles to gain

[26] *Ibid*. Harris at 299.

[27] *Ibid*. Harris at 300.

[28] *See* Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", 21 J. Legal Studies 115, 1992; Barak Richman, "Ethnic Networks, Extra-legal Certainty and Globalisation: Peering into the Diamond Industry", in Gessner, Volkmar (Ed.), *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges*, Oxford, Hart Publishing, 2008; Lisa Bernstein, "Private Commercial Law in the Cotton Industry: Cheating Cooperation through Rules, Norms, and Institutions", 99 Mich. L. Rev. 1724, 2000-2001; Karen Bradshaw Schulz, "New Governance and Industry Culture", 88 Notre-Dame L. Rev. 2515, 2012-13. *See contra* Jason Scott Johnston, "Should the law ignore commercial norms? A comment on the Bernstein conjecture and its relevance for contract law theory and reform", 99 Mich. L. Rev. 1791, 2000-2001; Peter A. Stanwick, "De Beers and the Diamond Industry: Squeezing Blood Out of a Precious Stone", International Journal of Case Studies in Management, Nov. 2011, Vol.9 (4).

[29] *Supra* note 20. Harris at 325.The following picture is a strangler fig tree situated at Bonnet House, Fort Lauderdale, Florida, taken by my Ipad February 17th, 2017.

sunlight. The strangler fig tree will either become the only canopy while strangling the host tree to death or the host tree and the fig tree will remain symbiotically together. Therefore, law cannot remain autonomous; it must respect business language, processes and relationships, promoting autonomy rather than chocking or interfering with it during legal regulation. Law must rise to the challenges business parties face to contribute to the proper regulation of TBN. The purpose of law is to offer certainty as well as flexibility to human activities, often considered competing characteristics that can be, potentially, compatible. How can law better guide standards of behavior during TBN?

For law to avoid being a nuisance and unduly interfering in TBN parties' private affairs, law must take into consideration business disciplinary concerns, the evolving needs of the global market and technological advancements. Law must be able to identify the additional challenges TBN parties face as opposed to their domestic counterparts. TBN suffer more complexities due to the long-term and pluralistic nature of their dealings, additional cultural barriers (in the wide sense of the word), larger output of investment,[30] incomplete and distant messaging that can distort the meaning of the exchanges between TBN parties and want of truly face-to-face discussions.[31]

In this thesis, we will propose how law could better implement an infrastructure to this human activity after taking a closer look at what negotiations are; their purpose and function, business perception of the processes of negotiation and how current legal regulation is operating. To answer the question that this doctorate thesis begs: "How can law better regulate TBN negotiations?" calls for a

[30] *See* Alan Schwartz and Robert E. Scott, "Precontractual Liability and Preliminary Agreements", 120 Harv. L. Rev. 661, 2006-2007. Schwartz/Scott portray: "The parties cannot write a final contract before the ex post state of the world is revealed." at 678. Schwartz/Scott explains some of the reasons parties use preliminary agreements: "The parties learn the true values only after they invest…The parties cannot contract on their project at because it is too complex. In particular, the project can take many forms, and there are a large number of possible states of the world…"There are two investment regimes. In the first, the parties agree to invest simultaneously. In the second, the parties agree that one party will invest first and the other will wait a period and then invest." at 678.

[31] In business *see supra* note 15. Ghauri at 3; in law *see* Larry A. DiMatteo & Lucien J. Dhooge, *International Business Law, A Transactional Approach*, 2nd Ed., Thomson West, U.S.A., 2006 at 23.

new vision, systematically responding to further questions throughout our journey.[32] Law must understand how deal making operates across the borders of the global market and how business parties, themselves, perceive their undertakings. In other words, law must follow the business community to gain a more opulent understanding of negotiations before law can even consider providing guidance in international business affairs.

Understanding negotiations: The purpose of negotiations is to strike a deal. The function of negotiations is to provide a path for parties to voluntarily reconciliate their own interests with opposing parties' interests into successful negotiations that bear the fruit of mutually satisfactory goals. Negotiations provide a forum of communications and feature an innate constructability as dispute resolution mechanisms. Resulting from its intrinsic characteristic, parties aim to establish agreements[33] despite of the tension between self-interests *versus* attainment of mutual goals.[34] The law could contribute to the protection of these business dealings if it could devise a manner to guide communications and conduct during the negotiation processes without unduly interfering with the efficiency, autonomy and flexibility that business parties aspire to. We posit that there is a way to improve legal regulation through private trade mechanisms that we have termed "Bills of Negotiations" [BON]. BON will record intended binding undertakings of TBN parties in an institutionalized setting that all legal regulatory sources of law interested in this human activity can recognize.

To track and record undertakings that TBN parties intend to be binding requires understanding of the intrinsic nature of these dealings along with the tensions that thread through this human

[32] To understand how law can better regulate means that we must ask questions of how law perceives negotiations, the intensity of negotiations and how rights and obligations can be formed during the negotiation processes. It also leads to questions with regard to whether a standard of conduct, such as good faith, should apply to transnational business negotiation parties.

[33] *Supra* note 1. Holmes Norton points out the tension: "They [negotiators] must be resolute to protect self-interest, but accommodating to invite agreement." at 330.

[34] *Supra* note 15. Ghauri at 4 and 18. The geodesic nature of an inter-connected business relationship is our term for Ghauri's representation of the nature of a business relationship, including knowing one's own interests, understanding the opposing interests and striving towards a mutual goal that is satisfactory to both or all parties.

activity. While TBN parties strive for mutual goals, there is divergence due to the tensions of self-interests and the inability to consider opposing interests; the very root of opportunism and why negotiations break down. When negotiations break down, parties are faced with choices: readjusting their efforts towards a mutual understanding or finding another means of planting one's heels to the ground. If a party chooses to honour one's own self-interests without regard to the interests of opposing parties, the commitment is broken; the trust is gone, and the agreement to strive towards mutual goals is terminated. Despite this frailty, where parties esteem to build trust, there are arrangements that are made between TBN parties whereby obligations are anticipated by the parties and relied upon.

While TBN parties seem to understand their own arrangements,[35] law has very few juridical tools to assess when negotiation parties intend to create legal obligations, let alone determine the intensity of such obligations during the negotiation processes. Under the three sources of law that we have identified, namely domestic laws, transnational laws and party autonomy, the way negotiations are characterized is globally inconsistent, therefore the measurement and enforcement of remedies is unpredictable. It is pressing to find a manner that TBN parties can confirm the meaning of their promises and agreements and delineate the type of relationship they anticipate having with one another. We advocate that this includes the ability to select the nature and scope of good faith business parties expect of one another.

For law to guide, regulatory sources of law must take a uniform approach to repel the diversity that exists today. For example, under Canadian Common Law [CCL] the leading precedence

[35] *Ibid*. Ghauri at 13 and 14.

regarding whether negotiations are even admissible as evidence in court to interpret a contract is *Jumbo King Ltd. v. Faithful Properties Ltd*,[36] where the court held that:

> "The court is not privy to the negotiation of the agreement - evidence of such negotiations is inadmissible - and has no way of knowing whether a clause which appears to have an onerous effect was a *quid pro quo* for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean."[37]

While generally under CCL, negotiations are inadmissible in court as evidence, the Quebec Civil Law [QCL] responds differently, recognizing a subjective nature that allows adjudicators to consider the facts during negotiations insofar as "a meeting of the minds" can be proved.[38] However, the problematic in QCL is determining not only whether there *is* a "meeting of the minds" but the extent of the terms and conditions agreed upon in absence of specifically expressed intentions.

Party autonomy is recognized, in principle, by both domestic and transnational laws insofar as the parties have expressed themselves in a recognized legal contract, or if custom or industry standards of usage are recognized by law. Other commitments between TBN parties remain concealed or overlooked.[39] Under transnational laws, the matter would more likely be approached even differently.[40] Party autonomy is promoted unless there is no proof of specific party consent. In absence of expressed party consent, transnational general principles of law [TGPL] could be apply.[41]

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[36] [1999] HKCFA 38; [1999] 3 HKLRD 757; 2 HKCFAR 279. at para. 59.

[37] *Ibid* at para. 59.

[38] Jean-Louis Baudouin et Pierre-Gabriel Jobin, *"Les Obligations"*, 7e édition, Cowansville, Éditions Yvon Blais, 2013. QCL's general position is use of a subjective test rather than the objective test used under CCL. Baudouin/Jobin clarify: "Dans un système juridique fondé sur la liberté contractuelle, pour conclure un contrat, aucune formalité particulière ne doit être nécessaire, puisque la seule expression de la volonté humaine, c'est-à-dire le consentement, est suffisant. Ces idées ressortent clairement de l'article 1385 du Code civil." at 142 and 143.
Only if there is no evidence of a meeting of the minds will a court consider an objective test.

[39] *Supra* note 28. Bernstein et al. The inability for law to regulate efficiently has provoked some industries to set themselves "outside" the law by establishing communitarian administrative centres.

[40] *Supra* note 22. Carbonneau at 105 and106. International arbitration is the favoured forum for dispute resolution amongst business parties.

[41] *See*, for example, 00-06-1995 ICC International Court of Arbitration (First Partial Award) 7110. English Co. (BRI) v. Middle Eastern Co. (ME) BRI and ME entered into 9 related contracts for the supply of equipment having no express choice of law but that under a dispute it would be settled "according to "laws or rules of natural justice". ME argued that the clause meant general principles of law. BRI claimed that the reference was merely procedural fairness. A majority decision interpreted the intention of the parties to mean general principles "…primarily reflected by the UNIDROIT Principles". http://www.unilex.infor/case.cfm?id=713.

Obligations arising out of TBN: Is a TBN party free to walk away from negotiations without obligations owing to the opposing party(ies)? Popularly, the answer might be "yes", if no contract can be recognized by law. However, would the response be the same if the opposing party *could* prove that a legal obligation was intended to be binding and that damages were suffered because of a breach of promise or a breach of an agreement undertaken during the negotiations? Current legal theory of negotiations does not address the full extent of juridical consequences to business parties or the regulatory aspects of negotiations. Whether or not law should be regulating negotiations, law *has* been regulating, albeit "piecemeal" and inconsistently.

Generally, negotiations are popularly considered void of legal obligations under domestic laws, often pondered as a non-binding period *prior* to the formation of a contract. However, law has intervened using contractual doctrine or extra-contractual liability. If law can "find" an agreement, expressed or implied, law will recognize a contract and enforce it, insofar as the elements of a valid contract have been met. Where a legally binding contract cannot be recognized by a system of law, other remedies may be imposed on the parties that, at very least, interfere with party autonomy and cause legal controversy and uncertainty.[42]

[42] *See*, for example, promissory estoppel under the common law. Randy E. Barnett, "Foreword: Is Reliance Still Dead?", 38 San Diego L. Rev. 1, 2001. Barnett maintains that the courts should make a careful distinction between tort and contract in the promissory estoppel doctrine and insists that "consent to be legally bound is what characterizes the contract side of the doctrinal divide." at 7. *See also* Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 Wis. L. Rev. 507 at 523. *See also contra*: Robert E. Scott, "*Hoffman* v. *Red Owl Stores* and the Myth of Precontractual Reliance," (Symposium:Commercial Calamities), Ohio State Law Journal, Feb, 2007, Vol.68(1), at 71-101. Scott cautions that promissory estoppel liability, in particular that found in *Red Owl*, creates uncertainty and unpredictability. Following a great deal of investigation, Scott argues that *Red Owl* is a misleading precedent and has been overturned in a more recent Wisconsin case. Scott refers to *Beer Capitol Distributing, Inc. v. Guinness Bass Import Co*., 290 F. 3d 877 (7th Cir. 2002) at 73. Scott acknowledges that "conventional wisdom among contemporary scholars' succumbs to the principle that 'courts will impose promissory estoppel liability for reliance investments undertaken prior to any agreement between commercial parties.'" Scott refers to E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations", 87 Colum. L. Rev. 217 (1987) and Michael B. Metzger & Michael J. Phillips, "The Emergence of Promissory Estoppel as an Independent Theory of Recovery", 35 Rutgers L. Rev. 472, 496-97 (1983); We will be discussing pre-contractual liability at the end of Chapter 1, Part II. *See* Ralph B. Lake and Ugo Draetta, *Letters of Intent and Other Precontractual Documents Comparative Analysis and Forms*, Butterworth Legal Publishers, Massachusetts, U.S.A. 1989 at 178. *See also infra* note 46 at 25. Hondius refers to Farnsworth in his article at 238 who suggests that the *Red Owl* case would not be successful in England. Although a number of commentators still consider *Red Owl* a viable precedent. For further discussion on the reliance interest see Robert Birmingham, 'Notes on the Reliance Interest', 60 Wash. L. Rev. 217, 1984-1985.

For example, in *Hoffman v. Red Owl Stores* ("*Red Owl*"),[43] Plaintiff was in the process of negotiating the purchase of a franchise with Red Owl Stores. Hoffman claimed that he had been given repeated promises and assurances that these promises would be honoured, upon which he relied to his detriment. Nothing was recorded. The commitment targeted Hoffman's entitlement to purchase and run a franchise for Red Owl Stores. Hoffman sold his own little grocery store and deposited a sum of money with Red Owl. When Red Owl later required more money than initially agreed upon orally, Hoffman took action in court. The court allocated a tort remedy based on promissory misrepresentation during the negotiation processes, an alternative remedy "found" due to absence of evidence of a contract.

The debate revolves around whether such promises during negotiations should be treated as 'contractual' consent or as a result of a tort, such as misrepresentation or fraudulent negotiating behavior. It is not denied that representations during negotiations, whether they are oral or written, implied or expressed, "create value because they enable parties to stay on the road to mutually beneficial contracts."[44] Furthermore, there are many reasons why promises "ancillary to a bargain" should be recognized by law. Promises allow business parties to plan their economic futures and allocate risks between the parties. They safeguard a seller in completion of the production of goods and expand the horizons towards long term future production. They enhance a buyer who can then calculate the expenditures of the deal to enable re-distribution to a sub-buyer.[45] Although law has considered remedies outside contractual doctrine, these exceptional remedies are not generally addressed by using consensual standards. When do legal rights and obligations arise during negotiations? Should promises made during TBN and incomplete agreements be recognized by law as consensual if, in fact, the parties intended them to be legally binding?

[43] 133 N.W. 2d 267 (Wis. 1965).
[44] *Supra* note 42. Ayres/Klass at 517.
[45] Marvin A. Eisenberg, "The Revocation of Offers", 2004 Wis. L. Rev. 271 at 277 and 278.

There remains a popular assumption that negotiations do not bear any legal ramifications except when pre-contractual liability can be detected, in those jurisdictions that recognize pre-contractual liability.[46] However, there is no consistency in the manner that legal systems approach pre-contractual liability during negotiations. Not all legal systems embrace the idea of imposing pre-contractual liability on negotiating parties, thus French civil law systems turn to more general aspects of the concept of good faith, most German civil law systems consider pre-contractual liability contractual and common law systems use other sources of remedy clothed in equity or tort. This inconsistency invades the proper working order of the global market, the welfare of states and the common good. Uniformity in the characterization of legal ramifications would provide better certainty in this area of law and alleviate future surprises and uncalculated risks, to the business world.

The uncertainty causing surprise can be demonstrated by how law categorizes obligations arising during negotiations. It is not clear whether parties' arrangements during negotiations fall into contractual obligations or whether they will, inadvertently, fall into an extra-contractual category of obligations. If negotiation arrangements can be considered contractual by law, they will benefit from the protection of law. If they cannot be considered contractual, the undertakings exchanged during business dealings may not be enforced by law. Therefore, business parties face uncertainty as to whether their agreements will qualify as contracts under legal formalities and profit from legal protection. Conversely, negotiating parties do not always wish to be legally bound, particularly in the early stages of negotiations when they are still not sure whether they want to continue doing business with one another. Nevertheless, business parties may inadvertently stumble into extra-contractual or pre-contractual legal obligations that one, or more, party did not intend to have been legal binding.

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[46] Ewoud H. Hondius, (Ed.), *Precontractual Liability, Reports to the XIIIth Congress International Academy of Comparative Law*, Montreal, Canada 18-24 August 1990, Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1991. Hondius, Commentator Pierre Legrand, for Quebec, concludes by recommending loosening the will theory towards an understanding of precontractual liability within the realms of good faith: "[Law] ought to regard itself as having an interest in [the parties'] conduct." at 295.

The law has no tools to view most of these promises and agreements that are often silent, verbal, incomplete and evolving. How could law solve this ambiguity? What if law could track these undertakings in the event of a dispute? Before such a tracking mechanism can be considered, it is necessary to take a closer look at the TBN relationship.

The TBN relationship: TBN parties are typically not strangers, often being introduced to one another through a business associate[47] or soon shed their introversion to one another while striving to preserve their business relationships to move towards mutual goals. These relationships require cooperation accomplished through communications exchanged between the parties.[48] These communications include promises and agreements and necessitate collaboration to fulfill the business relationship.[49] Through this cooperation buds trust.[50] Without trust, there is no reputation to uphold. Without reputation, launching a business endeavor in the global market is dubious at best.

Trust spawns the necessity of a minimum standard of behavior or conduct during negotiations. Standards of conduct, including a minimum standard of good faith, are imperative in an environment that breeds opportunism, puffing and bluffing and where a party may be desirous to snatch the largest piece of pie. A hurdle under CCL is that only recently has the concept of good faith been recognized by the courts as an organizing principle of common law contracts,[51] which has not been overtly extended to negotiations, but we argue that it could under the right circumstances. CCL recognizes the party autonomy through freedoms of contract. Party autonomy itself presumes a certain level of good faith and can be refined through specific expressed party consent. TBN parties prefer to design their

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[47] For example, *see Yam Seng Pte Limited* v. *International Trade Corporation Limited*, [2013] EWHC 111 (QB) where parties were presented to one another through business associates.

[48] Bryan H. Druzin, "Eating Peas with One's Fingers: A semiotic Approach to Law and Social Norms", Int J. Semiot Law (2013) 26: 257-274.

[49] Jean-Claude Usunier, "Cultural Aspects of International Business Negotiations", in Pervez N. Ghauri and Jean-Claude Usunier, (Eds.), *International Business Negotiations*, 2nd Edition, Bingley, UK, Emerald Group Publishing Limited, 2008 at 116.

[50] *Ibid*. Usunier at 116 and 117.

[51] *See supra* note 47. *Yam Seng*. *See also Bhasin v. Hrynew*, 2014 SCC 71; [2014] S.C.R. 494.

own playing field but this freedom is contingent on certain behavioral standards.[52] Although there is no current uniform manner to determine what standard of behaviour, or duty of good faith, is owing during negotiations, or how such a duty should be applied by law, we argue that there could be a way.

Business parties would not negotiate unless they forecasted that they would be better with each other than alone.[53] TBN parties invest during the negotiation processes, and these are not insignificant investments, as TBN are characteristically long-term relationships. These investments deserve legal security and recognition by law. As a Quebec notary, my mission has been to securitize contracts for over thirty years. I wish to contribute the same security to transnational business negotiation transactions [TBN transactions].

To securitize a transaction, it is necessary to ensure whether negotiating parties doing business from different legal jurisdictions have the capacity to contract and, in the case of a legal person, that the party representing the legal person has the authority to transact. Furthermore, corporate status must be verified to ensure that the corporation is in good standing in its respective jurisdiction. It is pressing that TBN parties have a way to confirm their promises, agreement and the type of relationship they wish to establish. It is essential for an adjudicator, during dispute resolution, to clearly see what has been legally undertaken between TBN parties. It is imperative to find a way to secure deposits in the purchase and sale of international goods in escrow to assure a seller the payment of the goods upon the buyer's receipt and inspection of such goods. An institutionalized fast track arbitration system, that could resolve issues between TBN parties expeditiously to preserve their relationships, is vital to secure party autonomy in TBN as its own juridical order.

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[52] *Ibid. Yam Seng*. Mr. Justice Leggatt recognizes that essential in the formation of contracts is honesty in para. [147]. *See also supra* note 1. Holmes Norton argues: "Fairness [as Truthfulness] is also important in negotiations. Like truthfulness, it encourages trust between opponents and thus facilitates agreement without requiring a negotiator to abandon the assumptions of the process." at 536.

[53] In business *see supra* note 15. Ghauri at 4; in law *see* Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 1983-1984 at 771.

The consequences of our approach will provide transparency to arrangements made between TBN parties, through private confirmation of promises and agreements registered between the parties themselves. In the event of an unresolved dispute, this evidence will illuminate adjudicators with cognizance of the parties' legal intentions. In other words, our proposal will promote party autonomy by aiding the elimination of suppositions, replacing them with clear evidence of the undertakings that parties intend as legal rights and obligations. Furthermore, since TBN parties require flexibility during negotiations, they also need a manner to discard previous legal engagements when circumstances change and the ability to document the replacement of new undertakings. Our proposal includes new trade mechanisms, fit particularly for TBN, which will record promises, agreements and the intensity of the business relationships throughout the negotiation processes. Prior to a discussion of our proposed solutions, we will ventilate the current problematics that arise in legal regulation.

The problematics: We have identified three factors contributing to the uncertainty arising during the regulation of unsettled disputes during TBN. The first problematic is that negotiations do not yet have their own specific category of obligations in law. Mostly, law has not articulated explicitly how arrangements during negotiations should be addressed,[54] somewhat due to law having the inability to interpret the legal intentions of negotiating parties and partly due to the limitations in the categorization of negotiations under general legal obligations. The last time a new category of legal obligations was opened was by the court in *Fibrosa*,[55] that of restitution, to accommodate the insufficiency that neither contract nor tort doctrine could satisfy. Since 1943, the courts have not opened the scope to any additional category of obligations and it is unlikely that the United Kingdom

[54] *Supra* note 9. Swan explains: "The method of legal reasoning that the common law has developed (or which characterizes the common law) has certain features that sometimes make principled analysis difficult. The common law seldom starts from a statement of principle: its principles, such as they are, are constructed out of a backward look at what has been done to see what, if any, generalizations can be made from the "wilderness of single instances"...The lens has changed from time to time so that the generalizations that, through one lens, appeared clear and consistent, are, through another, vague, erratic and contradictory." at 168.

[55] *See Fibrosa Spolk Akcyna v. Fairbairn Lawson Combe Barbour Ltd*. [1943] A.C. 32. Set in the midst of World War II, the outcome of *Fibrosa* opened the polarized categories of contract law and tort under English law to include a quasi-contractual category of law.

Supreme Court or the Supreme Court of Canada will open another category of obligations to accommodate negotiations any time soon. Because our thesis cannot contribute towards the fundamental requirement of our legal systems to recognize a new category of obligations specifically suited to TBN, we anticipated the necessity to find an alternative solution that would dilute the necessity of change on a legislative or judicial level.

The second and third problematics are based, respectively, on transparency and uniformity, to which we do propose solutions. The second problematic is based on transparency, or rather the lack of it. TBN parties are not only routing for themselves, but for the good of the global market, for the enhancement of the welfare of states and to offer consumers supplies that would not otherwise be attainable. It is an arduous task, involving a great deal of risk and investment on the part of TBN parties.[56] Therefore securing arrangements that have been undertaken between TBN parties is indispensable. However, these arrangements are subject to a lack of transparency and therefore often intangible to law (unless the parties have executed a valid, binding contract), inhibiting law from being a viable source of remedy to an injured TBN party.

To accomplish a better functioning of deal making across borders, law must continue to protect the autonomy of the parties. To do so, arrangements between TBN parties require recognition by law even though they may fail to have produced a recognized contract under constraints of current contractual doctrine.[57] Many business agreements are skeletal and, even where a legal contract is drawn up, the parties' conduct may have deviated from the written terms,[58] or circumstances may change.

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[56] *Supra* note 30. Scott/Scwartz.

[57] *See* 3. in Section 1 of Chapter 2, Part I. Preliminary agreements and agreements to agree later.

[58] *Supra* note 9. Swan CCII. Swan elaborates with regard to the conduct of the parties: "As is distressingly clear from the cases, the careful work of solicitors is undone by the failure of the client or, more usually, its employees, to behave consistently with the terms of the agreement." at 41.

Business and management have recognized the value of the negotiation relationship and the importance of preserving it, since it is a considered a quantum commodity essential for successful negotiations.[59] A clearer understanding of the business relationship must be recognized by law since even when a contract is recognized by law, it may be interpreted through legal fiction that distorts the meaning that the parties may have intended.[60] The static nature of contracts is not conducive to the dynamic nature of TBN transactions.[61]

Characterization of legal obligations arising out of negotiations determines whether a remedy can be applied on a contractual basis or on an extra-contractual basis, which are the only two sources of obligations currently available for use by adjudicators.[62] Extra-contractual remedies, including tort or delictual remedies, distort the very nature of the TBN relationship.[63] TBN parties have no assurance, at present, as to whether promises and agreements they arrange between themselves will be legally recognized or whether or not they have inadvertently fallen into a pit of obligations that was never intended. Summarily, law does not fully comprehend the TBN relationship and the meaningful promises and agreements exchanged during the processes of negotiations since law is unable, currently, to see which arrangements TBN parties intend to be legally binding and which arrangements were not intended to be legally binding.

Business parties loathe turning to law for assistance, often preferring to rely on non-legal sanctions. Still, sophisticated business parties are often at an impasse to understand deemed legal obligations, leaving them on unpredictable legal grounds as the courts are making decisions based on

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[59] *Supra* note 15. Ghauri/Usunier; Roy J. Lewicki, R.J, Joseph A. Litterer, John W. Minton and David Saunders, "Interdependence" in *Negotiations*, Illinois, Irwin Professional Publishing, 1995; Roy J. Lewicki and Robert J. Robinson, "Ethical and Unethical Bargaining Tactics: An Empirical Study", Journal of Business Ethics 17: 665-682, 1998; Roy J. Lewicki, Edward C. Tomlinson and Nicole Gillespie, "Models of Interpersonal Trust Development: Theoretical Approaches, Empirical Evidence, and Future Directions", Journal of Management 2006; 32, 991, http://www.sagepublications.com; Lewicki (Interpersonal Trust Development); Bernard Cova, Florence Mazet and Robert Salle, "Project Negotiations: An Episode in the Relationship" in International Business Negotiations, New York, Pergamon, 1999.

[60] *See* 2.1 in Section 3 of Chapter 1, Part I on implied contracts.

[61] *Supra* note 9. Swan.

[62] *See* 2.2 in Section 3 of Chapter 1, Part I on extra-contractual traps, including other international approaches.

[63] *See supra* note 43. *Red Owl*. The tort debate is whether or not promises made during negotiations should be based on consent?

the opaque vision that courts currently have on facts during the negotiation processes. Furthermore, TBN parties often conduct negotiations relying on oral representations or incomplete documents. There is a growing awareness in the business community that some sort of identifiable expression should be developed to demonstrate their intentions during their negotiations to avoid misinterpretation.[64]

The third problematic lies in conflict of laws, since a plurality of legal systems operates during the regulation of TBN. There is a multitude of permutations that could arise depending on which legal system gains hierarchy of regulation, and each of these legal systems has a different response to how obligations arising out of TBN should be regulated and whether a duty of good faith should be applied to negotiations, thereby causing uncertainty and global inconsistencies. We will be performing a comparative law analysis to expose these inconsistencies after examining the three sources of law that potentially regulate negotiations. We will conclude that the manner party autonomy is interfered with greatly influences global inconsistencies, contributing to this uncertainty. Understanding negotiations and the negotiation relationship can aid law to overcome the second and third problematics, by proposing a manner that TBN parties can exercise their autonomy within a legal structure that all sources of law can recognize.

A proposed solution: Since business parties prefer to regulate their own affairs, we have proposed an infrastructure accessible to law and business: new juridical tools which we have termed "Bills of Negotiations" [BON] that guide and promote the continuance of party autonomy while maintaining legal standards of conduct.

We will be using Canadian legal models to demonstrate the differences between common law and civil law systems to demonstrate how negotiations are regulated on a domestic front to expose

[64] *Supra* note 15. Ghauri at 22. *See also*, Hans Hindriks Edlund, "Imbalance in Long-Term Commercial Contracts", European Review of private law, 2009, Vol. 5(4) pp. 427-445; Tommy Roxenhall and Pervez Ghauri, "Use of the written contract in long-lasting business relationships", Industrial Marketing Management 33 (2004) 261-268.

some of the obstacles we encountered, such as the fact that CCL has been resistant to the recognition of the concept of good faith as an organizing principle in the common law,[65] challenging the core of our thesis. We argue that there is a minimum level of good faith congruent to the TBN relationship and that there are levels of choice of conduct that could be recognized by the CCL, under the rights circumstances, if the parties have specifically expressed their agreement.[66]

To defend our argument that good faith during negotiations could be extended to negotiations when shepherded by expressed party choice, we have used the analogy of a gyroscopic juridical orientation to demonstrate how stability can be provided in this area of law. Parallel to the gyroscope's capability of spinning so rapidly that it is free to alter in direction, there is a need to ensure that TBN parties have the flexibility and stability required to do business from different legal jurisdictions. Since most civil law jurisdictions and transnational laws, like the American *Uniform Commercial Code* [UCC], embrace the principle of good faith, with aspiration of the development of the duty of good faith under the CCL and other English jurisdictions, we posit that the juridical gyroscopic orientation supporting party autonomy could reconcile the regulation of TBN.

To further defend our position that TBN *could* be regulated effectively by law, we will turn to Hogg's wisdom.[67] We posit that Hogg's co-operative will theory of contracts [HCWT] is an ideal base towards a new LNT of TBN with a foundation. It is pressing that TBN parties have a way to confirm their promises, agreements and solidify the type of relationship they long to maintain. Our goal is to provide law in action with juridical tools for the proper functioning of TBN and an alternative methodological base to our proposed practical application. Hogg has a vision to resolve the debates

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[65] *Supra* note 47. *Yam Seng* was later referred to by the Supreme Court of Canada, only recently recognizing good faith as an organizing principle in common law contracts, referred to in *supra* note 51. *Bhasin*.

[66] *Supra* note 9. Swan warns that the concept of good faith is meant to remedy "scumbageous" behavior during the formation and performance of contracts, but has not been recognized to extend to negotiations.

[67] *Supra* note 11. *See also* Martin Hogg, "Contract Theory: Is There a Path Through the Theoretical Jungle?" Edinburgh School of Law Working Paper Series, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract = 1981896.

regarding theories of contract by amalgamating the polarized positions of contract as a promise or contract as agreement (or consent) while adding the relational value that modern, long-term contracts are built upon. Since promise, agreement and relationship are the aspects that we have identified as essential for the proper functioning of TBN, we argue that HCWT is an ideal foundation towards a new legal negotiation theory built specifically for TBN. Naturally, this theory could be adapted to domestic negotiations, but this prospect is outside the scope of this thesis.

A new legal negotiation theory [LNT] of TBN would provide the theoretical base required for our proposed new trade mechanisms, termed BON. Summarily, BON will migrate to e-commerce which will guide the parties a manner to record specific promises, agreements and relational concerns that the parties wish to be binding that can be recognized by law. Each of the BON must be confirmed between the parties. Each of the BON may be mutually discarded, and/or replaced, when circumstances change. Therefore, the promises, agreements and the relationship will be transparent to each negotiating party by following depth bills that mark the stages of negotiations, horizontal bills to track negotiation strategies and remind parties of the elements that must be addressed in each stage of negotiations, and vertical bills that provide a pathway to follow negotiation tactics. Vertical bills will follow the three aspects based on HCWT[68] (promises, agreements and the relationship itself) which will serve as the methodological basis for the operations of BON.

In conclusion, law must tread carefully before regulating a human activity that necessitates autonomous deal-making. Prior to regulating, law must come to a better understanding of the processes of negotiations and how TBN parties communicate together. Law must be able to envision the arrangements that TBN parties intend as binding and the extent of the TBN relationship, which is a valuable commodity to TBN parties. A lack of transparency intercepts law's capacity to view the

[68] *Supra* note 11. Hogg.

pertinent facts taking place during negotiation movements, therefore law is unable to discern the legal consequences of these movements. Characterization of negotiations affects whether law can find a remedy as well as the type of remedy that law will impose. Because of a plurality of regulatory sources of law interested in TBN, characterization of negotiations is inconsistent and therefore legal remedies imposed by adjudicators settling unresolved disputes are unpredictable. We propose a manner to provide more certainty in this area of law and the development of TBN in the future.

THE STRUCTURE OF THE DOCTORATE THESIS AND METHODOLOGY

Commencing with a general landscape, including the definition and concept of negotiations,[69] Chapter 1 of Part I will lead to the break-down of the very purpose and function of negotiations, following the normative behavioral patterns to discern when social promises become legal promises. The nuance of when TBN parties step into the legal world is the pivotal point to identify whether and when legal obligations have been created during negotiations, thus law must visualize this division line.

To regulate, law must have a firm understanding of business negotiations and the intricacies of the communications exchanged between negotiation parties. Moving forward in Section 2, we will investigate the processes of negotiation from a business perspective to better comprehend the business negotiation relationship; how TBN parties perceive meeting mutual goals[70] and the nuanced communications exchanged between TBN parties and what they mean to business negotiation parties during negotiation.

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[69] Gary L. McDowell, "The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation", 44 Am. J. Legal. Hist. 257, 2000. McDowell recites: "…legal dictionaries, as well as dictionaries more generally, have remained a constant resource in American law for those seeking to give meaning to the words of both statues and constitutional provisions…a majority of the justices of the Supreme Court, at one time or another, have turned to them." at 257.

[70] Lalita A. Manrai, and Ajay K. Manrai, "The Influence of Culture in International Business Negotiations: A New Conceptual Framework and Managerial Implications", Journal of Transnational Management, 15:69-100, 2010, also published online at http://dx.doi.org/10.1080/15475770803584607.

There is a consensus in most disciplines having an interest in negotiations, that negotiations are viewed as a metaphorical dance. This image aids to break down the components of what we have entitled the "negotiation system", comprised of negotiation tactics, metaphorically termed "negotiation steps", that move parties through their respective negotiation strategies, figuratively called "negotiation positions". These positions steer TBN parties, while they are building a business relationship, across the borders that business disciplines and behavioral scientists refer to as "negotiation stages".[71]

Law can benefit from behavioural scientists who have examined business negotiations and exposed nuances within the functioning of negotiations, such as how business negotiation parties communicate with one another and how they overcome cultural barriers. We intend to expose how signals and silent communications are exchanged between the parties, identified by the lifetime empirical works of Hall[72] and Hofstede.[73] These communications lead the parties towards mutual goals and represent commitments that TBN parties undertake during the negotiation processes, most of which remain unrecorded.

A short summary of the influence and intervention of law in section 3 of the first chapter, will aid to expose the struggle in law to discern which undertakings, exchanged between negotiating parties, are legal and which ones are simply social promises.

Due to endless permutations resulting from conflict of laws that prevalently occur in TBN, we chose Canadian legal systems as our models to demonstrate the differences and similarities present in Canadian Common Law [CCL] and in Quebec Civil Law [QCL]. Canadian legal systems divide legal

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[71] *Supra* note 15. Ghauri and *infra* note 208. Docherty/Campbell.

[72] Edward T. Hall, "The Silent Language in Overseas Business", 38 *Harvard Business Review*, May/June 1960.

[73] These communications aid to determine party intention in exchanges between TBN parties to enable parties to move forward towards attaining their mutual goals. *See* Geert Hofstede, "Hofstede's Dimensions of Culture and their influence on International Business Negotiations" in *supra* note 15. Ghauri; Geert Hofstede, "What is culture? A reply to Baskerville", Accounting, Organizations and Society 28 (2003) 811-813; *See also* Rachel F. Baskerville, "Hofstede never studied culture", Accounting, Organizations and Socity 28 (2003) 1-14; Geert Hofstede, "What is culture? A reply to Baskerville", Accounting, Organizations and Society 28 (2003) 811-813.

obligations into contractual obligations and extra-contractual obligations. Law only recognizes contractual obligations when it can recognize a valid contract. If law does not recognize an agreement, pre-contractual or extra-contractual traps may be imposed by law as remedies to what law has considered an injured party. These responses in law are not globally uniform. This results in a precarious legal venture travelled by TBN parties, resulting in inconsistent interference with party autonomy, unsuitable for TBN. Legal interference can occur when either an agreement fails to pass the tests of contract validity, misinterpretation of a contract, exceptions and legal fiction cacophonous to the nature of TBN, causing unpredictability in legal regulation by domestic laws.[74]

The result can be devastating to business parties if they find themselves with improper legal remedies should negotiations go sour. Regulation of TBN will remain inconsistently trial and error until law can realize a better manner to track negotiation movements during the negotiation processes, and thus assess whether the parties have actually created rights and obligations with one another and the nature and extent of these rights and obligations. In other words, the facts necessary to decide whether the parties' undertakings were intended to be legally binding must be accessible during legal dispute resolution.

The second chapter of Part I, limits the scope to voluntary promises and agreements, focusing on the relationship existing between business negotiating parties. Remaining on the metaphorical analogy of negotiations,[75] we will address three potential sources of law that regulate TBN that we have termed, the "legal ballroom", comprised of three sources of law that we have identified: domestic laws, transnational laws and party autonomy. The legal ballroom is a metaphoric

[74] To better accomplish a manner in which law can regulate TBN, law must find a way to record when the negotiating processes begin and how long they last or, at very least provide a means in which the parties can signal these boundaries themselves. Once the negotiation dance begins, communications develop into commitments, the intensity of business relationships increases, and behavioral expectations commence.

[75] *See* Roderick A. Macdonald, "Three Metaphors of Norm Migration in International Context", 34 Brook. J. Int'l L. 603, 2008-2009.

demonstration[76] aimed to uncover when party autonomy is promoted by law and when law interferes with party autonomy, to reconcile the three sources of law towards uniformity.

We will focus on freedoms of contract in Section 1 to illuminate the advantages of mandatory enforcement of legal obligations by domestic laws resulting from a legally recognized agreement. For example, when a contract is recognized by law, it gains the protection of the state through the enforcement of the agreement under the doctrine of contract by domestic courts, thus party autonomy is supported. Yet, we have also observed that there are restrictions to the static nature of contracts during the exercise of TBN parties during deal-making, particularly the recognition and interpretation of preliminary or incomplete agreements.

Transnational sources of law offer more dynamic and flexible solutions than domestic laws, largely relying on voluntary compliance rather than sovereign enforcement. We will follow the historical transformation of merchant custom to expose that merchant customs, identified by domestic laws, are parallel with standards developed by the merchants themselves.[77]

Transnational laws purport to support party autonomy but also maintain an expectation of minimal behavioral standards.[78] However, enforcement of transnational laws relies on domestic ratification or voluntary compliance by the parties themselves. TGPL developed out of merchant custom may be applied by international arbitration. This special customary law is easily confused

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[76] There is a general consensus in legal negotiation theories that negotiations can be metaphorically compared with a dance.

[77] Transnational laws are complex as they are spherical nature of transnational, being "*of*", "*above*", "*below"*, *"around*" and "*through*" international conventions and treaties, domestic sources of law and party autonomy. *See* Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda", 87 Am. J. Int'l L. 204, 1993. Slaughter Burley observes that out of the post war trajectory, "International legal theorists had long grappled with the theoretical conundrum of the sources of international legal obligation-of law being simultaneously "of" and "above" the state" at 208. *See also* Peer Zumbansen, "Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power", Law and Contemporary Problems, Vol. 76, 117; Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law", European Law Journal, Vol. 8, No. 3 September 2002, 400-432; Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism", 21 Transnat'l L. &Contemp. Probs. 305, 2012-2013.

[78] *See* Robert H. Mnookin and Michael Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979) which is cited by several commentators, including Menkel-Meadow *supra* note 53 at 766; *See also* Rebecca Hollander-Blumoff, "Just Negotiation", 88 Wash. U.L. Rev. 381, 2010-201 at 392. In spite of its context, it is surprisingly simple to apply the principles to a business association since both contexts result from relationships between the parties; Rebecca Hollander-Blumoff, "Legal Research on Negotiation", International Negotiation 10, 149-164, 2005. Rebecca Hollander-Blumoff, "Social Psychology, Information Processing, and Pleas Bargaining", 91 Marq. L. Rev. 163, 2007-2008. Rebecca Hollander-Blumoff, "Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential", Law & Social Inquiry, Vol. 33 (2), 473-500, Spring 2008.

with matters that the parties themselves intended. When the parties have failed to expressly stipulate the nature and scope of good faith, transnational laws experience the same difficulty as domestic laws in the application TGPL, including the scope and nature of the duty of good faith.

We will altercate that a third source of law exists, derived from the parties themselves in Section 3 of Chapter 2, leading to a query of how *party autonomy* could be considered its own juridical order in the context of TBN. On a juridical positivist perspective, it is the state legislature that awards parties the right to decide business matters on their own, insofar as the parties do not breach mandatory provisions of domestic laws. Therefore, it will undoubtedly take a pluralistic lens to view how party autonomy during TBN could be considered its own juridical order.

There has been no consensus in law as to the nature of party autonomy. Is it a principle,[79] a paradigm,[80] a myth,[81] or some other concept? We will argue that party autonomy is contingent on context, and that in the context of TBN, it could potentially become recognized as its own juridical order, if the appropriate infrastructure could be institutionalized sponsoring expressed party choice. We will review the will theory for this purpose. We will investigate similarities and differences that should be taken into consideration between merchant custom and self-regulated industries and why regulation "outside the law" may not be beneficial to the global market.

In our conclusion, a discussion of whether transnational laws can supersede party autonomy will be addressed. Does the act of filling the gaps with TGPL inadvertently infringe on party autonomy? TGPL are meant to reflect expected behavioral standards of TBN parties stemming from

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[79] Emmanuel S. Darankoum, «L'application des Principes d'UNIDROIT par les arbitres internationaux e par les juges étatiques», 36 R.J.T. n.s. 421, 2002. Darankoum describes party autonomy in function of a principle: « L'autonomie de la volonté des parties est considérée comme l'un des principes les plus acquis en matière de contrats internationaux et reconnue par les droits nationaux. » at 427.

[80] Ralf Michaels, "Party Autonomy – A New Paradigm without a Foundation?", Japanese Association of Private International Law, June 2, 2013.

[81] Horatia Muir-Watt, "'Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance", European Review of Contract Law, Sept, 2010, Vol.6(3). *See also* Horatia Muir-Watt, « La fonction subversive du droit comparé », (2000) 52 *R.I.D.C.*, 503 Extract p. 503-527. ISSN 0035-3337.

lex mercatoria, a merchant custom developed by merchants themselves to promote trust and credibility, but perhaps TGPL do not always align with what the parties specifically intended.

The second part of the thesis uses a juridical gyroscopic orientation towards a solution that can eradicate uncertainty in legal regulation. We will initiate our gyroscope by laying all the pieces we have collected from Part I. This preparation, inspired by Wigmore's kaleidoscope, offers an impartial manner to collect artefacts, and serves as a base in our comparative analysis to expose the tensions between party autonomy and behavioural standards of good faith during TBN. Our aim is to evaluate how party autonomy could be better supported by law during TBN and temper the relationship between party autonomy and good faith during the processes of TBN. Our comparative analysis will lead to the conclusion of the necessity of proposing a LNT of TBN[82] *with* a foundation.[83]

Section 2 will examine why current legal theories are not contributing predictability and reliability in the functioning and regulation of TBN. Legal negotiation theory is incomplete, so we turned to contract theory. Common law commentators have agonized over the theory of contract and whether it exists as its own doctrine or simply as an extension of tort.[84] Although current legal theories are a distance from what TBN parties require in today's market, the common law discourse on whether contract theory should be based upon promise[85] or based upon consent,[86] lead to a solution which, ultimately, raises party autonomy to the top of the legal regulation podium.

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[82] Such a theory is expected to envelope good faith and reflects the true nature of TBN by recognizing that promises, agreements and a business relationship within normative requirements that have developed over time and continue to dynamically mutate.

[83] *See supra* note 80. Similarly, Michaels who calls for a legal theory of party autonomy. The tension between party autonomy and the concept of good faith and how its application affects negotiations (or not) will be analyzed. In the second part of Section 1, we will follow the historical transformation of the concept of good faith both under Canadian laws and enter a discussion on the manners in which good faith can be imposed by domestic courts: implied by the parties themselves, imposed by law, or imposed by custom. The Supreme Court of Canada failed to elaborate the duty so widely. *See supra* note 51. While the outcome in *Bhasin* recognized an objective organizing duty of good faith in the performance of contracts imposed by operation of law and did not extend the duty to the formation and extinction of contracts, as previously recognized in *supra* note 49. *Yam Seng*. The judgement in *Bhasin* also ignored aspects of party intention.

[84] *See* Grant Gilmore, *The Death of Contract*, Columbus, Ohio, Ohio State University Press, 1974 and Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979; Patrick S. Atiyah and Stephen A. Smith, *Atiyah's Introduction to the Law of Contract*, 6th edition, Oxford, Clarendon Press, 2005; See also Stephen A. Smith, *Atiyah's Introduction to the Law of Contract*, Oxford, Clarendon Press, 2005.

[85] *See* Juliet P. Kostritsky, "The Promise Principle and Contract Interpretation", 45 Suffolk U.L. Rev. 843, 2011-2012; for a discussion on Fried's re-introduction of "contract as a promise", considered to have salvaged that "promise" is sufficient to the doctrine of contract in recent years Juliet P. Kostritsky, "Contract Interpretation: Judicial Role Not Parties' Choice", in Larry A. DiMatteo, Qi Zhou and Severine Saintier, *Commercial Contract*

Hogg's theory [HCWT] offers a dynamic solution to this debate by amalgamating the two opposing contract theories and adding relational aspects of contracts. When applied to the regulation of TBN, Hogg's theory operates to provide a universal methodological tool to dissect the anatomy of legal obligations arising during negotiations. We are in search of edge pieces that build towards a LTN of TBN with a foundation and posit that the distillation and adaptation of HCWT serves as a fundamental basis for a LNT of TBN and a manner to provide transparency to TBN dealings.[87]

To commence a LNT of TBN, we recommend that a basic understanding of TBN must recognize three fundamental factors that contribute to the creation of legal obligations:

- re-characterization of the concept of negotiations as promises, agreements and relationships;
- recognition of party autonomy as its own juridical order to reconcile self-interests with mutual goals; a continuum of negotiation stages increasing intensity of the relationship, consequently the commitments that are relied upon; and
- setting flexible standards of TBN parties' communications and standards of conduct so the tri-dimensional regulatory systems can measure and delineate TBN commitments to one another in law based on party autonomy.

Using the proposed edge pieces to a LNT of TBN, we will conclude this chapter by demonstrating that legal theories can and should contribute to the proper functioning of TBN and dispute resolution between TBN.

Chapter 2 of Part II deals with how the gyroscope spins; in other words, the practical application of a LNT of TBN which records promises, agreements and the intensity of the business relationship, propelled by party autonomy. Law could better serve the business community through an infrastructure that privately records meaningful business semiotics, contributing to the settlement of

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Law: Transatlantic Perspective, CUP, 2013; *See also* Juliet P. Kostritsky "Taxonomy for Justifying Legal Intervention in an Imperfect World : What to do when the Parties have not achieved bargains or have drafted incomplete contracts", Wis L. Rev. 323, 2004.

[86] Randy E. Barnett, "Contract is Not Promise; Contract is Consent", 45 Suffolk U.L. Rev. 647, 2011-2012; *See also* Randy E. Barnett, "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract", 78 Va. L. Rev. 1175, 1992; Randy E. Barnett, "A Consent Theory of Contract", (1986), 86 Colum L. Rev. 269; Randy E. Barnett, "The Death of Reliance", 46 J. Legal Educ. 518, 1996; *See also supra* note 42. Is Reliance Still Dead?"; Randy E. Barnett, "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract", 78 Va. L. Rev. 1175, 1992.

[87] This entails breaking down the three major components of Hogg's theory into negotiations based upon promises, negotiations based upon agreements and negotiations based upon relationships. To apply Hogg's theory to a LNT of TBN and gain an understanding of how legal regulation could be performed in a more uniform fashion, we must also consider adding to this theory the normative patterning of TBN and the manner in which they communicate with one another, accumulated by reviewing what we have gathered from business and behavioral scientists' perceptions.

disputes through standards and communications chosen by the parties themselves in an institutionalized setting.

We posit that legal standards must not chip away at the flexibility of party autonomy nor restrain parties' agreements, actions or communications that could ultimately threaten the parties' relationship and hinder the ability for TBN parties to regulate their affairs. Where parties' relationships have broken down, many parties wish to continue their ventures and seek neutral and expert help to mend business relationships. Transnational law metamorphoses through international arbitration as a solution from the past yet remains an essential dispute resolution method for broken negotiations in transnational affairs due to the thirst of business parties to remain autonomous.[88]

The development of new, symbolic trade mechanisms is not unlike the integration of letters of credit, bills of lading and INCOTERMS, except that each BON symbol relates to a choice that TBN parties must necessarily take during the negotiation processes. Electronic bills of lading [e-BL] provide trade mechanisms for the transport and transference of international sale of goods so we will review the development of these commercial instruments. We can learn from the frailties that arose during the launching of e-BL which are now serving the global market.

Inspired by my father's last work as a chemist who catalogued uniform truck symbols across Canada that officials could understand, we hypothesized that a standardized demarcation of negotiation semiotics could provide efficient tools to the global market using uniform symbols, to aid law in the recognition of how TBN parties are actually communicating. Referring to the collection accumulated from behavioral scientists and re-formulating the proposition of a new vision for a LNT of TBN, we will suggest a way that TBN could be better regulated using new juridical tools.

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[88] *See especially supra* note 22. Carbonneau considers arbitration beneficial to reestablish the parties' relationship and reinstate their autonomy: "International arbitrators not only adjudicate international commercial disputes, but they also have elaborated a common law of international contracts and business transactions in their rulings. Moreover, when international arbitrators rule on statutory rights and claims, they become *de facto* international legislators. International arbitral awards, therefore, constitute legal precedent that can bind subsequent arbitrators and even courts." at 42.

We anticipate that BON will contribute towards the wealth of the state and enhance the global economy while providing business parties with flexibility to bolster efficiency, predictability, and foreseeability in support of party autonomy in a cooperative setting. The purpose of BON is to track communications between TBN parties and form a bridge between business perceptions and legal ones. This bridge will promote party autonomy,[89] standardize communications and conduct in TBN processes, and provide evidence to aid adjudicators to understand the level and intensity of parties' legal commitments during TBN.

We advocate that BON will ameliorate current legal regulation of TBN by defeating various debates that have ensued regarding contract doctrines, eliminate the uncertainty of common law "consideration", discard the tension between objective and subjective tests to assess party intention and expand freedoms of contract exercised by TBN parties. The goal of BON is to aid law in supporting the autonomy aspired by TBN parties by providing a manner for law to recognize the clear manifestations of party intention. BON will also eliminate the uncertainty that has transpired in adjudicating matters, such as what was specifically promised,[90] whether the parties intended to form a legally binding agreement, albeit incomplete[91] and the terms and conditions of these agreements. In other words, BON will follow the business relationship during the entire negotiation processes.

The scope of this study is directed towards the legal regulation of the private commercial nature of TBN. To limit our scope to a manageable level we chose to equate the issues to the field of

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[89] *See supra* notes 80 and 81. Michaels and Muir-Watt regarding the importance of party autonomy. We must continue to strive towards understanding the negotiation process in TBN to settle the legal enigma that lies between certainty and flexibility by recalling the powerful words of Mohandas Karamchand Ghandhi: "*Our ability to reach unity in diversity will be the beauty and the test of our civilization.*"

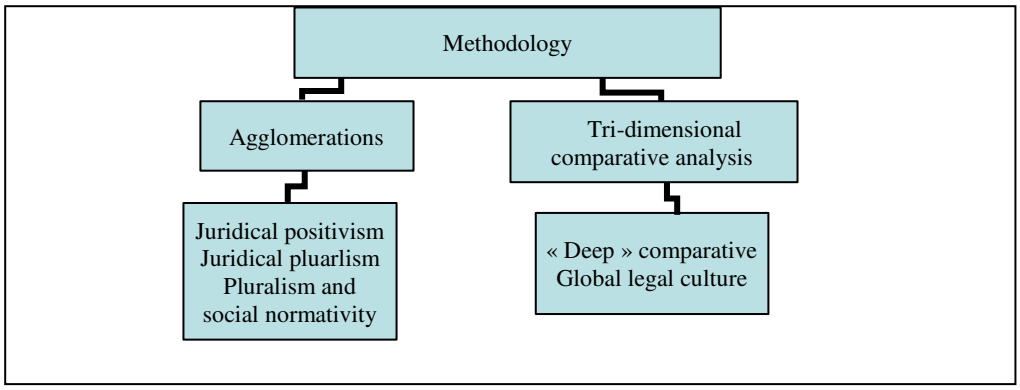
[90] *Carlill* v. *Carbolic Smoke Ball Co*. [1892] 2 Q.B. 484 (UK C.A.).

[91] *Walford v. Miles* [1992] 2 A.C. 128. *See supra* note 9. CCL Swan disagrees with the outcome of Walford: "The idea, expressed in *Walford v. Miles*, [1992] 2 A.C. 128, at 138, [1992] 1 All E.R. 453, at 460, [1992] 2 W.L.R. 174, at 181 (H.L.) by Lord Ackner that the "concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations", misses the point, *viz*., that negotiations are only possible -- just as effective and meaningful communication of any kind is only possible -- if the parties involved are committed to some minimal standard of good behaviour and the observance of rules. Alan Berg has convincingly shown that what Lord Ackner said has not been universally accepted by English courts. *See contra* Alan Berg, "Promises to Negotiate in Good Faith" (2003) 119 Law Q. Rev. 357 at 363 whereby Berg considers that an obligation to negotiate in good faith is enforceable when it imposes upon parties that they may not withdraw from negotiations without a reason or cause. *See* issues outlined by Keith Han and Nicholas Poon, "The enforceability of Alternative Dispute Resolution Agreements-Emerging Problems & Issues", (2013) 25 SAcLJ 455, in particular that "Full-blown disputes are said to always be bad news for a company. It may frighten investors, divert resources and, in some cases, paralyse a company…Dispite the growing numbers of adopters of amicable ADR mechanisms, the law governing agreements to resolve disputes amicably is still relatively underdeveloped." at 455 and 456.

international sale of goods. This field has a rich history enabling the discussion of norms of merchant custom mutating into recognized TGPL that provide a foundation for TBN standards of conduct. International trade law allows us to draw on an extensive quantity of material regarding various regulatory institutions whereby party autonomy, hypothetically, has always been supported.

Our doctorate strives to find an efficient, secure and simple manner in which TBN parties can communicate together to demonstrate the exactitude of their legal commitments in a way that can be recognized by law. To do so, law must continue to support the autonomy that has been offered in the past and travel forward into the future by providing convenient tools for use by TBN parties that show a comprehensive view of the travelled road of TBN parties to adjudicators.

METHODOLOGY



Our overall philosophy towards this doctorate is to find a better manner to legally regulate and securitize TBN transactions. To test our doctorate hypothesis, we required several methodological approaches, each serving a different purpose. Summarily, juridical positivism and juridical pluralism serve as collection tools; the former on a domestic level, juridical pluralism on transnational and party autonomous levels and pluralism to ventilate the internormativity incidental to party autonomy. Juridical positivism offers a clear, objective and scientific analysis of law and its domestic structure and the ability to identify legal norms and their application on a domestic level. This level of

investigation will use a juridical positivist approach to display how negotiations are being currently regulated in domestic settings.[92]

Alas, positivism is unsuitable for the study of the regulation of TBN whose boundaries reach beyond the will of the legislature,[93] so we require further methodological tools to analyze the impact of non-state laws. A comparative analysis will expose the fundamental question of how law can better regulate this human activity that deserves "reconsideration of the rules"[94] to propose improvements to the further development of the legal regulation of TBN in a global context.[95]

Juridical Positivism: To proceed scientifically, and inspired by Wigmore's kaleidoscope, we collected doctrinal writings and jurisprudence which unearthed elements that are contributing to the uncertainty in domestic legal regulation of negotiations. Kelsen's *Pure Theory of Law* provided the methodology to search for answers to questions such as: How are legal rights and obligations created and identified on a domestic level?[96] Kelsen's theory consists of a pyramid; a hierarchy of categories of defined norms in which the superior norms are defined by the State and all other norms must base their validity upon superior, or fundamental, norms.[97] Kelsen's methodology[98] provides juridical

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[92] Geoffrey Samuel, *Epistemology and Method in Law*, Hampsire/Burlington, Ashgate Publishing Company, 2003. Extract pp. 1-93, 95-123. ISBN 185521 5993 (29/365p.) Samuel proposes establishment of a model: "Comparative Viewpoint…Epistemological importance…indicate[s] that comparative law can offer a critical set of models through which legal knowledge assumptions can be questioned." at 111. *See also* Geoffrey Samuel, "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences", in Mark Van Hoecke (Ed.), *Epistemology and Methodology of Comparative Law*, Oxford and Portland Oregon, Hart Publishing, 2004, 35-77.

[93] Thomas E. Carbonneau, *Carbonneau on International Arbitration: Collected Essays*, New York, JurisNet, 2011. Carbonneau concludes: "The use of a comparative methodology with international implications is the most appropriate means by which to achieve that substantive end." at 380. Carbonneau illustrates this quanundrum: "The positivist view declares national law as the only source of law, while, in the autonomist view, the lex mercatoria is an autonomous legal system which is at least potentially complete and self-reliant and which may compete with national law." at 31 and continues the thought: "Nobody denies that there is a body of international rules, founded on the commercial understandings and contract practices of an international community principally composed of mercantile, shipping, insurance, and banking enterprises of all countries. That body of rules antedates the emergence of strictly separated national legal systems; it has never ceased to exist; moreover, it is continually being developed. It should be recognized by national legal systems as customary law and, together with legislation, precedent or doctrine, and equity, as one of the four main sources of the national law itself." at 32.

[94] *Supra* note 3 at 282. Riles. *See also* Werner Menski*, Comparative Law in a Global Context,* 2nd Ed., New York, CUP, 2006.Menski points out: "Law [in a pluralistic global context]…is no longer neatly packed in toolboxes for easy transportation, application and consumption." at 29.

[95] *Ibid*. Riles defines:"The statement that law is a means of social control and organization has almost become a commonplace." at 234.

[96] Geoffrey Samuel, *Law of Obligations*, Glos, UK, Edward Elgar Publishing Limited, 2010. Samuel explains, for example, that: "…according to Justinian, obligations arise out of four sources, three of which-contract, quasi-contract (or unjust enrichment) and delict – remain as formal sources today in the civilian tradition." at 27. Whereas under the common law and classical Roman laws "thought in terms of remedies rather than rights; that is to say both sets of jurists started out from the form of an action and worked from there towards a solution." at 318.

[97] Michelle Cumyn, « Les catégories, la classification et la qualification juridiques: réflexions sur la systématicité du droit », (2011) 52 *Les Cahiers de droit*, 351, Cumyn explains the pyramid: "Elle prend la forme d'une classification de toutes les normes du système sous forme de hierarchie, dans laquelle les normes d'une catégorie superiéure fondent la validité des normes d'une catégorie inférieure...» at 358.

qualification of factual situations in order to establish normative interpretations and eliminate the necessity of intertwining morality and law.[99] Although Kelsen has been criticized by other approaches, his theory brilliantly enabled the evolution of the adoption of an infinite number of new norms thereby paving the way to the creation of new principles and new categories of law.[100] This leads to an approach that could open a new category of law specifically suited to negotiations. We discarded this possibility as it became clear that this venue would not be forthcoming soon, even though *Fibrosa* bears witness to the possibility that courts could open a new category of obligations.[101]

In almost all juridical jurisdictions, negotiations have no specific rules[102] and normativity within the context of TBN can only be recognized by law if it can fall into custom recognized by law. Consequently, Kelsen's theory alone cannot provide the entire legal picture.[103] A Dworkian view is necessitated to answer questions such as: To what degree does an adjudicator exercise discretion that impacts the establishment of obligations during negotiations and how close are the parties' actions to the formation of a contract?[104]

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[98] Hans Kelsen, *Théorie pure du droit*, Boudry-Neufchatel, Editions de la Baconniere, 1953 et 1988, Extrait : ISBNø (13/205p). Kelsen describes the process: « L'efficacité d'une norme est donc une condition de sa validité.» at 42. Kelsen believed that a legal norm must take the form of a command to regulate human behavior whereby sanctions are imposed by the Courts to maintain the will of the State and sustain the integrity and legitimacy of the legal system through consistency and coherence.

[99] *Supra* note 97. Cumyn describes a characteristic of the positivist legal system: « Une autre caractéristique importante du système, en effet, est son caractère *dynamique*: le système n'est pas inerte, il a la capacité de se transformer tout en conservant son unité et son identité propre.» at 354.

[100] *Supra* note 98. Kelsen explains the limitless structure: « Au point de vue statique le droit apparaît comme un ordre social, comme un système de normes réglant la conduite mutuelle des hommes…Une norme n'a pas seulement une validité spatiale et une validité temporelle. Elle a aussi une validité matérielle…Une norme a enfin une validité personnelle, eu égard aux individus dont elle règle la conduite. Ces deux validités, matérielle et personnelle, sont illimitées quand la norme s'applique à n'importe quel comportement...» at 42 and 43.

[101] *See supra* note 55. In a transnational context, however, it would take more than the power of one legislature to open a category of legal obligations specifically for TBN; rather it would require international coordination and cooperation to effectively accomplish such recognition.

[102] With certain exceptions, including Art. 1337 of the Italian code.

[103] William Twining, "Normative and Legal Pluralism: A Global Perspective", 20 Duke J. Comp. & Int'l L. 473 2009-2010. Twining points out, "It is important to distinguish between state legal pluralism (sometimes called weak legal pluralism), legal plycentricity (the eclectic use of sources within different sectors of one state legal system), and legal pluralism conceived as the coexistence of two or more autonomous or semi-autonomous legal orders in the same time-space context." at 488 and 489. This statement refers back to very basic questions of law and Twining turned to Jeremy Bentham's questions about individuation: "Jeremy Bentham…asked "what constitutes one law? What constitutes a complete law? So these are not puzzles confined to legal pluralism…One familiar move is to postulate that all norms, laws, and legal rules belong to some larger unit such as a system, order, or code."

[104] Ronald Dworkin, « Le positivisme », (1985) 1 Droit et Société. Dworkin describes discretionary power as a reason that standards should not be applied mechanically : « On utilise parfois "pouvoir discrétionnaire" dans un sens faible, uniquement pour dire que, pour une raison ou une autre, les standards appliqués mécaniquement mais exigent que cet organe utilise son jugement. » at 44.

Negotiations have not escaped the scrutiny of domestic tribunals as adjudicators attempt an approach by applying fictitious means to exercise their discretion in an attempt to find a remedy between the parties.[105] For example, whether a contract has been formulated or not is based both on fact and on law and is rarely textbook clear. The law in action must justify its adjudicative intervention to fill the gaps of the parties as "implied contracts";[106] to categorize negotiations under pre-contractual liability and the resistance to recognition of preliminary relationships. The most valuable feature of Kelsen's theory is the objective, scientific nature of the analysis of law and its structure[107] which serves an excellent base for legal examination. We must go beyond the skeletal theory of Kelsen. Hart and Dworkin both recognized a certain extension of juridical positivism and embraced the discretionary power of a judge in complex cases,[108] insofar as the legitimacy of the legal system is upheld,[109] offering more flexibility in the use of the positivist methodology and interpretative tools for tribunal decisions.[110] But even Hart and Dworkin cannot satisfy the intricacies of TBN long-term relationships.

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[105] Although the characterization of these relationships has fallen into various categories in a rather fictitious fashion: implied terms on a contractual level and pre-contractual liability on a tortious basis in the common law and on either a contractual basis in German civil law or delictual law under French law. Quebec and Japan have retained resistance to the concept of pre-contractual liability but nevertheless can provide remedies by virtue of breach of good faith.

[106] *Supra* note 92. Samuel refers to Lord Atkin: "As Lord Atkin pointed out in 1941, 'it was necessary to create a fictitious contract: for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other. [*United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1, at 27]. In short, these quasi-contractual debt claims were rationalized under the principle of an implied contract." at 56.

[107] Hans Kelsen, "Qu'est-ce que la théorie pure du droit?", (1992) 22 *Droit et Société*. Kelsen describes the essence of legal positivism:"…la connaissance du droit positif, sa description, l'analyse de sa structure, la définition des concepts qui le conçoivent et son interprétation scientifique…doivent être strictement objectives…" at 557.

[108] *Supra* note 92. Samuel refers to Ronald Dworkin, pointing out that Dworkin may have a more even balance in juridical positivism since his theory argues that a Judge "must construct a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well…[The Judge may not] "strike out in some new direction of his own." Dworkin (1977, pp. 116-17) and Dworkin (1985), extracted in Lloyd and Freeman (1994, p. 1322) at 34.

[109] Pierre Noreau, « Voyage épistémologique et conceptuel dans l'étude interdisciplinaire du Droit. », *Dans le regard de l'autre/In the Eye of the Beholder, Montreal*, Editions Themis, 2007, p. 165-199. Extrait pp. 165-199 ISBN 2894002262 (35/199p.) Noreau refers to Dworkin and inserts: "Pour les théoriciens du droit, la théorie est par conséquent un procédé de définition en même temps qu'une opération de légitimation…la théorie du droit offre une reconstruction des conditions susceptibles d'assurer la cohérence logique du droit et de garantir son intégrité par rapport aux autre types d'activités sociales." at 169.

[110] Jonathan Yovel, "Legal Formalism, Institutional Norms, and the Morality of Basketball", 8 Va. Sports & Ent. L. J. 33, 2008-2009. Yovel notes: "…Dworkin's model of "law as integrity"…consists not merely of the rules and other norms identified by any conceivable Hartian "rule of recognition" but also by the tenets of the political morality of the given community or relevant reference group…[With regard to "hard cases" "some legal questions…allow for several, equally legally correct solutions [which]…call for the application of a "strong" form of legal discretion that is, essentially, a creative act of inventing a new solution where the rules of prevailing law have not yet reached." at 41.

Pluralism: Pluralism serves as a tool of extraction of norms exterior to State law.[111] Pluralism seeks the creation of harmonization in a global world. There is no "highest" power in the international sphere. Rather, there exists a plurality of overlapping and often conflicting laws having seemingly equal value and therefore there are choices to be made by adjudicators when addressing questions of a pluralistic nature; an alternative methodological approach to positivism.[112] How are the choices made?[113] The effectiveness of dispute resolution relies on the cooperation of the parties through alternative dispute mechanisms or face a foreign Court which may, or may not, have been chosen in advance by the parties.[114] The parties have the freedom to choose to cooperate and have their unresolved disputes settled through arbitration or mediation.[115] Transnational "soft laws" do not bear the teeth of sovereignty, as they have no embodied sanctions per say. However, the loss of reputation may be a decisive factor to encourage parties to conform. Furthermore, international arbitrators turn to TGPL to fill in gaps. An adjudicator must prioritize conflicting norms and competition between sources of law prior to applying a particular law to the circumstances of the case.[116]

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[111] Violaine Lemay and Alexandra Juliane Law, "Multiples vertus d'une ouverture pluraliste en théorie interdisciplinaire du droit: l'exemple de l'analyse du phénomène *de cause lawyering*.", (2011) 26 *Revue Canadienne de Droit et société*. Pluralism offers an alternative perspective: "...une perspective pluraliste guide non seulement vers des solutions alternatives concrètement "équilibrantes", mais aussi vers des solutions éthiques et juridiques potentielles, en termes de protection des droits du justiciable." at 368. *See also supra* note 103. Twining examines legal pluralism referring to Gad Barzilai while introducing the concept: "Legal pluralism…primarily articulates detachment from legal centralism revolving around state law, criticism of the exclusiveness of state law." at 474. He notes that "plural presupposes that they [objects] can be indivuated". *See also* Violaine Lemay, « La propension à se soucier de l'Autre : promouvoir l'interdisciplinarité comme identité savante nouvelle, complémentaire et utile », dans : Frédéric Darbellay, Thèse PAULSEN (dir.), *Au miroir des disciplines ?im Spiegel der Disziplinen. Réflexions sur les pratiques d'enseignement et de recherche inter-et transdisciplinaires,* Bern, Peter Land, 2011, pp. 25-48.

[112] Jean-Guy Belley, « Le pluralisme juridique comme orthodoxie de la science du droit », (2011) 26 *Revue Canadienne de Droit et société* 257. Extract : p. 257-276. ISSN 00829-3201.

[113] *Supra* note 97. Cumyn refers to Santi Romano who maintains that the parties have the opportunity to make the choice: « Romano démontre en effet que le droits ne saurait être réduit à un ensemble de normes. Il met en lumière le rôle crucial des acteurs du système juridique, ceux qui font et qui appliquent le droit. » at 358. Party choice has been supported by international arbitration.

[114] Andràs Jakab, « Problèmes de la stufenbaulehre. L'échec de l'idée d'inférence et les perspectives de la théorie pure du droit », (2007) 66 Droit et société 411, Jakab claims that superior norms have no real force and therefore issues of effectivity of law must be analysed in a pluralistic setting:"...la *norme fondamentale* ne fonderait ainsi aucune prétention à l'obéissance." at 420.

[115] *Supra* note 112. (Whereby Courts and arbitral tribunals may be obliged to intervene on a discretionary basis) Belley describes that internormativity becomes a recognized legal norm: « La sociologie de l'internormativité poursuit aujourd'hui dans cette voie en suggérant que l'existence dynamique du non-droit assure une régulation sociale que l'esprit juridique serait bien avisé de concevoir comme une ressource utile voire indispensable… » at 262.

[116] Can custom override party autonomy? Do sovreign rules override custom? *Supra* note 114. Jakob justifies the existence of custom law: "Dans les ordres juridiques où le droit coutumier est reconnu, on peut raisonner comme si le législateur avait inséré implicitement dans chacune des lois une *norme de création du droit coutumier*." at 434.

Concepts of negotiation are not systematically recognized by legal systems in the same way, therefore a deviation from legal positivism must take place to journey to new perspectives, in search of alternative solutions. Merchant law is recognized as a juridical order, providing regulatory rules for contracting parties in accordance with merchant custom.[117] But many commentators have questioned its autonomous nature and whether it can take precedence over other principles of law. These factors will be studied through a pluralistic approach. The pluralistic approach will also aid to collect factors of internormativity between non-State laws and State laws, their legal interpretation and application, providing a base for a comparative law approach.

A pluralistic approach will include an overview of the transformation of trade on a non-state level, preponderant of *lex mercatoria* which is still relevant to TBN in the current global market. This argument will be demonstrated through transformations of trade regulation, focusing on the development of merchant law as of the 13th century England. While there are supporters who believe that *lex mercatoria* has existed since Biblical Genesis[118] or that it was developed by Phoenicians, Greeks and Romans[119] followed by Arabs and finally embraced by the Italian merchants of the Middle Ages, there are commentators who maintain that there is no legal evidence to date which can properly substantiate this claim.[120]Although we know that trade between humans is steeped in history, the exact nature of trade and how it was regulated has not been definitively described until the 13th century;[121]

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[117] J.H. Baker, *The Law Merchant and The Common Law before 1700*, Great Britain, Cambridge Law Journal 38(2), November 1979, Baker describes historical merchant law: "It was not law to be judicially noticed…but custom to be averred and proved as fact. It was therefore necessary, in alleging a custom of merchants, to observe the common-law requirements for establishing customs which could be admitted as exceptions to the common law…The *usus mercatorum* was not, therefore, trade usage in the modern sense. It was, in contemplation of law, unchanging and unchangeable custom." at 315. *See also* Paul R. Teetor, "England's Earliest Treatise on the Law Merchant", 6 Am. J. Legal Hist. 178, 1962.

[118] *Ibid*. Foreward by Wyndham Anstis Bewes.

[119] *Supra* note 117. Baker.

[120] Charles Donahue, Jr., *Medieval and Early Modern Lex mercatoria: An attempt at the probatio diabolica*, (2004) 5 Chi J. Int'l L. 21, 2004-225 at 22.

[121] The original documentation regarding merchant customary law is found in Bristol's Little Red Book, written during the 13th century. Nikitas E. Hatzimihail, "The Many Lives-And Faces-Of Lex Mercatoria: History as Genealogy in International Business Law", (2008) 71 Law & Contemp. Probs. 169; Hatzimihail doubts the validity of Goldman's assurance that lex mercatoria derived from the Roman law '*ius gentium*' because the nature of the law cannot be defined, "In fact, despite Goldman's assurance, there is little historical evidence-but a lot of speculation-as to what *ius gentium* really was." at 185.

perhaps as a result of inadequate archive searching[122] or because these events were too common place to record. To follow the transformation of merchant law, we must explain its legal reality[123] and then measure the facts and the law in the context of time[124] using the perimeters of social origins and norms to establish historical authenticity, derived from party autonomy.[125] On another note, it is pertinent to analyze legal history in its hermeneutic socio-economic setting.[126]

Comparative Law: The comparative law approach is designed to provide methods in which various legal regimes can be compared. It is not simply a study of foreign laws, rather an exploration for a normative structure to find principles of law protecting fundamental rights and provide regulation to modern globalization.[127] The function of a comparative law approach is to provide solutions in transnational contexts.[128] Muir-Watt hypothesizes that comparative law can shed further light than commonly attributed patterns.[129] The purpose of a comparative law analysis is to take a scientific approach to question the elements in which legal knowledge is attained; to regroup the qualitative factors to ascertain whether there are consistent and coherent factors that support party

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[122] The study of the Admiralty courts, Municipal courts, Seigniorial records and Church records may shed light on the legal subject along with Lord Mansfield's notes and decisions referring back to the merchant law of the 13th century.

[123] In other words, establish the concrete application given to the norms and how they transformed. *See supra* note 23. Fecteau explains how to establish the reality: « Un savoir aussi tiraillé entre l'interrogation sur le sens de la norme et les contraintes de la pratique sociale, entre la réflexivité et la distanciation propres aux sciences sociale et la nécessité d'administrer la norme dans toute sa matérialité. » at 38. *See also* Derek Roebuck, *Early English Arbitration*, Oxford, Holo Books, The arbitration Press, 2008.

[124] *Ibid* at 38.

[125] *Ibid* at 39.

[126] *Supra* note 118. Bewes in Baker.

[127] Otto Pfersmann, « Le droit comparé comme interprétation et comme théorie du droit », (2001) 53 Revue internationale de droit comparé 275. Extrait: p. 275-288. ISSN0035-3337: « Le droit comparé est une discipline [qui] est devenu indispensable dans toute recherche doctorale...[que] lui-même affiche dès lors de nouvelles ambitions et revendique toutes compétences en matière d'unification du droit et même d'authentification de la pertinence des solutions nationales. Le « globalisation » du droit ainsi que l'interpénétration progressive des ordres juridiques, renforcée par l'avancée des ordres juridiques supranationaux semble ici donner toute sa légitimité à cette nouvelle démarche. » at 275.

[128] *Supra* note 92. Samuel reflects upon the value of comparative law: "...'comparative law' as a discipline implies, evidently, that one has an epistemological foundation for both 'comparison' and 'law'. Yet much of the literature on comparative law seems unaware of the importance of this epistemological dimension. What this present enquiry will attempt to do, therefore, is to show how the construction and reconstruction of models of 'institutional' facts have a vital role to play in comparative law studies. Comparative law is not just about the comparison of legal texts and normative propositions; it is also about the way...a Roman, a French and an English lawyer structure factual situations." at 4. He further explains that: "Legal knowledge thus requires comparison between different legal system(s)...In looking...at the differences and the similarities between the reasoning and methodological models of...common law and French law, one is not just engaging in an exercise of comparative law. One is also moving towards the production of a theoretical model." at 15.

[129] *Supra* note 81. Muir-Watt provides three hypotheses whereby two join towards a common thought: « Les deux premières renvoient à l'utlité de la comparaison afin, soit de donner un éclairage différent de celui qui est habituellement mis en avant, soit de proposer une grille de lecture fédératrice de solutions éparses. » at 524.

autonomy and determine normative application by legal systems in transnational contexts.[130] This knowledge should lead to the validation of whether our hypothesized processes could, indeed, improve the legal regulation of TBN. The interconnecting of tridimensional interests[131] and regrouping of factors considered during adjudication of disputes during negotiation processes should lead to a clearer understanding of how TBN could be regulated differently.

Law is recognized both as a guide and as a reflection of patterns of human activity over time,[132] but the focus has altered with hermeneutic theories. The rise of sovereign states through the nineteenth century accented the creation and enforcement of laws through the will of the legislature resulting in the supremacy of theories of juridical positivism, focusing law to an analysis of norms. However, post-modernist trends have transformed beyond simple normative values to consider that law must also be analyzed in consideration of its function[133] and include other factors.[134]

Transnational laws are not regulated by domestic hierarchy; rather juridical orders in the global context appear to be on an equal plane but in fact, they orbit within an economic universe underpinned by socio-economic factors.[135] To harmonize these juridical orders may entail, as Danneman has suggested, a deeper analysis into comparative law, understanding legal reality[136] as well as their hermeneutic[137] settings, to avoid any misrepresentations. Scholars have not agreed to any

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[130] *Supra* note 92. Samuel proposes establishment of a model: "Comparative Viewpoint…Epistemological importance…indicate[s] that comparative law can offer a critical set of models through which legal knowledge assumptions can be questioned." at 111.

[131] Tri-dimensional includes interests of the parties, State interests and the interests of the global market.

[132] *Supra* note 23. Fecteau at 50.

[133] *Supra* note 3. Riles refers to W.J. Kamba, "Comparative Law: A Theoretical Framework, (1974) 23 Int'l & Comp. L.Q. 485 at 513:"…there is no doubt that there is a significant relationship between legal development and socio-economic changes…the legal systems under comparative study must be viewed in the socio-cultural context in which they thrive."at 234.

[134] *Supra* note 94. Menski comments: "In view of such debates, it appears that lawyers will increasingly need to rely on, or must develop for themselves, social science expertise. This means that particular legal methodologies need to be developed, or existing ones reshaped, to analyse law in a global context." at 15. *See also supra* note 3. Riles quotes Wigmore, "Jottings on Comparative Ideas and Institutions," 6 Tulane L. Rev. 48, 51, 263 (1931-1932) "Modern scientific thought has made it generally understood that a legal institution can be fully comprehended only in the light of the social, economic, religious, political, racial, and climatic circumstances which surround it." at 264.

[135] *Supra* note 94. Menski refers and quotes by Robertson: "After much debate, the emerging assessment appears to be that globalization is much more than one single phenomenon and is not actually moving the world in the direction of uniformity…The hybridization inherent in globalization processes leads to what Robertson (2003) calls 'global localization', which he also referred to as 'glocalization' (Robertson, 1995)." at 12.

[136] *Supra* note 92. Samuel explains legal reality: "…law is not applied to facts as such; the facts get transformed into a kind of legal 'reality' which allows them to assume a normative dimension with greater ease." at 42.

[137] *Ibid* at 65.

defined comparative law methodology[138] or even whether comparative law is an epistemological instrument,[139] a discipline[140] or a methodology. To attain this 'higher level of abstraction', comparative scholars seem to concur that a comparative analysis comprises three stages:

I Identification of our object: regulation of TBN;
II Description: identifying factors, as discussed; and
III Analysis: exploration of interconnections and observations.[141]

A complete picture entails recognition of our own legal system and recognition of our bias subjectivity[142] and linguistic inabilities. We must rely on viable foreign scholars to provide insight into other systems to better understand the comparative process.[143] This is one of the reasons we chose to borrow Canadian laws as our domestic models. The complications in transnational trade are due to the plurality of sources of law and intervening regulation from juridical and non-juridical sources which may appear to be irreconcilable. How can the law serve technological, economic globalization? Are these elements relevant in the creation of commitments to ward off any misunderstandings regarding party responsibility and enforcement of obligations during negotiations?[144]

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[138] John C. Reitz, "How to Do Comparative Law," The American Journal of Comparative Law, Vol. 46, No. 4 (Autumn, 1998), p. 617-636 adds: "…there isn't really a large degree of consensus about the essentials of the comparative method." at 618.

[139] Marie-Claire Ponthoreau, *Droit(s) constitutionnels(s) compare(s)*, Paris, Economica, 2010, Leçons 3, (p. 59-85) at 62.

[140] Jean Pradel, *Droit pénal comparé*, 2nd édition, Paris, Dalloz, 2002. Pradel describes different views on the definition of comparative law, including : « Pour certains auteurs, le droit comparé…est bien une science indépendante, égale aux autres disciplines juridiques…Pour d'autres au contraire…le droit comparé n'est pas une branche à part des sciences juridiques…C'est une discipline qui consiste avant tout en une méthode…« une dimension scientifique très accusée ». at 3 and 4.

[141] *Supra* note 139 at 62. For example, Ponthoreau first defines the object, and then requires the epistemological reflection which entails interpretation through evaluation and choice. *See also* Gerhard Danneman, "Comparative Law: Study of Similarities or Differences?" in Mathias Reimann and Reinhard Zimmermann (Ed.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 383-419. Danneman categorizes the object under "Selection" at 407; reflection under "Description" (comparisons of legal and non legal contexts) at 412 and "Analysis" at 415 and 417. *See also supra* note 138. Reitz.

[142] *Ibid*. Ponthoreau declares: "Peut-on parler de neutralité et l'objectivité du discours juridique ?...La neutralité est un mythe pour tout discours juridique. » at 84.

[143] *Supra* note 138. Reitz confirms the use of viable foreign sources: "…it is quite legitimate for comparatists to base their comparisons on literature produced by foreignlaw specialists…but she needs to be a discriminating consumer of the available scholarly writing…" at 633.

[144] *Supra* note 92. Van Hoecke argues: "…harmonization will not be only about choosing the 'better concept' and the 'better rule', but also about rethinking more fundamentally the use and function of every concept and rule." at 194. *See also supra* note 141. Danneman reiterates: "In the case of the business which looks for the best legal system in which to operate, this means that the various corporate vehicles which are being compared should offer similar functionality." at 405.

The function of law in this socio-economic globalized web is not based purely on norms. To explore the interconnections and observations, ordinarily a comparative law analysis should break down into three sections:

1) Function and normative values;
2) Transplant test and legal culture; and
3) Institutional settings.

We oppose the popular view that negotiations in law remain norm-free, requiring a closer look at its normativity. In a second step, the investigation of how laws compare, and whether similarities are disguised in terminology will be assessed by a transplant test and legal culture. Thirdly, we will address the importance of institutional settings.

Function and normativity of negotiations: The theory of juridical norms is not based simply on a set of rules,[145] with one norm built upon another. Rather, as Twining claims, "we are here concerned with general prescriptions that guide behavior and provide reasons for action."[146] Normativity is established by two primary factors: the pattern of human behavior and the predictability of regulating it.[147] The conditions of evolution and transformation of social normativity must be clarified and connected to legal culture to establish how law affects culture and vice versa. To compare rules and norms entails categorizing them.[148] However, this is not an easy task. Twining warns, "There is no settled vocabulary in relation to rules and norms; nor is there any settled way of classifying them."[149] Legal regulation is not without competition as non-legal sanctions also exist in the regulation of TBN. Merchant laws originated out of social norms developed over time which

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[145] *Supra* note 103. Twining illustrates: "many puzzles about normative pluralism are about concepts and issues that belong to the general theory of norms rather than about the idea of pluralism." at 479.

[146] *Ibid* at 480.

[147] *Supra* note 11. Piazzon demonstrates the factors that fit within the scope of juridical security, namely accessibility, stability and foreseeability in accordance with certain standards at 17 and 62. *See also* M.H. Kramer, *Objectivity and the Rule of Law*, (CUP, Cambridge 2007) at 102 who summarizes L.L. Fuller, What is law? A reply to Professors Cohen and Dworkin, (1965) 10 Vill. L. Rev. 655, 657, at 103 in the expression of eight essential normative functions is required in order to consider the existence of a legal order.

[148] *Supra* note 3. Riles states: "How can we compare if we cannot even identify stable units of comparison?" at 252.

[149] *Supra* note 103. Twining at 480.

transformed into two parts juridically normative on the one hand and socio-economically normative on the other hand. Some commentators believe that law cannot cater to flexibility since it falls into vagueness and law must uphold certainty.[150] We posit that law can accomplish both. The study of the intensity of the business parties' relationship and the way they communicate will lead to whether legitimate law sources are rising to TBN needs. If law is to participate in the regulation of TBN, it must also follow the socio-economic interests of the parties.

Transplant test and legal culture: Regulation of transnational activity is a complex, global phenomenon. Comparativists use transplant tests and legal culture to understand where juridical orders converge and where primary facts must be defined using the values of each legal system. Pradel confirms that we cannot only look to the written law but also implicit underlying elements.[151]

Transplants or borrowed legal concepts from another legal system can be difficult to detect since whole legal systems are rarely integrated into another legal system, rather certain elements of a legal rule or concept will be incorporated.[152] The transplant test serves a useful purpose in comparative law since it requires an analysis of both similarities and differences in legal systems.[153] This allows us to compare factors to ascertain whether similarities may be detected even though the expression of terminology may be different. Likewise, terminology may be absent in juridical orders.[154] We must seek to understand the philosophical ideology of principles referred to during regulation[155] to determine whether there is a common base that can aid in harmonization of the underlying laws that regulate negotiations. To find similarities in a global context requires reaching to

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[150] *See* for example, Robert E. Scott, "In (Partial) Defense of Strict Liability in Contract", in Omri Ben-Shahar and Ariel Porat, (Eds.) *Fault in American Contract Law*, New York, Cambridge University Press, 2010 at 20.
[151] *Supra* note 140 at 42. Pradel.
[152] *Supra* note 94. Menski refers to Watson: "…'a complete legal union is neither possible nor desirable" at 52.
[153] (This would also apply to other juridical orders in a transnational context, including party autonomy and *lex mercatoria*.)
[154] *Supra* note 92. Van Hoecke warns of methodological problems when analyzing terminology at 174.
[155] *Ibid*. Van Hoecke at 174.

broad levels identified by Danneman[156] and Samuel.[157] Pradel argues that convergence is more frequent than generally believed, claiming that differences can transform little by little into similarities through transplants and custom.[158] How easily can transplanted juridical norms be detected in a poly-pluralistic setting?[159]A transplant test permits examination of commonalities in legal concepts.

The comparative examination enables the study of diversions between legal cultures to be understood, leading to an intellectual flexibility. How do adjudicators apply this concept when one party may be domiciled in a jurisdiction that has not overtly embraced the principle, unless there has been an acceptance by agreement between both parties through party autonomy? Samuel argues that a deep hermeneutic analysis creates a prototype that can assimilate these differences.[160] Although the transplant test offers a way to ascertain true differences, where no transplant or similarity can be detected, nevertheless, there may be a way for juridical orders to work in tandem.[161]

Because of the consistent integration of social norms in this field, yet a third assessment is necessary using the comparative tool of institution settings that examines how laws integrate values into institutional settings. Institutional settings will serve to appreciate the integration of social norms to business practices and regulation of party autonomy. This tool functions in tandem with the transplant test and legal culture as we search for reconciliation of the regulation of TBN.

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[156] *Supra* note 141. Danneman.

[157] *Supra* note 92. Samuel at 65.

[158] *Supra* note 140. Pradel explains: "There are those who believe that if all jurisdictions recognize a binding contract between the parties and all jurisdictions agree to the manner of enforcement of the obligations under the contract, then the 'transplant' test is fulfilled and there is no need for a comparative exercise. Legal culture must be measured since the comparison is not merely a semantic one; rather an analysis of values belonging to the legal system and how socio-economic and cultural aspects influenceit." at 126. *See also* Annelise Riles, "Comparative Law and Socio-Legal Studies", in Reinhardt Zimmerman and Mathias Reimann (Ed.), *Oxford Handbook of Comparative Law*, 2006, Oxford, Toronto, Oxford University Press. Riles refers to Pierre Legrand: "the very notion of a legal transplant is predicated on a formalistic understanding of law as a set of rules. This formalistic view of law and of legal transplants…ignores the way law is given meaning by the context in which it is read. From this standpoint, a transplanted rule is no longer the same rule once it is embed in a new context of meanings." at 797. *See also* Annelise Riles, *Rethinking the Masters of Comparative Law*, Oxford, Portland Oregon, Hart Publishing, 2001.

[159] Mathias M. Siems, "The End of Comparative Law", (2007) 2, *The Journal of Comparative Law*,133-150 at 17. Skeptics, such as Siems argue that transplants are nonexistent since once the concept is transplanted, it becomes mutated.

[160] *Supra* note 92. According to Samuel: "The key, therefore, is the pattern of institutional structures rather than the actual existence of an institutional model in one system and absence in another…differences between the civil and the common law traditions are to be found in the symmetry of institutional thinking…[which]…creates a normative structure that leads in turn to certain general types of 'virtual' fact situations." at 70.

[161] Art. 4.8.3 UNIDROIT and Art. 1.7 of the *Vienna International Sales Convention*, 1980. Furthermore, transnational institutional settings are found in conventions which are not legislatively based but must be ratified by sovereign sources. Party autonomy allows the parties to refer to principles of supratransnational law in a binding power.

Institutional settings: Commonly administrative, institutional settings are set up to regulate human activity within a social context. Since the traditional view of attaining juridical security is based on coherence and consistence, stability, foreseeability[162] and enforceability, both private and public institutions attain this security through the prevention or regulation of disputes between parties.[163]

Norms must be understood in the context of their institutions. Within the scope of TBN there are at least three institutional settings. One setting is based on organized institutions that have set standards socially acceptable by a certain community in self-regulated industries.[164] These institutions have not been considered suitable for the global market;[165] nevertheless, there are resemblances that we can draw on by comparing self-regulated industries to merchant custom that will allow us to reconsider how the regulation if TBN if party autonomy could follow an institutionalized process.

The domestic institutional setting is based on government legislation and court adjudication set up to regulate merchant activities. Legal norms are imposed by the law of States, such as public order. International treaties, such as *The Vienna Convention on the International Sale of Goods*, and UNIDROIT principles provide guidance for norms on a transnational level applied institutionally by international arbitration. Transnational general principles of law are exponential norms that set a method of how mandatory transnational general principles of law can formulate through ratification.

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[162] *Supra* note 11. Piazzon.

[163] This phenomenon is particularly frequent in self-regulating business settings. *See also supra* note 28. Bernstein et al. Not all legal systems set up institutions in the same manner and therefore a comparative law analysis must be performed to determine the source of regulation; whether the setting is a public decision having a political basis or private administration boards. The substantive and procedural manners will vary in each juridical order by how juridical security is safeguarded and how categories of law are defined.

[164] An example of this type of institution is private administrative institutions that are self-regulated trades that impose communal sanctions by committees accepted by their members, such as the diamond industry.

[165] *See also supra* note 28. Bernstein (diamonds) at 122. For example, private ordering has been prevalent in the diamond industry whereby the governance is based on standardized symbols such as "open cachet." Historically, this method of communication involved an envelope with a designated diamond sealed in a certain fashion to signify it is up for sale and inspection of a future purchaser. Should the purchaser sign the envelope, he is granted twenty-four hours to inspect the diamond to establish whether he wishes to transact. Should he accept the diamond in writing by a mark on the envelope, a reputation bond is considered between the parties and the transaction is deemed accepted by both parties.*See* 3. In Section 3, Chapter 2 of Part I which compares self-regulated industries with merchant custom.

Ratification takes place not only when parties are willing to consent, but also comprises norms weighed in function of the common good.[166]

Each legal source must be compared to determine whether the function of each institution has attained similar results or whether defined differences in the objectives of these institutions are apparent.[167] To formulate a broad comparative study of legal systems entails building deeper foundations than traditional functionalist comparatists.[168] Traversing to other disciplines and institutional settings in light of legal culture,[169] including sociological and cultural values, broadens the scope of comparative law to define the true nature of negotiations and how various legal institutions and parties view their own economic values[170] and mutual gains. We will focus on whether commonalities exist under these institutional settings or whether further diversity is causing rupture and uncertainty in the TBN.[171] We will conclude that an institutionalized setting may provide the solution to how party autonomy during TBN could be considered its own juridical order.

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[166] *Supra* note 94. Menski quotes Robertson to demonstrate interconnections through common sense: "[Robertson (2003:4)]…'suggests the emergence of something greater than the accident of interconnections'. That kind of globalization cannot hope to live without deep respect for plurality and diversity in the world, based on flourishing and dynamic equity rather than flattening equality. It also has to take account of something as vague as 'public interest' or 'the common good'. " (foot notes removed) at 17.

[167] *Supra* note 139. Ponthoreau quotes Raymond Saleilles to explain the comparative law ideal: « …ayant pour objet de "dégager de l'ensembles des institutions particulières un fonds commun ou tout au moins des points de rapprochement susceptibles de faire apparaître, sous la diversité apparente des formes, l'unité foncière de la vie juridique universelle. » at 36 and 37. For example, in our own system, the C.c.Q.has no articles specifically addressing negotiations.

[168] *Supra* note 92. Samuel at 29.

[169] *Ibid* at 46.

[170] *Ibid*. Samuel questions: "Do civil lawyers and common lawyers…perceive money in the same way?" at 38 which he later answers: "For every definition of law there is an alternative." at 76. *See also* Violaine Lemay, « La propension à se soucier de l'Autre : promouvoir l'interdisciplinarité comme identité savante nouvelle, complémentaire et utile », dans : Frédéric Darbellay, Thèse PAULSEN (dir.), *Au miroir des disciplines ?im Spiegel der Disziplinen. Réflexions sur les pratiques d'enseignement et de recherche inter-et transdisciplinaires,* Bern, Peter Land, 2011, pp. 25-48.
Extract : pp.25-48. ISBN: 978-3-03-430554-9 (24/228p.).

[171] Are these values common to all institutional settings? The interpretation of 'mutual gain' may affect the perception of security by underlying motivations. Private parties protect their own interests. State legislatures are a political phenomenon that protects their sovereign values according to the society it represents. Supratransnational law devices attempt to unify and harmonize basic human values. *See* Abdul F.M. Maniruzzaman, "The *Lex Mercatoria* and International Contracts: A Challenge for International Commercial Arbitration?" American University International Law Review, 14, no. 3, 1999:657-734. Maniruzzaman argues: "Although universality does not imply uniformity, the lex mercatoria, if it is to command universal acceptability, should generally be responsive to the values and traditions of various legal cultures." at 692. Justice Michael Mustill, "The New x *Lex Mercatoria*: The First Twenty-five Years," Arb Int'l, 1988. Mustill contends that principles such as*pacta sunt servanda* and *culpa in contrahendo*, are amongst principles that serve as a basis for lex mercatoria which, he claims conflicts with common law principles at 110. *See also supra* note 92. Samuel believes that hermeneutic study can. *See also*, John Bell, "Comparing Public Law", in Andrew Harding and Erin Örücü (Ed.), *Comparative Law in the 21st Century*, Kluwer Law International, 2002. Bell expresses: "These supra-national sources introduce an element of legal pluralism…the supranational legal order provides a metalanguage for talking about the specific arrangements in legal system…[which] can only be identified if one takes account also of the institutional setting." at 240.

PART I CURRENT REGULATION OF BUSINESS NEGOTIATIONS

The purpose of Part I of our thesis is to create an awareness of the three sources of law that regulate negotiation parties, on the one hand, and on the other to further investigate the perceptions from business and behavioural scientists' perspectives to bring back to law a better understanding of the processes of negotiations and how parties behaviour is influenced during this human activity. This will help identify how business arrangements are conducted and why many meaningful arrangements agreed to between the negotiation parties have not been recognized by law.

To regulate, law must gain a greater appreciation of the processes of TBN and how TBN parties conduct themselves and communicate with one another while striving towards common goals.[172] International business dealings cross a medley of borders, thus a conglomeration of cultures influences the successful progression of TBN. Consequently, how TBN parties conduct themselves and how they communicate with one another is influenced by cultural factors which, if approached with expediency and sensitivity, can advance the parties forward..[173]

Business commentators have grasped the importance of discerning discrepancies that mean different things to different cultures arising during verbal and non-verbal communications while transacting across borders.[174] Since there are many ways in which negotiation communications can take place, we are searching for a better manner to synchronize international business communications acceptable to business and law.

We will lay a more general landscape to come to a better understanding of how communications are exchanged between parties during business negotiations. Various disciplines have expressed interest in business negotiations, resulting in extensive material existing on the

[172] *See* 2. in Section 2 of Chapter 1, Part I.

[173] *Supra* note 15. Ghauri hearkens cultural aspects: "The effect of different variables on the process and its different stages varies in intensity. One of these variables means that the process saves time and continues smoothly, while a negative influence causes delay and hindrances." at 5.

[174] John L. Graham, "vis-à-vis: International Business Negotiations" in Perez Ghauri and Jean-Claude Usunier, *International Business Negotiations*, UK, Emerald Group Publishing Limited, 2008. For example, it has been said that when using interpreters to translate between different languages, the Japanese will concentrate on the "nonverbal responses" during the exchange while North Americans will remain fixated on their Rolex watches.

subject. We have not limited our scope to legal commentaries; rather we have searched through a collection from business and marketing and behavioral science disciplines to more fully discern how business parties perceive[175] their business arrangements.

The analysis of the social normativity of business negotiations will follow, to furnish law with a better means to recognize repeated, acceptable behavioural standards crossing over social normativity into legal relations. There are two ways that law can contribute transparency and uniformity to this human activity. Firstly, by providing a means for transparency; guiding proper behavior during the negotiation processes and ensuring a fair playing field that provides a standard of communications to avoid misunderstandings and suppositions. Secondly, law can contribute to the protection of the norms of efficiency, autonomy and certainty in business dealings by providing consistent, predictable and uniform legal protection of these aspired norms during TBN.

To offer more certainty, law must gather a greater understanding of the processes and functioning of negotiations from a business perspective. Ascertaining how TBN parties' reach their mutual goals despite obstacles that arise between parties negotiating from different geographical jurisdictions requires embellishment. Law has not paid sufficient attention to how parties communicate with one another while negotiating across borders, the significance of semiotics and silent communications, and the sensitivity involved to overcome cultural roadblocks. For law to better contribute to international business dealings, it must protect efficiency by supporting party autonomy and offer certainty to discern when business parties are creating legal obligations and when they are not.

[175] Roderick A. Macdonald, "Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change", Louisiana Law Review, 2007, Vol. 67(4). Symposium: Law Making in a Global World, 1113-1160. Macdonald breaks down human perception into four procedural steps: "Perceiving, naming, categorizing, and understanding." at 1118.

CHAPTER 1: BUSINESS NEGOTIATION ARRANGEMENTS

One of the pitfalls in the legal categorization of negotiations is that law has failed to recognize the extent of the dynamic nature of TBN. Current legal theories have offered little practical contribution to the proper functioning of the TBN processes. TBN deserve their own specific legal tools customized for global trade to provide more security to international deals so that TBN parties do not have to guess whether the promises and agreements exchanged between them will be recognized by law, or dodge extra-contractual traps.

Diverse disciplines approach negotiations under different prismatic realities. The law cannot operate autonomously, rather it must remain fastidious to other disciplinary perspectives to gain a keener regard to the quagmire within the very root of the definition of negotiations at large. Are negotiating parties "seeking" to reach an agreement, transferring rights and obligations between themselves, or a combination of both? If the popular misconceptions were valid and there were no legal consequences while business parties negotiate, then no rights or obligations should be in formation. If, however, legal ramifications are "probable at inception",[176] then rights and obligations must, necessarily, be in the process of exchange during negotiations.

Very little effort has been undertaken by law to set uniform legal standards of communications and conduct during negotiations. Insufficient juridical tools lack the capacity to capture most negotiation movements to provide transparency for dispute resolution facilitation. This deficiency of transparency distorts the TBN parties' true intentions and deprives business parties of the security to receive legal protection of their business undertakings. There are global inconsistencies resulting from piecemeal legal regulation causing further uncertainty.

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[176] Marcel Fontaine and Filip De Ly, *Drafting International Contracts: An Analysis of Contract Clauses*, Leiden; Boston, Martinus Nijhoff Publishers, 2009 at xviii. "Legal ramifications are probable from inception." *See also* Filip De Ly, "Law and Practice of Drafting International Contracts", in Lesguillons (Ed*.), Revue de Droit des Affaires Internationales*, International Business Law Journal, no. 3-4, 2002.

Section 1: Why Should Law Take an Interest in TBN?

We have identified two reasons why law should take an interest in TBN. Firstly, in its very nature, law has provided guidance to maintain behavioral standards in human activities, in which negotiations should not be an exception. Secondly, law is accountable for the protection of legal norms, hence an obligation for law to manoeuvre into a position that can provide the security to protect social norms of TBN that have become legal norms.

Business parties require efficiency, autonomy and certainty in their dealings and if these norms are not protected, the risks business parties must take while striving to attain mutual goals would be so high that no reasonable person would endeavor to enter into business dealings. Without these fundamental norms, a free-for-all could cause devastating results to the global market, threaten the welfare of domestic States and disgruntle consumers. Our mission is to provide a means to ensure transparency and uniformity in the proper functioning and development of legal regulation of TBN in future years.

As terms can often take on different meanings, we will review terms, including "negotiations", "obligations", "transnational", "transnational business negotiations" ["TBN"] and "transnational laws" in the context of this thesis.

1. Review of terms and definitions

There lies a curious dichotomy within the definition of the word "negotiations". Are they exponential and gathering momentum until an ultimate contract is reached or are negotiations translatory, in other words, are rights and obligations exchanged during the processes of negotiations? The common dictionary defines "negotiations" as "discussions *aimed* at reaching an agreement" but

in the same breath the definition terminates by injecting, "the action or process of "*transferring ownership*".[177]

The term "negotiation" (*negotiatio*) originated in dictionaries in the late 15th century where it was defined as *doing business* or "enchained" (or connected),[178] strikingly similar to the meaning of obligations in the same hermeneutic timeframe (a "bond" or connection). In modern days, the value of negotiations as a 'correlation' has often been overlooked and the relational aspect of negotiations has been predominantly ignored, negotiations pondered as a mere stage prior to the formation of a contract.[179]

Negotiations serve as communication vehicles while negotiators voluntarily transfer and extract information from one another in search of mutual goals. In business negotiations, this information not only serves to promote a party's own interests to accomplish the benefit the party sought but entices the opposing party(is) towards the conviction that the opposing party will also receive a satisfactory benefit. Successful negotiations mean that the parties will gain more together than they would have on their own, even though the gain may fall short of the initial goal.

It is generally accepted that when negotiations are unsuccessful, in other words the parties' interests do not correspond and the parties have made no promises or agreements with each other, they are free to walk away. Striving towards successful negotiations, business negotiators use strategies and tactics to mine information from one another to assess both their own positions and the

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[177] *See* the Oxford on line dictionary. *See also* Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979: "Negotiation is [a] process of submission and consideration of offers until [an] acceptable offer is made and accepted…The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction." [our emphasis]In direct contravention with the first statement the definition concludes that [negotiation is] the act of settling or arranging the terms and conditions.

[178] Origin: late 15th century (denoting an act of dealing with another person) from Latin *negotiatio*(*n*-). *See infra* note 183. Owsia at 155.

[179] Carrie Menkel-Meadow, "Legal Negotiation: A Study of Strategies in Search of a Theory", Am. B. Found.Rs. J. 905, 1983 at 908. *See* Professor of managerial economics: Howard Raiffa, *The Art and Science of Negotiation*, Cambridge, Massachusetts, Harvard University Press, 1982 at 7; Professor in conflict analysis and resolution: Dean G. Pruitt, *Negotiation Behavior*, New York, Academic Press, 1981 at 1. Menkel-Meadow reiterates a list of definitions of negotiations from commentators of various interdisciplinary sources who consider negotiations as a *process*: Anthropologist, P. H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective*, New York, Academic Press, 1979 at xiii; Negotiation expert: Herb Cohen, "You Can Negotiate Anything: How To Get What You Want", Secaucus, New Jersey, Lyle Stuart, 1980 at 15. Menkel-Meadow surmises generally: "we all negotiate whenever we want something from somebody."But negotiations are not only what we want from someone; negotiations are focused on the parties' willingness to achieve mutual goals. Gary T. Lowenthal, "A General Theory of Negotiation Process, Strategy, and Behavior", 31 U. Kan. L. Rev. 69, 1982-1983. Lowenthal defines negotiation as a "process in which parties with differing interests seek a mutually agreeable set of terms that each would prefer to non-settlement." at 73.

opposing parties' bargaining positions.[180] Negotiations are often imagined as a game of chess where undisclosed strategies and tactics win the prize. But, negotiations are not just about the prize (*purpose* of negotiations); it is the angst of the journey (*function* of negotiations) that requires investment of time and resources of negotiating parties.

If negotiations continue successfully, the parties make arrangements together in the form of exchanging promises and agreements with one another which can be either tangible (for example, monetary or exchange) or intangible (such as investigation and future expectations). They form a business relationship together which is based on cooperation and trust. If these promises and agreements are not recognized by law, they become vacant and unenforceable by law, impeding upon proper resolution of disputes between the parties.

In long-term negotiations, during the discussion of the parties' own interests and the examination of interests of the opposing parties, some issues are resolved during negotiations while other matters remain to be determined later. Therefore, it is virtually inconceivable to create *a* contract that will follow the length of time that TBN parties require to meet their goals since everything cannot be decided at any one occasion and new dynamics arise along the road to fruition of a successful business relationship. Meanwhile, interdependence develops between the participants.[181] Trust, time and effort are associated as commodities, in the business world, that contribute to the business relationship.[182] But the rights and obligations coinciding with these commodities are, for the most part, currently imperceptible in law.

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[180] *Supra* note 15. Ghauri at 18.

[181] *Supra* note 59. Lewicki.

[182] Our initial comments and gathering of legal obligations relate to business negotiations generally. However, TBN, necessarily, fall into a plurality of legal regulatory sources, differentiating them from domestic negotiations. Also, it is considered, by a business perspective by commentators such as Perez Ghuari that there are more cultural considerations and complications in communications during TBN. As of Section 2 of this chapter, we will narrow our scope towards TBN negotiations, targeting more specifically voluntary engagements of TBN parties. We will limit our scope to legal obligations of TBN which we associate with "relational negotiations"; that is, long-term business negotiations as opposed to one-shot deals, characterized by their continuing character and the fact that, habitually, the relationship requires more time, effort, monetary considerations and characteristically proceeds by virtue of partial, inter-connected agreements as negotiations progress.

When *are* obligations generally recognized and enforced in law? Obligations originate from the Roman term *obligatio*, meaning "a bond".[183] They may be imposed by domestic sources of law, by transnational sources of law and by the parties themselves. Hogg suggests that obligations must be considered within the context of legal duties which give rise to liability:[184] "…[O]bligation usually signifies a duty of performance, on giving rise to a reciprocal right to receive performance."[185] Hogg identifies many variances to the term "obligation", he considers that there are "at least two main meanings: (1) a legal tie or bond by which someone is bound to a performance in favour of another; and (2) more generally, any legal duty arising in law."[186]

How are obligations created along the negotiation processes? If we were to satisfy ourselves purely with definitions, regressed from their Latin meaning as a connection,[187] we would be lead to believe that negotiations are short term, one shot deals alienated from the formation of contract, the performance of contract and the extinction of contract; having few or no legal contractual connotations. We do not deny that they can be, but long-term business relationships between TBN parties must be distinguished from short-term one-shot deals.[188]

The word *transnational* is derived from the prefix "trans" which can mean "across", "beyond" or "through" geographic territories. *Transnational business negotiations*, in the context of our thesis,

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[183] Parviz Owsia, *Formation of Contract, A Comparative Study Under the English, French, Islamic and Iranian Law,* Sterling House, London, UK 1994. Owsia explains the origins of obligation and its ties to legal doctrines: "Obligatio in Latin is a derivative of ligare which originally meant 'to enchain' but gradually came to mean to unite, to bind or tie, together. It denotes at the same time the burden, the 'debt', assumed by or imposed on a person, its correlative benefit, 'the credit', accruing to the other person, and the correlation between the two sides, whether the bond is generated by a contract or a tort.' at 155.

[184] Martin Hogg, "Saying What We Mean: Fundamental Structural Language in Contract Law", in Larry A. DiMatteo and Martin Hogg [Ed], *Comparative Contract Law - British and American Perspectives*, Oxford University Press, Oxford, UK, 2016 at 16.

[185] *Ibid* at 19.

[186] *Ibid*. Hogg at 19 and 20. Hogg's distinction divides obligations between obligations *voluntarily* expressed by the parties themselves and involuntary obligations *imposed* upon the parties. Our primary focus is on voluntary obligations undertaken by the parties themselves that risk being misconstrued as a result of the lack of juridical tools to provide transparency in negotiation communications. Furthermore, a plurality of conflicting laws presents inconsistent manners to recognize and measure obligations arising out of negotiations. This dissonance to predict when legal rights and obligations arise during TBN is not only disturbing, it is destructive. That is domestic laws, transnational laws and merchant customs resulting from widely accepted compliance of mercantile custom that has a minimum formation of law, and by party autonomy itself). However, *see supra* note 47. Mr. Justice Leggatt pronounces : "I say "in principle at least" because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly." at para. [149].

[187] *Supra* note 183. Owsia.

[188] Catherine Alexander, "Legal and Binding: Time, Change and Long-Term Transactions", *The Journal of the Royal Anthropological Institute*, Vol. 7, No. 3 (Sep. 2001), 467-485. Necessarily, these long-term business adventures include the development management Studies 41:1, January 2004, 107.

refers to private parties doing business across borders; meaning the parties are conducting business from two different geographic regions, consequently involving a minimum of two legal jurisdictional sources. They may occur between private parties, or private parties and public states whereby the respective parties are conducting international business. We will be concentrating on TBN between private parties, including corporate entities.

There is no real consensus with regard to the term *transnational law*, other than its development out of our understanding of "globalization studies." For some scholars, transnational laws refer to a universal legal phenomenon of *ius commune*, receding domestic borders.[189] Transnational laws provide a method to regulate and reconcile actions that cross borders. Due to the plurality of sources of law comprised within transnational law, a comparative analysis is necessary to ascertain concepts of law that are widely accepted between domestic state laws and non-state laws, including public international law, private international law, the parties themselves and custom and

[189] Carrie Menkel-Meadow, "Why and How to Study 'Transnational Law'", UC Irvine L. Rev. Vol 1:1, 97 at 103. On a juridical positivist note, some commentators advocate that "international or transnational law might not be seen as formal "law," since it is not enacted by a state or formal governmental body." at 103. Menkel-Meadow used the latter statement to describe, broadly, the term "transnational law". She demonstrates the legitimacy of transnational law: "the study of legal phenomena, including lawmaking processes, rules, and legal institutions, that affect or have the power to affect behaviors beyond a single state border." at 104.] Some commentators have defined transnational laws as hybrid. [*Supra* note 77. Slaughter Burley.] Others consider that an "internalization" takes place between transnational laws and domestic laws and vice versa. *See* Harold Hongju Koh, "Bringing International Law Home", 35 Hous. L. Rev. 623 (1998) at 200. Koh identifies three reasons why nations cooperate in the global market: 1) interest (long term self interest); 2) identity (to be recognized amongst other nations); and 3) interaction and internalization. He explains: "Within these regimes [governmental and private participants] there is conceptual space for international law: law plays a critical role both in stabilizing the expectations and in reinforcing the restraints that regimes seek to foster." at 200. On identity *see supra* note 77. Slaughter Burley. *See also* Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law", The University of Chicago Law Review, Vol. 72, No. 2 (Spring, 2005) 469-536 at 472. In the context of TBN, transnational laws transcend domestic laws and party autonomy inter-dependently. The term *transnational law* must be differentiated from traditional concepts of international law. Menkel-Meadow expounds: "Traditional conceptions of international law most often contemplate treaties (formal signed documents and obligations) or customary practices…that bind states or sovereigns and are often known as public international law…Another recognized conventional category is private international law which contemplates that private entities and individuals will make contracts, deals, and transactions with each other across borders that may then require legal enforcement and have complex issues of conflicts or choices of laws." at 101; Menkel-Meadow further comments: "Harold Hongju Koh, considers "transnational" law to be a hybrid of international and domestic law; as others describe, it is the law that governs the "gaps" between formal international law and domestic law... Perhaps the leading question in the study of transnational and international law and their differences from each other is whether we are observing convergences of legal systems in the similarity of treatment of common legal issues of our need to specify legal standards that can travel and govern global activity" at 110 and 111. [Menkel-Meadow refers to Harold Hongju Koh, Why Transnational Law Matters, Keynote at AALS Workshop on Integrating Transnational Legal Perspectives into the First-Year Curriculum (Jan. 3–7, 2006), in 24 Penn St. Int'l. L. Rev. 745 (2006)]. Pluralistically, transnational laws have been considered "a-national", since they are recognized by international arbitration as standing autonomously on their own right, resulting from a plurality of regulatory systems which are inter-dependent with one another. *See also* Harold Hongju Koh, "Transnational Legal Process", 75 Neb L. Rev. 181, 1996. *See supra* note 93 at 31. Carbonneau on autonomy; Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, 329 Recueil des cours 49, 2007. *See also supra* note 77. Slaughter Burley on plurality. *Transnational laws* have also been considered to fall into a subsection of international commercial law. Gbenga Oduntan, "The Province of International Business Transactions Defined: Content, Scope and Intersections with International Legal Studies", Manchester Journal of International Economic Law, Vol. 5(1), 87-111, 2008 at 89. Other commentators have taunted *lex mercatoria* as a myth or a legal pluralistic philosophy. Paul Schiff Berman, "Global Legal Pluralism: A Jurisprudence of Law Beyond Borders", Journal of Law & Society, 2013, Vol. 40(4), 706; Michael Giudice, "Global Legal Pluralism: What's Law Got To Do With It?" Oxford Journal of Legal Studies, 2014, Vol. 34(3), 589.None of these theories are necessarily incorrect, but they must be brought into respective contexts. *Lex mercatoria* is a law amongst *negotiating merchants*, originating in the Mediterranean for cross-border merchants and entering into English law in the Middle Ages. *See also* Robert Wai, "The Interlegality of Transnational Private Law", 71 Law & Contemp. Probs. 107, 2008.

usage. What is certain, *is* that a body of TGPL exists and is recognized by international arbitration.[190]

Transnational laws are not governed by the state, although they may be ratified by the state or through private actors. Even though the regulation of TBN has roots in the ancient phenomenon of merchant custom, it is modern history that took heed of the importance of this new non-geographical expanse of law.[191]

Transnational laws must be distinguished from international laws. In the context of sale of goods, international law is divided between matters of private law and public law, although these distinctions have become decisively smudged. Private laws occur between private actors or private and public actors transacting on private matters whereas public law pertains to matters concerning the state. Because of its nature, transnational laws harmonize private and public laws, international and domestic laws and support party autonomy, filling gaps during dispute resolution.

2. The purpose and function of negotiations

The dichotomy in the definition of negotiations is properly understood when we consider both the purpose and function of negotiations. The *purpose* of negotiations is to strike mutual goals ("aimed at reaching an agreement"), beneficial to all parties, by placing parties in a better position within their association (or relationship) than without each other.[192] Parties accomplish this goal through the *function* of negotiations ("the action or process of transferring ownership") which takes place through specialized communications; tactics and strategies exchanged at the bargaining table whereby parties must synchronize their differing interests and potential conflicts to advance from one stage of negotiations to the other in order to achieve the negotiation *purpose*. The behavior of the

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[190] *Supra* notes 93 and 189. Carbonneau and Gaillard.

[191] Transnational laws are not territorial, unlike the classical view of law that emanates from a territorial source, such as a kingdom, a state or a municipality. *Supra* note 183. Oduntan turns back history: "Certain myths pervade common understanding of international business…There is an assumption that the regulation of IBT is a very modern phenomenon and one which exists solely as a result of sophisticated governmental regulation and intergovernmental diplomatic relations. The correct view is that each epoch since antiquity and even beyond has produced its own interethnic or international business transactions based upon what is traded at the period and according to various levels of sophistication." at 93.

[192] *See also supra* note 179. Lowenthal.

parties during the function of negotiations is highly influenced by what the parties are expecting to achieve. Thus, the curious dichotomy within the definition of negotiations becomes clearer when the duality of the framework of the processes of negotiations are considered, whereby the *purpose* and *function* of negotiations are inter-wreathed.

Along the negotiation path, parties form a business relationship together and offer each other a series of promises and agreements. It is the business relationship itself and these promises and agreements that we are interested in and how they are characterized by law.[193] To improve the regulation of negotiations by law we must first grasp a better understanding of business negotiations and the obligations business parties perceive they are creating, to expose the current inconsistencies of legal regulation of TBN.

3. Business negotiation behavior and the normative requirements of efficiency, autonomy and certainty in business dealings

For law to regulate negotiations, it must be able to follow the superimposed social norms that anticipate a certain behavior between negotiating parties.[194] Negotiating business parties share aphonic convictions of behavior amongst themselves, operating on a normative basis that, if recognized by law, would be considered legal norms.

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[193] *Supra* note 179. Although negotiations are often considered of a competitive nature, Menkel-Meadow opens the scope to a better understanding of business negotiations through problem-solving negotiation approaches which she differentiates from classical adversarial negotiation approaches and encourages the former approach to be used in the global economy at 907. Although she refers to both approaches of negotiations as "legal negotiations", nevertheless the classification of negotiations is never established beyond a process. The strength in Menkel-Meadow's theory is found in her ability to distinguish two phases of negotiation: "transactional (rulemaking, forward looking)" and "dispute resolving (litigation, backward looking)." at 926; *See also* Christian Bühring-Uhle, Lars Kirchhoff and Matthias Scherer, "Conflict and Negotiation Theory as a Conceptual Framework for Conflict Management" in Arbitration and Mediation in International Business, Netherlands, Kluwer Law International, 2006. Bühring-Uhle's explanation of negotiations: "Negotiation belongs to the most complex forms of human interaction. The process of communication, persuasion and choice involves the use of highly personal, somewhat intangible skills, a mixture of shrewdness and intuition that many regard more as an "art" than a proper subject for scientific investigation." at 5.

[194] Thomas Donaldson, "Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory", Academy of Management Review, 1994, Vol. 19, No. 2, 252. Donaldson explains that normative is used in a prescriptive rather than descriptive sense. "It provides guidance about actions or policies instead of describing them."at 252. Donaldson resumes that there is a tension between empirical and normative methodology which frustrates the patterning of business ethics. He suggests that both of these factors are necessary to harmonize beyond utilitarian concepts and move towards "shared convictions of living people." at 279. *See also* Bernstein, Lisa, "Social Norms and Default Rules Analysis", 3 S. Cal. Interdisc. L.J. 59, 1993-1994.

Behavioural negotiation norms have been divided outside the law into descriptive norms and prescriptive norms. Descriptive norms are considered as how negotiations *are* (or *ought* to be)[195] whereas prescriptive norms (derived from customary or industry standards) provide standards or guides that have been commonly accepted as appropriate behavior during negotiations by the merchants themselves.[196] When these prescriptive norms become recognized and enforceable by law, they become legal norms.

There are three primary descriptive norms that have been identified by commentators: i) *efficiency*,[197] ii) *autonomy*,[198] and iii) *certainty*;[199] followed closely by three supporting descriptive norms: *reciprocity*,[200] *flexibility*[201] and *solidarity*.[202]

i) *Efficiency* is axiomatic. International business dealings would not function if parties could not negotiate efficiently. Efficiency signifies reaching mutual goals in the most timely, economic and efficient manner. Underlying the efficiency norm are two factors. Firstly, parties themselves would not take risks entering into negotiations if they did not anticipate being better off with the project

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[195] William Zartman, "Common Elements in the Analysis of the Negotiation Process", Negotiation Journal, Vo. 4(1), 1988 Zartman. For example, descriptive norms are social norms that predict the way in which parties perceive that other parties will behave in certain circumstances, whether the behavior is acceptable or not. *See also* Wendi L. Adair, and Jeanne M. Brett, "The Negotiation Dance: Time, Culture, and Behavioral Sequences in Negotiation", Organization Science, Vol. 16, No. 1 (Jan.-Feb., 2005), 33-51.

[196] *See* transformation of merchant custom in 1.1 of Section 2. of Chapter 2, Part I.

[197] *See supra* note 11. Hogg.

[198] *See supra* note 11. Gutmann. Other commentators have divided the norms creating obligations between autonomous norms and "rights-based norms" to justify the enforcement of obligations between contracting parties. *See also* David Charny, "Hypothetical Bargains: The Normative Structure of Contract Interpretation", 89 Mich. L. Rev. 1815, 1990-1991 at 1817. Charny identifies three potential reasons for contracts to be enforceable: 1) because party autonomy gives parties the "power to bind themselves with others"; 2) because it is beneficial for "social reciprocity" [fair social arrangements]; and 3) grounds of efficiency: "Contracts improve welfare because voluntary exchange presumptively enhances the welfare of both parties: the parties consent to the exchange only because each believes she will be better off after the exchange is consummated than before it" at 1823 and 1824. *See also* Charny, David, "Nonlegal Sanctions in Commercial Relationships", 104 Harv. L. Rev. 375, 1990-1991.

[199] *Supra* note 11. Piazzon.

[200] *Supra* note 5. Chuah confirms that reciprocity is a cornerstone of the success of a contract: "The intentions of the parties should be unequivocal and clear to each other." at 28. We argue that reciprocity is equally normative to negotiations as parties need to be brought into a transparency that shows their true intentions, albeit to confirm an agreement, to agree to agree later or to agree that their intention is not to form any legal obligations.

[201] *Ibid.* Chuah underlines the importance of flexibility to negotiating parties: "[I]t is not unusual for the parties to agree to negotiate changes to the deal or a new bargain in the event of intervening developments (such a change in the market or logistics)." at 30.

[202] *Supra* note 11. *See* Hogg's cooperative theory applied to negotiations in 2. of Section 3 of Chapter 1, Part II. *See also* Steven J. Burton, "Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View" 35 Wm. & Mary L. Re. 1533, 1993-1994 at 1558. Burton refers to Speidel, "Article 2 and Relational Sales Contracts", 26 Loy. L.A.L. Re. 789, (1993) whereby Speidel equates the duty of good faith as "internal norms generated by the relationship' beyond the agreement. These norms include reciprocity, solidarity, cooperation, and risk sharing, at least in longer term contracts with imprecise terms and interdependence between the parties beyond a single transaction." at 793. *See also* Steven J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", 94 Harv. L. Rev. 369, 1980-1981.

between the parties than without. Secondly, to benefit the global society, domestic states and consumers around the globe, it is necessary to protect the efficiency of global trade.[203]

ii) Equally as important as efficiency, and a supporting factor of it, is the normative value of *autonomy*; the ability for parties to self-regulate by creating voluntary, mutual agreements.[204] Norms of autonomy are supported by business parties through *reciprocity*, the assumption that both parties will strive towards mutual satisfaction of the parties' self-interests (the purpose of negotiations).

iii) *Certainty* provides the security anticipated by TBN parties. *Flexibility* is necessary to deal with the dynamic, ever-changing circumstances during the functioning of negotiations. When parties have been unable to resolve changes, they may use problem-solving skills inherent to negotiations to resolve issues or they may choose to address the issues later. This requires the ability to allocate foreseeable risks to one party or the other while remaining cooperative to resolving unforeseeable circumstances that may arise between the parties. When a decision is made, parties may draw up a preliminary agreement.[205] *Solidarity* is the binding force of the TBN parties' relationship, geared towards achieving the purpose of negotiations.

These norms have formed in business relationships out of necessity. When business parties anticipate and expect a certain standard of party conduct to promote trust, which has a minimum formation of law, such as merchant custom or inherent in industry standards, the law can recognize and enforce the norm. In other words, prescriptive norms that are recognized as repeated and structured standards of behavior that, once they acquire a minimum formation of law, become legal norms recognized as customary guides or industry standards that are recognized, thus enforced, by

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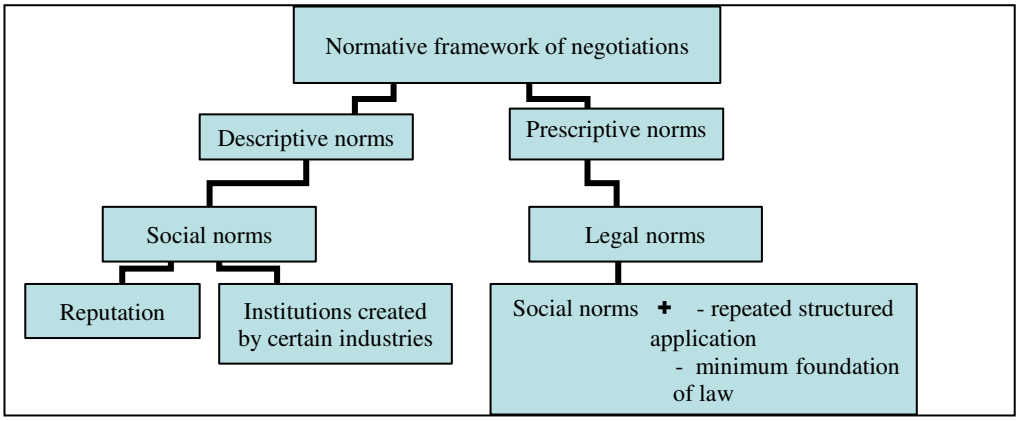
[203] *Ibid*. *See also supra* note 5. Chuah expresses the need for supply and demand and thus the need to exchange products that cannot easily be resourced.

[204] *See supra* note 11. Hogg, Gutmann. *See also* Zhaohua Meng, "Party Autonomy, Private Autonomy, and Freedom of Contract", Canadian Social Science, Vol. 10 (6), 212.

[205] Many commentators have referred to *supra* note 91, *Walford v. Miles*, as the leading precedent demonstrating how the court did not regard an agreement to negotiate as enforceable by law for lack of certainty. However, change is on the horizon. *See also* Leon E. Trakman, and Kunal Sharma, "The Binding Force of Agreements to Negotiate in Good Faith", The Cambridge Law Journal, 2014, 73, 598-628, doi:10.1017/S000819731400083X.Where parties have established an objective manner in which the agreement can be determinable, even English law has interpreted the agreement and enforced obligations: See *Petromec v. Petroleo* [2006] 1 Lloyd's Rep. 121) and *Barbudev v. Eurocom Cable Management Bulgaria* [2011] EWHC.

law.[206] The difficulty lies in determining where the crossover between social and legal obligations is situated. Our proposal is intended to provide the means to enable law to recognize when the line has been crossed, confirmed by TBN parties themselves.



Born of these prescriptive norms, readily identifiable standards of behavior by law, is the elusive concept of good faith which must be broken down into two aspects: whether the source of the duty is the parties' intention or whether it is imposed by operation of law. Many commentators have argued that good faith interferes with party autonomy but, in fact, good faith stems from the internal workings of party autonomy; the duty receives its breath from the prescriptive norm of autonomy, meaning that it is the intentions of the parties.[207] If the source of good faith is derived by operation of law, it supersedes party autonomy as it is applied without heed to party intention. We argue that law can better protect the norm of efficiency by expanding its support of autonomy in TBN. It is our mission in this thesis to demonstrate how this expansion could take place.

It is imperative for law to contribute to *certainty*, predictability and foreseeability when regulating TBN to offer security to TBN dealings. Law must proceed cautiously in order not to over-regulate or under-regulate. To do so, law must accumulate a deeper understanding of the functioning and processes of negotiations to preserve transparency and uniformity.

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[206] *Supra* note 23. Fecteau.

[207] *Supra* note 204. Meng. *See also* Mo Zhang, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law", 20 Emory Int'l L. Rev. 511, 2006. *See also supra* note 186. Mr. Justice Leggatt at para. [149].

A Symposium took place in Marquette University Law School in 2003 to expand the horizons of legal knowledge of "rational-choice" negotiation theories prevailing over the past twenty-five years. Following Fisher and Ury's *Getting to Yes* and Raiffa's *The Art and Science of Negotiation,* on which our current legal negotiation theories are founded, new topics were investigated to enlarge the understanding of existing conflict resolution during negotiations which traditionally centered around preparation, strategy, communication skills, integrative versus distributive negotiation, Best Alternative to a Negotiated Agreement (BATNA), reservation price, zone of potential agreement (ZOPA), and developing problem-solving techniques.[208]

It has been widely accepted, outside of law, that to learn patterns of culture requires seeking characteristics within the "frame" of negotiations, such as high context and low context communication contexts. We will discuss these characteristics more fully under our headings "Synchronizing the patterns of negotiations so goals can be achieved" and "Cultural roadblocks" in Section 2 of this chapter.

Negotiations necessitate that parties perform the same dance;[209] the same aggregate view of the purpose of negotiations, within the function of negotiations. Business parties understand the challenge of each stage of negotiation and communicate with one another, often by adjusting their own interests to appeal to a common understanding. A systematic number of phases have been

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[208] Jayne Seminare Docherty, "Culture and Negotiation: Symmetrical Anthropology for Negotiators", 87 Marq. L. Rev. 711, 2003-2004. Seminare Docherty discusses a heuristic metaphor used to identify layers of culture at 712. *See also* Jayne Seminare Docherty, "Narratives, Metaphors, and Negotiation", 87 Marq. L. Rev. 847, 2003-2004; Jayne Seminare Docherty,"Power in the Social/Political Realm", 87 Marq. L. Rev. 861, 2003-2004; *See also* Marcia Caton Campbell & Jayne Seminare Docherty, "What's in a Frame? (That Which We Call a Rose by any other Name Would Smell as Sweet)", 87 Marq. L. Rev. 769, 2003-2004. Jennifer Gerarda Brown, Marcia Caton Campbell, Jayne Seminare Docherty, & Nancy Welsh, "Negotiation as One Among Many Tools", 87 Marq. L. Rev. 853. Expansion into the scope of culture, roles of metaphors, effects of power and identity along with the significance of emotions received attention. For example, Seminare Docherty's contribution to negotiations is one of an anthropological excavation, described as an iceberg comprising a surface, just below the surface and the deepest level, being the foundation of negotiations. Parties from the same iceberg or culture do not necessarily share the same cultural meanings so how a negotiating party communicates is contingent on other factors. In fact, it was conceded that the focus cannot be only on the visible part of the iceberg.

[209] *Supra* note 195. Adair/Brett demonstrate by pairing two ballroom dancers from two different cultures, for example, Latin and American, whereby the partners are switched to "form intercultural pairs…They hear the same music and understand the general progression and adjustments their movements must make as the music changes. However, because each dancer is accustomed to distinct steps, the pairs may have difficulty synchronizing their movements [Latin ballroom dance is built on rapid, staircase movements, whereas American ballroom dance…is based on smooth gliding movements]. Although with adjustments they may be able to complete the dance, it is likely to lack the polish of the same culture dancing." at 33. *See also* Adair, Wendi L., "Go-Go Global: Teaching What We Know of Culture and the Negotiation Dance", Negotiation and Conflict Management Research, 2008, Vol. 1 (4), 353-370.

identified within the negotiation processes.[210] These phases, termed "stages of negotiation", are not necessarily as distinct as they first appear; rather roll together like the rhythm of a dance.

Commentators point out two "cornerstones" to the successful preparation of negotiations. A party's own preparation and the assessment of opposing party's interests. Although preparation is a large part of setting up negotiation strategies, commentators have also identified that negotiators must also improvise along the negotiation path[211] due to unforeseen circumstances that arise during negotiations that modulate a negotiator to improvise, like music and acting.[212] The improvised element of negotiations poses more challenges, since TBN parties cannot readily *prepare* for circumstances that may transpire during negotiations.

Watching for "cues" from body-language[213] and silence, or unspoken limitations[214] are considered important communication factors for successful negotiations. Semiotic communications can be expressed in mini agreements, or even contracts, while others remain remote.[215]

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[210] *Ibid*. Adair "Go-Go" explains the subtleties: "First, we know that culture affects the strategies negotiators use toexchange information. High context negotiators are more likely than low context negotiatorsto use offers to exchange information. We know that high context negotiators startusing offers early in the negotiation. And we know that when low context negotiatorsmake early offers, their ability to generate integrative solutions is compromised. Second,we know that culture affects how negotiators dance. Low context negotiators are morelikely to reciprocate direct behaviors and high context negotiators are more likely toreciprocate indirect behaviors. Also, high context negotiators are more likely than lowcontext negotiators to move in complementary sequences. Third, we know that culturedoes not impact the four stages of the negotiation dance. Low context, high context,and mixed-context dyads all moved through the same negotiation dance represented byfour distinct strategic stages." at 360.

[211] Lakshmi Balachandra, Robert C. Bordone, Carrie Menkel-Meadow, Philip Ringstrom and Edward Sarath, "Improvisation and Negotiation: Expecting the Unexpected", Negotiation Journal, October 2005, 415.

[212] *Ibid* at 417. A discussion on improvisational orientation concludes that: "Effective negotiators learn how to "play off" of what the other party has said and done. In doing so, they demonstrate that they have not only *heard* what the other party has said, but that they have also reflected on that information." at 418.

[213] *Ibid* at 419.

[214] *Ibid*. Blachandra at 419. *See also* Warren D. Allen, "What Are the Rudiments of Music?", Music Educators Journal, Vol. 23(5), Mar., 1937, 23. Allen enunciates: "Every child born into the world, whether he be Oriental, African, Fijian, or Occidental…learns to communicate with his fellows, in song as well as in speech; in gesture, signals and bodily movements of various kinds." at 23. Silence can speak as a pause in music. Ira Lieberman, "The "Music Theory" Teacher and "Elements of Music", College Music Symposium, Vol. 12 (Fall, 1972), 20. "…we can distinguish intuitively…between "waiting" time and "event" time. Waiting time is the period during which we are acutely aware of time's passage, second by second…" at 22.

[215] Gunther Teubner, "In the Blind Spot: The Hybridization of Contracting", 8 Theoretical Inq. L. 51, 2007. Teubner reflects on the modern changes in contract and suggests that now three communication systems are implied in contract, namely, "economy, production and law." He reconciles these systems through a "blind spot" to gain insight into why remote agreements arranged between negotiating parties cannot be recognized by law: "[the] contract's inter-discursive binding effect must remain invisible to contemporary society as a whole and its self-description. It can be observed only in its effects on the economy, law, and production, but not itself as relationality between them. In the dance of mutual adaptations of the diverse contractual projects, while the movements of the individual bodies can be seen, the dance itself remains invisible." at 59.

To serve the business world, law must "grasp the ghosts" of these remote agreements and espy the dance: pay attention to a deeper sense of cultural communications between TBN parties and comprehend how parties discern what negotiation communications really mean.[216]

Section 2: Do We Have a Deal?

How can TBN parties ensure that promises and agreements exchanged between them will be protected by law? Conversely, how do TBN parties meet their mutual goals without trespassing on obligations that may be imposed by law? The simple answer is that TBN parties cannot predict how law will interpret their negotiation movements or interpret their communications and conduct, indispensable to striking a deal. It is essential for law to grasp the answers to these questions more sufficiently prior to influencing or intervening in business dealings. Hence, we will voyage to other disciplines of study to examine negotiations from the perspective of business and behavioral scientists to bring back to law an assessment of how law can better regulate.

1. Understanding negotiations from a business perspective

When parties negotiate, three processes operate concurrently with one another, namely negotiation *tactics* and negotiation *strategies* within each of the negotiation *stages*. We have entitled these processes "the negotiation system". Stages of negotiations indicate the intensity of the negotiations and how far the parties have travelled through the functioning of negotiations towards their mutual goals. Tactics and strategies have been envisioned, respectively, as negotiation *steps* that connect the negotiation *positions* of the parties[217] taking place in each of the negotiation *stages*, enabling TBN parties to advance from one stage to another towards building a mutually satisfactory business relationship. In other words, in any given stage of negotiations, the parties choose

[216] *Supra* note 179. Lowenthal relates: "Insight into the negotiation process may enable rule makers to regulate negotiation, in all its forms, systematically and rationally." at 72. Photo taken from 2738650-handshake-illustration-on-an-abstract-blue-background.
[217] *Supra* note 195. Zartman at 31 and 32.

negotiation positions and, while assessing one another, challenge or match each other's positions through negotiation steps. The choice of negotiation steps and positions normatively changes in intensity with the advancement of each stage.

Negotiations are a continuum in a business relationship that intensifies from one stage to the next while the parties meet terms that are mutually satisfactory along the way. Whether parties have a "deal" assumes that negotiations have been successful and that the *purpose* of negotiations is foreseeable. The *function* of negotiations is the manner negotiations proceed to accomplish the parties' *purpose* or mutual goals.

"What is negotiation?" Gifford queries and then responds: "... Everyone knows what negotiation is. Two parties face each other and haggle."[218] Ghauri, however, refines the distinction between bargaining and negotiations, claiming that the former may be distributive and competitive but that the latter is ordinarily integrative and cooperative:[219]

> "*Bargaining* is more like haggling in a typical "bazaar" setting, or in so-called competitive bargaining or distributive bargaining…[where parties] maximize their own benefit, quite often at the expense of the other party[220]…On the other hand *negotiation*, also called "integrative bargaining", refers to win-win negotiation where both or all parties involved can end up with equally beneficial or attractive outcomes."[221]

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[218] Donald G. Gifford, *Legal Negotiation, Theory and Applications, Minnesota*, West Publishing Co., 1989 at 2. Gifford further defines negotiation for the purpose of his book as, "a *process* in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict...the term "bargaining" will be used interchangeably with "negotiation…" at 15. *See supra* note 59. Lewicki et al who claim that:"Interdependent relationships are characterized by interlocking goals-both parties need each other to accomplish their goals…[a] mix of personal and group goals is typical of interdependent situations." at 24.

[219] *Supra* note 15. Ghauri maintains that: "In business relationships, parties negotiate because they think they can influence the process in such a way that they can get a better deal than simply accepting or rejecting what the other party is offering. Business negotiation is a voluntary process and parties can, at any time, quit the process. Negotiation is, thus, a voluntary process of give and take where both parties modify their offers and expectations in order to come closer to each other." at 3.

[220] *Ibid*, Ghauri adds as a matter of fact: "Parties are therefore more competitive and opportunistic." at 3.

[221] *Ibid* at 3. Ghauri concludes: "…With negotiation, it is possible for both parties to achieve their objectives and one party's gain is not dependent upon the other party's concession. Business negotiation is considered by many authors as being this type of negotiation (Fisher & Ury 1991; Pruitt 1983; Ghauri 1986; Lewicki *et al*. 1991)." at 4.; Herb Cohen, "You Can Negotiate Anything: How To Get What You Want", Secaucus, New Jersey, Lyle Stuart, 1980. *See contra* Claude Alavoine, "You Can't Always Get What You Want: Strategic Issues in Negotiation", Social and Behavioral Sciences 58 (2012) 665-672; Tony Fang, Verner Worm and Rosalie L. Tung, "Changing Success and Failure Factors in Business Negotiations with PRC", International Business Review 17 (2008) 159-169; Dean A. Foster, "The effective International negotiator " in *Bargaining Across Borders : How to Negotiate Business Successfully Anywhere in the World*, New York, McGraw-Hill, 1992. Jean H. Gagnon, « Le but véritable de la négociation » in *Réussir par la négociation*, Montréal, Les Editions Quebecor, 1990 ; Robert Gulbro and Paul Herbig, "Cross-cultural Negotiating Processes", Industrial Management & Data Systems 96/3, [1996] 17-23; Carrie Menkel-Meadow, "Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections", Negotiation Journal, October 2005, 485.

In plain terms, Ghauri is referring to approaches in negotiations: *bargaining* being the distributive or competitive side of negotiations where parties play within the terms of the "game theory" at a zero-sum level (win-lose) and grapple to obtain the largest piece of pie. Parties may bluff, puff and cheat to obtain the largest part of the pie; they may offer gifts which may be considered bribes, or they may feign a trusting relationship to induce the other party to acquiesce. On the other hand, *negotiating*, more commonly referred to as integrative bargaining falls under the game theory at a non-zero-sum level (win-win). Parties seek to expand the pie or solve problems by investigating alternative solutions rather than focusing only on dividing the pie.

1.1 Negotiation approaches

There are two negotiation approaches identified by business and marketing commentators: distributive and integrative. Distributive negotiation approaches are considered competitive, while integrative negotiation approaches are deemed to be problem-solving. There is rarely one pure orientation in approaches due to the very nature of negotiations. Rather, negotiation approaches are a mixture of both distributive (catering to self-interests to win) and integrative (knowing one's self-interests but also heeding consideration to opposing interests).[222] Each of the parties must attempt to either match (or acquiesce), challenge or propose a new solution to the opposing parties' approach at any given time during the negotiation processes. While negotiation parties can better prepare for

[222] *Ibid*. Usunier describes the negotiation process as having both distributive and integrative orientation: "In the distributive strategy (or orientation) the negotiation process is seen as leading to the division of a specific "cake" which the parties feel they cannot enlarge even if they were willing to do so…The negotiators hold attitudes and objectives that are quasi-conflictive. Interdependence is minimized whereas opposition is emphasized…According to this model, [Pruitt 1983: the "dual concern model"] the ability to envisage the other party's outcome is a prerequisite for the adoption of an integrative strategy. Problem-solving orientation can be defined as an overall negotiating behavior that is co-operative, integrative and orientated towards the exchange of information (Campbell et al. 1988; Adler 2002)." at 111-113. Business commentators have identified that negotiations inherently use both competitive and collaborative factors in order to bridge the relentless tension between the self-interests of the parties and the mutual goals they seek to attain. To appreciate how this mixture of negotiation approaches influences the parties' perception and conduct, we will glance at a brief overview of the two approaches from a business point of view.

distributive argumentation to challenge an opposing parties' apprehended approach, integrative negotiation requires more improvisation.[223]

Each of the negotiation approaches rely on the ability of the parties to assess and communicate options available to them.[224] There is always a question of monetary limits to which a party will not exceed or descend when offered a price, sometimes referred to as "reservation points" in the "bargaining zone". As the relationship is dependent on whether parties wish to do business together, there is also a subjective social content.[225] Lewicki describes two influential factors:

- the perception of the outcome; and
- the perception of the process.[226]

The perception of the outcome relates to the *purpose* of negotiations; that is *what* gain the parties anticipate they will accomplish together or the reason why parties negotiate in the first place. Perception of the process follows the *function* of negotiations; meaning *how* the parties negotiate together to attain that gain during the processes of negotiations. These factors serve as subjective elements that may expand (when parties are cooperating with one another) or diminish (when parties are locked on their own interests) the size of the bargaining zone. The outcome of negotiations drives the behavior between the parties during the function of negotiations which, in turn, influences whether negotiations will be successful:

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[223] We must not be deceived by the term "problem-solving" as self-interests are never completely quashed. Jonathan R. Cohen, "The Ethics of Respect in Negotiation", Negotiation Journal, April 2002, 115. Cohen considers the matter one of self-respect: "Self-respect requires that one defend oneself from being misused." at 118. Usunier maintains, the relationship pattern is a "dual concern model" using "two basic variables: concern for one's own outcome (horizontal axis) and concern for the other party's outcome (vertical axis). The relationship is focused on the perception of the process that parties will be better off together than apart. *See supra* note 53 in legal negotiation theory: Menkel-Meadow describes problem solving using the example of a chocolate cake: "…[linear conception of the structure of negotiation] frequently fails to provide a satisfactory solution for the parties. Consider the example of two children arguing over a piece of chocolate cake. The parental compromise solution, cutting the piece in half, will not be satisfactory to either child if one prefers the cake and the other the icing… A linear negotiation structure might work in those few cases where there is really only one issue, but it is clearly insufficient when the issues in a negotiation are many and varied." at 771. Meanwhile, strategies and tactics are positioned, including inaction, yielding, integrative, or contending strategies. *See supra* note 49. Usunier; *supra* note 15 at 112. Ghauri.

[224] *Supra* note 59. Lewicki refers to (1962) Deutsh to define integrative techniques which he argues must maintain a certain cooperation as a "*promotive interdependence* or nonzero-sum" whereby the parties have formulated a certain trust between themselves and divided the tasks so that they can work in tandem." At the same time, he demonstrates conversely that: "When the goals of two or more people are interconnected so that only one can achieve the goal…'there is a negative correlation between their goal attainments'…" at 25.

[225] *Ibid*. Lewicki describes this content as: "how we feel about negotiating with this person, and what we feel to be an acceptable price or resistance point." at 26.

[226] *Ibid* Lewicki: "two efforts in negotiation help to create this trust and belief-one is based on perceptions of outcomes and the other on perceptions of the process." In other words, an interdependent relationship is solved by creating trust where one party makes a concession and the other party responds at 32.

"mistakes made during the bidding can have an enormous impact on both players…a wrong offer can upset relationships, even causing the other party to walk away…"[227]

Although theories have mushroomed in past years, there appears to be a consensus that *identification* and *characterization* are the preparatory factors negotiation parties must consider:

- Negotiators must analyze their own motives and goals, termed "identity";[228] and
- Negotiators must analyze the other party(ies) motives and goals, termed "characterization".[229]

Hindriks breaks down identification and characterization into five elements that manipulate the choice of negotiation approaches: 1) gathering of information regarding the value of the product or services, 2) gaining knowledge of the parties' preferences, 3) timing and deadlines; 4) utilization of strategies by the parties, and 5) exchanging offers.

The first three elements set the agenda and setting, providing a forum in which the parties can communicate. The fourth element, utilization of strategies, is the start of the negotiation positions. *How* they negotiate (exchanging offers) is dependent on the fifth element: the exchange of negotiation tactics or steps[230] and is accompanied by a protocol or patterning, like a dance.

Setting up negotiation approaches also influences which tactics and strategies will be chosen by the parties and nourish the perception of each other's strategies[231] that merge into patterns.[232] The patterns delineate the adaptability and sensitivity of the parties to each other.[233] Lewicki summarizes

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[227] Koen Hindriks, Catholijn M. Jonker and Dmytro Tykhonov, "Negotiation Dynamics: Analysis, Concession Tactics, and Outcomes", 2007, IEEE/WIC/ACM International Conference on Intelligent Agent Technology, 427 at 428.

[228] *Supra* note 208. Campbell/Seminare Docherty at 774 and 775; *See also supra* note 195. Adair/Brett, termed "relational positioning" at 36.

[229] *Ibid*. Termed, "identifying the problem." by Adair/Brett.

[230] *Supra* note 227. Hindriks explains: "A negotiation step in bargaining consists of an offer proposed by one party to the other." at 429. Hindriks adds that there are formalities attached to negotiation steps: "Exchanging of offers leads to negotiation protocol." at 428.

[231] *Ibid* Hindriks describes: "Classification [of negotiation steps] enables us to relate the intent of a strategy in making a negotiation step with the actuality of the perception of that step by the opponent." at 428. "For example, a strategy might be concession oriented, i.e., steps are intended to be concessions, but in reality, some of these steps might be unfortunate, meaning that although the proposer of the bid is giving in, from the perception of the receiver, the bid is actually worse than the previous bid." at 432.

[232] *Ibid*. "By testing strategies over various domains and against various opponents patterns emerge of when such unfortunate steps occur." at 432. Hendriks eludes that unfortunate steps could be avoided with proper knowledge of the product/service and knowledge about the opponent at 433.

[233] *Ibid* at 430.

the process as a dance of discussions and concessions that requires the understanding of many factors which may affect the negotiation process[234] including the atmosphere they wish to create.[235]

Distributive techniques tend to be competitive and relate more to orientation of power dependence and individualism.[236] However, it is considered that even distributive techniques are subject to a certain amount of cooperation, as strategically, the negotiator must tussle towards a negotiated "Best Alternative to a Negotiated Agreement" [BATNA].[237] Integrative strategy refers to problem-solving approaches and focuses parties towards future orientation of the parties' goals. Empirical studies have proved that integrative orientation improves the results of the negotiation process which, in turn, creates a cost reduction for both parties.[238] The primary goal during the integrative approach is for the parties to access a "maximum joint gain".[239] This goal is accomplished through trust.[240]

Trust is recognized as a valuable commodity in business negotiations, fraught with the tensions of the bargaining zone that is directed towards increasing one's own slice of the pie.[241] The

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[234] *Supra* note 59. Lewicki summarizes "Negotiation is a process of offer and counteroffer, of discussion and concession, through which the parties reach a point that both understand is the best (for them) that can be achieved. Although this process if the heart of negotiation, it cannot be understood or successfully carried out without a knowledge of how a wide array of other factors affect the process." at 47.

[235] *Ibid*. "The outcomes of one party are linked to those of the other party by the structure of the bargaining relationship. How outcomes are linked (or perceived to be linked) will have a fundamental influence on how negotiations proceed." Strategies by negotiators must ask whether they wish to create a competitive environment or a cooperative one and set the goals. at 46.

[236] *Supra* note 49. Usunier describes distributive orientation: "These are negotiations of the "win-lose" type – "anything that isn't yours is mine" and vice versa." at 112.

[237] The best strategy to advance negotiations if an agreement cannot be reached, which requires opening communications in the most flexible fashion. Leigh Thompson, "Distributive Negotiation: Slicing the Pie" in *The mind and the heart of the negotiator*, 2e ed, Upper Saddle River, N.J., Prentice-Hall, 2001 p. 33-60. Thompson's description of distributive orientation lies in his theory on BATNA, which, in referring to Raiffa 1982, argues is part of the negotiation dance at 33. However, *see also supra* note 49. Usunier's conclusion: "The process of intercultural encounter in negotiation has been described as akin to a dance in which one dancer dances a waltz when the other dances a tango (Tinsley et al. 1999)."at 134. *Supra* note 59. Lewicki adds *interdependence* as another element to the relationship: "In negotiation, both parties need the other...and...each is dependent upon the other. This situation of mutual dependency is called *interdependence*...When we are independent of another person we can, if we choose, have a relatively detached, indifferent, uninvolved outlook.When we are dependent on another, we have to accept and accommodate the demands of another...When we are interdependent, however, we have an opportunity to influence the other party and many options are open." at 24.

[238] *Supra* note 49 at 113. Although Usunier argues that intracultural negotiation (similar cultural backgrounds) is easier to integrate than intercultural (different cultural backgrounds) negotiations, he displays optimism towards integration as long as the negotiators can "adapt successfully" to one another through oral or written communications at 114 and 115.

[239] *Ibid* at 117.

[240] *Ibid.* Usunier illustrates: "Trust is built step by step, with a view towards the future." at 130. *See also supra* note 15. Ghauri concurs: "This process which requires trust and security for each party, is critical to successful interdependent relationships. This trust can be developed by including the other party in the negotiation process and ensuring that her needs are met as well as your own. Following a fair process will contribute to feelings of satisfaction and success to both parties." at 33.

[241] *Supra* note 237. Thompson describes ten ways that this can be accomplished. at 34. *See also* Leigh Thompson, Kathleen L. Valley and Roderick M. Kramer, "The Bittersweet Feeling of Success: An Examination of Social Perception in Negotiation", Journal of Experimental Social Psychology 31,

"bargaining zone" is where each party has a reservation point; *a limit beyond which a party will not negotiate* and, at the same time, where there is more value in the negotiation agreement versus not reaching an agreement at all.[242] When the bargaining zone is "positive" the parties are motivated to cooperate with one another even though there is still a competition between each other's claims.[243] Thompson defines the scope of the bargaining zone during negotiations as a collection of information which is as important during distributive orientation as it is in integrative orientation.[244]

Since there is no real *pure* orientation during negotiations, both negotiation approaches inherently retain a degree of conflictual nature as the parties protect their own interests.[245] With reference to Fisher and Ury, Thompson argues that effective negotiations are accomplished by increasing bargaining value and developing relationships by encouraging negotiators to focus on the *purpose* of their negotiations: mutual gains that benefit both parties.[246] Parties must avoid functional traps that can prevent them from attaining their goal, including the "fixed pie perception", meaning the inability for parties to adapt and alter their positions.[247]

To assess the BATNA, the parties must search for the mutual bargaining zone by assessing behavioural reception points.[248] BATNA, is therefore a preparatory course of action to avoid having negotiations fall apart by planning flexible options, accumulating information and assessing one's

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467-492 (1995); Leigh Thompson and Geoffrey J. Leonardelli, "The Big Bang: The evolution of negotiation research", Academy of Management Executive, vol. 18, no. 3 (2004).

[242] *Ibid*. Thompson at 36.

[243] *Ibid.* Thompson argues that opportunism is higher in distributive orientations at 36 and 37.

[244] *Ibid*. Thompson expounds: "Fairness is a "hot button" in negotiation because most negotiators view themselves as fair, or wanting to be fair...As a negotiator, you should be aware that fairness is subjective and therefore egocentric, meaning that a variety of norms of fairness exist, and negotiators usually focus on norms of fairness that serve their own interests (Lowenstein, Thompson and Bazerman 1989). Thus, negotiators should realize that fairness is an arbitrary concept that can be used as a bargaining strategy with an opponent; however, the negotiator should simultaneously be prepared to counter argue when an opponent presents a fairness argument that does not serve her own interests." [our underline] at 42. *See also* Cecilia Albin, "The Role of Fairness in Negotiation", Negotiation Journal, Vol. 9, Issue 3, July 1993, 223. *See also* Melvin J. Kimmel, Dean G. Pruitt, John M. Magenau, Ellen Konar-Goldband and Peter J. D. Carnevale, "Effects of Trust, Aspiration, and Gender on Negotiation Tactics", Journal of Personality and Social Psychology, 1980, Vol. 38, No. 1, 9-22.

[245] *Supra* note 241. Thompson/Leonardelli.

[246] *Ibid*.

[247] *Ibid*. "Instead of settling a negotiation through a power struggle" he encourages that "the solution is to negotiate on some basis *independent* of the will of either side-that is, on the basis of objective criteria." at 115.

[248] *Supra* note 241. Thompson/Leonardelli localizes the issues:"No other area of management study in organizational behaviour has remained front and center stage for as long as negotiation has. And the trajectory suggests that there is more to come. The negotiation universe continues to expand, especially as it crosses regional, national, and ethnic divides to show how negotiation differs across cultures." at 116.

own interests and those of the opposing party. How much or how little distributive approach must always be balanced with integrative movements and the focus on mutual gains that will benefit all parties. Adequate communications become the key to success whereby transparency is vital, including consideration of how much information should be disclosed to the opposing party and what should remain in reserve.

There is also the matter of attitude. Lipsky and Avgar[249] have explored the concept of "attitudinal structuring",[250] which revolves around attitudes of the parties towards one another.[251] This aspect includes the assessment of reasons for the negotiations of each party and how much they trust one another. In both distributive and integrative negotiations, a party's *attitude* influences the entire process and outcome of the negotiations,[252] as parties react to one another's steps and positions. Attitude influences the behavior of the opposing party(ies) and therefore the mood and behavior during negotiations, which in turn reflects the choice of strategies and tactics and thus the conduct during the processes of negotiations.

Attitude and how well the parties can "match" their self-interests may contribute to the final results of whether the goals and objectives of the parties can be realized. Although positions of conflict and strategy are features to business parties during negotiations, the parties toil to accommodate a mutually satisfactory *relationship* that will prosper. Relationships, at times, require "compromise", meaning giving up some of the short-term goals for long term ones to encourage the other party to reciprocate.

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[249] David B. Lipsky and Ariel C. Avgar, "Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model", 38 U. Tol. L. Rev. 47, 2006-2007. at 63.

[250] *Ibid* at 68. Intraorganizational bargaining is concerned with the relationship between the negotiator and the negotiating team and how an alignment can "divide and conquer" a negotiating strategy. Although this aspect is interesting it is out of the scope of our thesis.

[251] *Ibid* at 66.

[252] *Ibid*.

If short term and long term goals are not in sight, the relationship will fail, which is why business parties must ascertain whether negotiations are likely to be successful to move forward and to avoid superfluous investments.[253]An investment in the relationship is necessary because of the dynamics of TBN, whose marketing strategy is "faced with particularly irregular purchasing patterns...[and that effects of economic discontinuity can be overcome] by developing strong social and relational bonds."[254]

1.2 The system of negotiation processes

Negotiations are comprised of three interlocking negotiation processes that operate to move negotiations forward: negotiation stages, negotiation strategies (or positions) and negotiation tactics (or steps). It is misleading to refer to negotiations as *a* process as there are three basic movements operating simultaneously and sequentially during negotiations. We have gathered from the business perspective that there are two components operating in the system of negotiation processes that co-relate to the *purpose* (outcome) and *function* (perception of the process) of negotiations. The negotiation system must be understood to provide transparency to the processes of negotiations.

Understanding business negotiations as relationships[255] begins with understanding that business parties negotiate simultaneously transferring a number of positions and steps within each position, sequentially moving from one stage to the next. These movements are employed

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[253] *Supra* note 59. Cova explains the dilemma: "The first, and principal, characteristic of projects from the seller's standpoint is the uniqueness of each transaction (Ahmed, 1993). A project requires the mobilisation of both internal resources and the organisation's network of external partners to deliver a specified scope of work…A second important characteristic of projects is the high degree of complexity associated with each transaction (Gunter, 1986)…A third characteristic is the high degree of discontinuity in the economic relationship between the buyer and the seller...(Hakansson, 1982)." at 253.

[254] *Ibid*. Cova suggests the development of a model "for the distinct phases of project negotiating process (Ghauri, 1981, 1982 and 1986) at 255 as a result of the growing need to accommodate the social dimension of business: He also explains that: "This linkage mix corresponds to a relational position in the network of both business and non-business actors forming the social context embedding the project. It's a necessary prerequisite for project business in order to create trust and gain information." at 256.

[255] *Ibid*. Cova warns that negotiations are far more complex than mere call for tenders. They are communication vehicles in which each phase is composed of various dimensions:"…these developments can give the company a different perspective of project negotiations: the only permanency lies in the fact that, in all cases, project negotiations are simply an episode in the relationship" at 269. *Supra* note 205. Adair/Brett identify: "We propose that negotiators have normative models of the negotiation process that both influence how they begin a negotiation and serve as a benchmark for monitoring their progress." at 35.

voluntarily, through party choice during the negotiation processes. The parties must eventually *match* their positions and negotiation steps, moving forward towards attaining their mutual goals[256]

According to the business perspective, parties are conscious of their steps, positions and even the stage in which they are situated (like a border crossing). Communications, verbal and non-verbal, influence the negotiation processes.[257] To understand negotiation patterns, we will explore the negotiation system from macro to micro dimensions within the system of negotiations, beginning with negotiation stages and then we will address negotiation strategies (also identified as positions) and negotiation tactics (also known as negotiation steps) found within these stages.

1.2.1. Stages of negotiations

"Negotiation stages represent time frames during negotiations characterized by a focus on particular kinds of strategy or sequence"[258] and require adjustments from one stage of negotiations to the other "to complete the dance."[259] Although there is no real consensus on whether there are three or four stages of negotiations,[260] Ghauri, in business, identifies three stages, to which behavioral

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[256] *Supra* note 15. Ghauri shows why business parties negotiate: "In business relationships, parties negotiate because they think they can influence the process in such a way that they can get a better deal than simply accepting or rejecting what the other party is offering." at 3. *See supra* note 59. Lewicki claims that:"Interdependent relationships are characterized by interlocking goals-both parties need each other to accomplish their goals…[a] mix of personal and group goals is typical of interdependent situations." at 24.

[257] *Ibid* at 13 and 14. Ghauri. Communications include not only verbal communications, but non-verbal communications: how parties greet each other, what a nod infers and how much time must be conversed with niceties prior to carrying out a business discussion. Promptness and dress is a symbol of respect in some cultures and offensive to the culture if the other party is not sensitive to it. TBN parties have a deep-rooted and historical understanding that has evolved between them. Our goal is to better comprehend the semiotics between them during negotiations in order to provide a translation of these symbols back to the law.

[258] *Supra* note 195. Adair, Go-Go at 356.

[259] *Supra* note 195. Adair/Brett "Like dancers from different cultures, we also expect negotiators from different cultures to enact different behavioral sequences at the bargaining table, leading to difficulty in synchronization and inefficient deals." at 33. *See* how flamenco turns into ballet and ballet transforms into jive: Yulia & Riccardo Jive WSSDF 2010: https://www.youtube.com/watch?v=9MF1REzg7GQ. The actions are similar for negotiation parties; they take cues from one another, knowing when one stage is completed and another begins. *See supra* note 15. Ghauri.

[260] *Supra* note 59. Cova identifies five stages to the preliminary process, including: a "*proposal preparation*" or bidding list to establish a dialogue; "*informal meetings*" designed to clarify details of the bid and "build a climate of collaboration and confidence within which to reinforce relationships…" "*formulation of negotiating strategy*" which begins the process of face-to-fact negotiations once the bidder has been chosen; "*face-to-face discussions*" or "two way dialogue" which are designed to measure the parties' expectations of the bargain[260] and "complete the project relationship map"; and "*agreement between the parties*" or "memorandum of understanding" which are subject to drafting more detailed terms and conditions prior to the signing of the contract. This is where business parties believe it is time to contact their legal advisor. at 263; On a behavioural scientific level: *Ibid* Adair/Brett posit a four stage sequential model was constructed to study both the content within each stage and the transition between stages, comprised of: 1) *Relational Positioning*; 2) *Identifying the Problem*; 3) *Generating Solutions*; and *Reaching Agreement* at 35 to 37. These factors determine when the negotiation dance begins and at what stage the relationship mutates, establishing undertakings between the parties. The parties' conduct during negotiation is influenced by the strategies and tactics chosen while at the negotiating table.

scientists, Campbell/Docherty concur:[261] pre-negotiations; face-to-face negotiations; and post-negotiations.

Pre-Negotiation Stage

> "*The Dance of Positions* - As the conversation begins, picture the music striking up for a spirited *flamenco*. The dancers draw themselves up to their full height, and proudly, confidently, and almost showily commence the first steps…Each presents himself or herself in his or her best possible light, seeking to dazzle and impress with his or her technique, passion and power. This is the dance of positions."[262]

Negotiations commence with the consideration of a party's own motives and goals in the project (termed "identification") and assessment of the opposing party's motives and goals (called "characterization"),[263] equipping parties to protect their own self-interests while anticipating the opposing parties' interests.

The pre-negotiation period is perhaps the most volatile stage of negotiations since parties must ascertain whether their business relationship is advantageous and determine whether their goals match. Therefore, this stage will terminate:

- If one or more parties decide there is no deal and breaks negotiations; or
- Once the parties have ascertained their willingness to reconcile their interests in a mutual fashion, they advance to the next stage.

To come to terms with whether the business relationship is beneficial, the parties must dance together with persuasive efforts to convince the opposing party that the propositions brought to the table serve not only the proposing party's position, but also that the propositions cater to the interests of the opposing party. To entice the other party, the mastery of the dance requires the projection of

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[261] *Supra* note 208. Campbell/Docherty argues that "frames can limit the range of possible solutions the disputing parties can envision." They describe a three step process that build towards an anticipated outcome or relationship, which he refers to as "frames" including: 1) *Identity*: party's perception of self or themselves in a group; 2) *Characterization*: Party's perception of the other party; 3) *Process*: How parties strategize to resolve conflicts or issues that interfere with the aspired outcome at 769.

[262] Mark Young and Erik Schlie, "The Rhythm of the Deal: Negotiation as a Dance", Negotiation Journal April 2011, Vol. 27(2), 191. Young and Schlie describe the first dance: "[In negotiations] this initial dance is mostly about her and the presentation of her positions…seek[ing] for their position to be understood and valued…they have laid down the markers of the space they demand, and established just who they are. This is not the end of the dance, but a good beginning." at 197. Ballet Furia, Fuego flamenco y clásico español. New Scala Production: https://www.youtube.com/watch?v=7WKhEzTAy_E.

[263] *Supra* notes 208 and 195. Campbell/Docherty and Adair/Brett. *See also supra* note 227. Hendriks.

the alternate party's perception of the performance. Before the first dance ends, the parties synchronize their steps towards "reciprocal sequences"[264] which are the responses that each party expresses to the other party's behavior.

These responses may be competitive, cooperative, or mixed, depending on the cross-cultural dynamics.[265] Although the pre-negotiation stage is sometimes perceived to be little more than an invitation to treat, information is gathered to assess whether parties have mutual future business interests;[266] information that can be valuable to an opposing party.[267]

The purpose of the pre-negotiation stage is to maintain one's own negotiating power[268] which must function by grasping the expectations of the opposing party(ies).[269] Ghauri refers to the positions within the preliminary stage of negotiations as a "power/dependence struggle" in which each party attempts to build up relative negotiating power.[270]

Parties must not only evaluate their future relationship, they must also exhaust any predictable events that may defeat the project, such as investigation of taxes and import duties, political atmosphere, and rules and regulations that may affect the parties' agreement together. Consequently, this stage requires a great deal of exchange to diagnose problems and determine risk assessment and

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[264] *Ibid*. Adair/Brett at 35.

[265] *Ibid*. Adair/Brett at 34.

[266] *Supra* note 15. According to Ghauri, this includes gathering background factors, such as each party's objectives, whether third parties are involved, and the environment in which the business transaction must take place, any influencers, competitors and the basic infrastructure is set on the table at 16. The negotiation process is therefore a matter of diagnosing problems that arise as a result of these factors and determining manners in which these problems can be resolved.

[267] *Lac Minerals Ltd. v. International Corona Resources Ltd. (1989) 2 R.C.S. 574.*

[268] *Supra* note 15. Ghauri interconnects: "The pre-negotiation stage is often more important than the formal negotiations in an international business relationship…Trust and confidence gained from these relationships [social, informal relationships] increase the chances of agreement." at 10.

[269] *Ibid*, Ghauri at 16, including identifying the contents of the deal; at 16 *creating alternatives* at 17: Expectations of the parties are not only identified by persuasion; threat; or concession. In fact, there are many alternative solutions to a problem." Ghauri identifies other options that may be combined: 1-credit; 2-profit sharing and 3-other gains which balance short term goals; and *considering the interests of the opposing party* at 18.

[270] *Ibid*. Ghauri clarifies the building process: "Negotiators can determine who has the relative power advantage by gathering information about the other party, considering each party's position and developing different alternatives. They can try to build their own relative power by developing arguments against the elements of power and improving their own position….The party with greater information automatically acquires more power…an experienced negotiator can build up information in order to gain relative power." at 19 and 20.

roles of the parties; that is which party will bear the loss, if there is one, and which party is responsible to attain information, so the parties can proceed further in the negotiations.[271]

Once the parties succeed in synchronizing their dance, they advance to the next stage, intensifying positions of problem-solving by augmenting the consideration for opposing interests.

Face-to-Face Negotiation Stage

> "*The Dance of Empathy* - As the cadences of the music – and the rhythm of the negotiation – shift markedly, the dancers now take up a very different set of moves. We are moving from spectacular to even more expressive dance. The tone is now softer, less confrontational; an expression of what each partner seeks. The castanets give way to strings; the dance has now become a *ballet*."[272]

By the time parties have reached the face-to-face phase of negotiations, they are no longer strangers. They have developed an understanding of each other's positions and new energy is applied towards syncing mutual goals. Although competition still exists between the negotiation parties, as each one has their own self-interests to protect, moving together towards attaining common goals takes precedence and deeper communications ensue. Coercion tactics are left behind with the castanets[273] and the discussion is focused on following each other's footsteps and flow. Ghauri's vision of the second negotiation stage is based on signals:

> "[A]t this stage…parties believe that they can work together to find a solution to a joint problem…the parties should evaluate the alternatives presented by the other party and select those that are compatible with their own expectations…A balance between firmness and credibility is important in all types of negotiation. It is important to give and take signals of readiness to move from the initial stage without making concessions. Negotiators having prior dealings with each other can easily send and receive signals, but it is very difficult for those meeting for the first time. Negotiators often send conditional

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[271] Thus, business perception of the pre-negotiation stage would substantiate the popular perception that negotiations are "norm-free".

[272] *Supra* note 262. Young/Schlie. Johannes Gettinger, Sabine T. Koeszegi and Mareike Schoop, "Shall we dance? – The effect of information presentations on negotiation processes and outcomes" Decision Support Systems 53 (2012), 161-174. Young/Schlie display the analogy with dance: "Each negotiator seeks to convey his or her own deeper needs or interests. [revealing more and more information] But the choreography now also calls for them to interact more completely with their partners. This requires an added focus on the moves of the other, and a synchronous pairing of movement….each one must trust the other one…The two have to communicate openly with one another and developed a common mutual understanding. They are ready to move to exploring options and offering concessions." at 198. *See* Ballet Nacional De España: https://www.youtube.com/watch?v=NbadDj9KF1s.; Duo Main Tenan T: https://www.youtube.com/watch?v=0dSeYecM6wA.

[273] *Supra* note 195. Adair/Brett "Early theorists hypothesized that most negotiations begin with a focus on power, with one negotiator trying to sway the other party. Empirical studies, however, showed that successful negotiators eventually move away from power and focus their efforts on coordination and cooperation (Pruitt 1971, 1981)." at 34.

> signals such as "We cannot accept your offer as it stands" or "We appreciate that your equipment is quite suitable for us but not at the price you mentioned."[274]

In western negotiations, it is expected at this stage that letters of intent or informal agreements are in the process of exchange to allow parties to rely on matters the parties have agreed upon to make arrangements ancillary to the deal. These communications aim to accommodate TBN parties to make arrangements that are often either verbal or non-verbal, and therefore may be subject to conjecture.

The function of this stage is to consider aspects that may hinder the conclusion of a contract.[275] Alternatives must be ranked and prioritized[276] towards a consensus but Ghauri cautions negotiators not to "directly submit a "final offer"[277] because it can create a disadvantage by cutting off alternatives.

Face-to-face negotiations are a series of communications reliant on context and culture. Therefore, there lies a danger of misinterpretation due to a lack of transparency. Even where parties speak the same language, symbols can take on different meanings and non-verbal communications can contribute towards the break or solidification of the relationship. Processing motives continue throughout the next stages of negotiation and intensifies on a transnational plane, identified by Hofstede.[278] Barkai acknowledges that the negotiation dance in cross-cultural settings is more complex:[279] "[e]ven…negotiators in bordering countries with very significant differences in negotiation styles have learned to hear the music and do the steps necessary to have a successful

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[274] *Supra* note 15. Ghauri at 11 and12 [our underline].

[275] *Ibid.* Ghauri suggests that parties be wary of who is entitled to make decisions, therefore capacity considerations are raised during the face-to-face negotiation stage. Ghauri questions: "Who within the firm should negotiate?" at 20.

[276] *Ibid* at 12.

[277] *Ibid* at 11.

[278] *Supra* note 73. Hofstede- reply.

[279] John Barkai, "Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution", 8 Pepp. Disp. Resol. L.J. 403, 2007-2008; Barkai explains: "When negotiators from different countries attempt the negotiation dance so that they can do business, on the way to reaching an agreement they are trying to not step on one another's toes as they communicate about their preferences, priorities, interests. Learning, understanding, and being able to apply the cross-cultural differences discussed in this article will help in the preparation for the cross cultural negotiation dance and for the dance itself." at 446 and 447.

negotiation dance."[280] But Barkai warns against cultural stereotyping comparing it with our unpredictable weather forecasts: useful as a good starting point but be prepared for the forecast to be inaccurate.[281]

Post-Negotiation Stage

> "*The Dance of Concessions* – The dancers pause and shift positions, eyeing one another playfully, clearly set to try new things. The step is now one of a *jive*…He leans forward and, demonstrating a jazzy movement, offers the first new pattern of the new step, encouraging his partner to respond in kind…The moves become more athletic and more creative, as each dancer first pulls the other to his side, then pushes away to protect his own space. At times, the dynamic is confrontational, with proposals that are boldly anchored and threats to walk away. Moves are made slowly, then with increasing speed. But, somehow, the dancers manage to find some sort of harmonious resolution, even if it emerges from unexpected poses."[282]

Ghauri argues that this stage "test[s] the understanding of the contract, as parties may have perceived issues or discussions differently."[283] If problems arise because of overlooked details, a further negotiation may be required combining the use of dispute resolution mechanisms.[284] Underlying cultural and strategic factors continue to inter-play. The post-negotiation stage generally includes an agreement to contract, albeit often incomplete. This third negotiation stage is delineated to review draft contracts or agreements, which we argue should be divided further into "contract" and "post-contract" in order to distinguish between that which is imminent to agreement or the signing of a contract and communications taking place once the contract has been signed where parties may need to re-negotiate or re-new terms originally consented to (resulting from dynamic changes in the business relationship or unforeseen obstacles that may have arisen).

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[280] *Ibid*. Barkai at 446.

[281] *Ibid*. Barkai at 447. Weathermen are the only persons who are allowed to be wrong.

[282] *Supra* note 262. Young/Schlie expound: "…they find a point of common repose, where trade-offs have been duly honored before embarking on the next exchange of movements. This dance is…highly improvisational…giv[ing] ground to the other, making offers and then counting on reciprocity from the others…Things become more concrete, as the agreement slowly takes tangible shape." at 199. *See* Yulia & Riccardo Jive WSSDF 2010: https://www.youtube.com/watch?v=9MF1REzg7GQ.

[283] *Supra* note 15. Ghauri.

[284] This is an obvious point where the law does intervene to interpret the rights and obligations created in the contract and where the parties must choose to either renegotiate to settle a dispute or turn to a third-party adjudicator.

The purpose of a contract, or agreement, is to document issues that have been agreed to, as well as to determine the language and format of the draft contract.[285] Inevitably there may be confirmation of the values of the parties and there may be outstanding issues to be determined later. During this process, discussions may ensue to summarize the negotiations and, as a result, further concessions may be exchanged resulting from the interdependence that has taken place.[286] The parties, by this stage, will have invested a great deal of time and resources, thus there is incentive to support their business relationship.

Negotiation stages do not move forward on their own. It is the strategies exercised by the negotiation parties within these stages that moves one stage across the border into the next stage.

1.2.2 Negotiation strategies

Strategies have become the focus of negotiation theories and have been integrated by our own legal scholars who have been highly influenced by the landmark theory of Ury/Fisher[287] "*Getting to Yes*". Metaphorically, in creative dance form, tactics are the negotiation steps whereas strategies are negotiation *positions of conflict*.

On a business level, Saner separates the terms *strategy* and *tactics*:

1) "Strategy is the overall guideline, indicating the direction we need to take from our wishes and needs to our objectives"; and

2) "Tactics, on the other hand, always follow after strategy, fleshing it out with a concrete line of action. If strategy is the thought, then tactics are its formulation."[288]

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[285] *Supra* note 3 at 13.

[286] *Supra* note 59. Lewicki expounds: "Parties understand that they do have common as well as conflicting objectives and that they have to find a way to achieve, as much as possible, common and complementary objectives that are acceptable to both sides…both parties sincerely and truly try to understand each other's point of view." at 226.

[287] Roger Fisher and Danny Ertel, "In a hurry ?" in *Getting Ready to Negotiate – Getting to Yes Workbook*, New York, Penguin Books, 1995.

[288] Raymond Saner, "Strategies and Tactics" in Perez Ghauri and Jean-Claude Usunier, *International Business Negotiations*, UK, Emerald Group Publishing Limited, 2008 at 51.

We will refer to negotiation strategies as "negotiation positions" that impact the conduct of parties during negotiations: how they maneuver to assess their own interests,[289] how they project[290] and relate[291] to one another's interests and react[292] to each other party's position.

At first blush, the popular conception of negotiations is a bull fight; two parties haggling over wares in a competitive and sometimes ruthless fashion.[293] But many scholars acquaint negotiations with dance.[294] Psychologist Adair[295] elaborates how parties use positions for persuasion,[296] sequences as pairs of strategy;[297] meaning how negotiators respond to any given strategy. Strategy has been discussed at great length by business and marketing disciplines, with an emphasis on the interdependence ensuing during negotiations.[298]

Adair/Brett open the scope of negotiations to "both interdependent and dynamic"[299] elements since parties are inter-related during the negotiations, but they also need to remain flexible since they must react to changes in circumstances during their negotiation relationship. The manner in which the

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[289] *See supra* note 15. Ghauri at 16.

[290] *See supra* note 59. Cova at 269.

[291] *See supra* note 59. Lewicki at 24.

[292] *Supra* note 209. Adair. *See also supra* note 208. Campbell/Docherty refer to the beliefs of the negotiation parties themselves (emic) as well as what behavioral scientists have observed (etic): "An understanding of the etic negotiation dance coupled with an understanding of the emic behavioral sequences of the dance in different types of cultures will allow cross-cultural negotiators to advance a negotiation strategically from one state to another and ultimately to an optimal conclusion." at 769.

[293] *Supra* note 262. Young/Schlie question the traditional approach to negotiations as a fight and cleverly describe negotiation stages in an alternative picture, comparing negotiations to dance, expounding on Wendi Adair's theory which ties dance movements to negotiation stages by comparing dance forms.

[294] *See supra* note 195. Adair/Brett. *See also supra* note 227. Hindriks further interjects, while referring to Raiffa 2002 Negotiation Analysis: The Science and Art of Collaborative Decision making: "…an analysis of the negotiation dance is important for the understanding and improvement of negotiation strategies." at 432.

[295] *Supra* note 209. Adair: "To dance is "to move rhythmically, usually to music, usually to prescribed or improvised steps and gestures" (Free Dictionary, 2008). Just as the music people listen to and the way they move rhythmically to that music can be artifacts of national culture, so the way people view negotiation (Gelfand et al., 2001) and the way they move interdependently at the negotiation table (Adair, 2003) are influenced by national culture." at 355.

[296] *Ibid*. Adair's empirical research on transnational negotiations has "measured[d] two kinds of cooperative strategy: priority information and offers, and two kinds of competitive strategy: rational persuasion and affective posturing." at 355. For psychologist Adair, affective posturing is a strategic position based on either status or emotion and rational persuasion is the development of arguments to persuade the other party of its limitation on the reservation point or alternatives that could be explored.

[297] *Ibid* Adair elaborates the dance analogy: "Negotiation sequences are pairs of strategies captured when one negotiator acts and the other negotiator responds." at 356.

[298] *Supra* note 59. Lewicki, Cova.

[299] *Supra* note 195. Adair/Brett at 355.

parties choose to position themselves and how willing each party is to consider the other one's interests contributes to the outcome of the negotiations.[300]

Saner has identified five primary negotiation positions (which he terms "positions of conflict") which can be used at different times during negotiations or combined at any one given period. These positions include competition, collaboration, compromise, avoidance and accommodation.

Competition is a conflictual position which is opposite from cooperative, but can play an important role. This confrontational position's objective is a power play in which one party pushes to get what he wants,[301] using power dependence tactics and pressure on the opposing party. Saner cautions that this position should not be maintained for any length of time at the risk of missing important signals given by the opposing party, and is not conducive to the enhancement of the relationship between business parties.

Collaboration is often considered integrative bargaining; a manner to find a juxtaposition solution to satisfy one or more opposing issues. The need to understand each other's needs is required to accomplish this objective. According to Saner, collaboration requires seeking alternative solutions so that the other party is enticed to collaborate. He further argues that it aids in the building of trust in the relationship.

When competition and collaboration are not functioning alternatives, **compromise** may be a solution if one or more parties are willing to sacrifice their position for a long-term purpose. Compromise can also become a teeter-totter between the parties by both parties making concessions;

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[300] *See* Carsten K. W. De Dreu, Bianca Beersma and Katherine Stroebe, "Motivated Information Processing, Strategic Choice, and the Quality of Negotiated Agreement", Journal of Personality and Social Psychology, 2006, Vol. 90, No. 6, 927-943. *See also supra* note 262. Young/Schlie's refers to the Brazilian dance of the *Capoeira*, which is an acrobatic dance based on martial arts and boxing, where Hindriks is referenced: "The negotiation dance of exchanging successive offers by negotiation partners affects the negotiation outcome." *Supra* note 227. Hindriks at 199-202. *See* 'The Best Capoeira Video Ever', https://www.youtube.com/watch?v=Z8xxgFpK-NM. *Supra* note 262. Young/Schlie compare Afro-Brazilian rooted Capoeira with negotiations: "We argue that both the content and the process of negotiation can change dramatically once we think of bargaining as an aesthetic activity that can provide intrinsic joy as well as extrinsic benefits. Such a "dance" provides plenty of room for competition as well as cooperation, as movements can be spirited and confrontational as well as smooth and harmonious." at 191.

[301] *Supra* note 288. Saner explains "Its thrust is to put through our own aims exclusively, without heed to the other, in the shape of a distributive result, a zero-sum game…This may indeed be impressive, but it is also extremely disturbing…obdurately pressuriz[ing] his hapless victim into a sale…In certain cases such stubborn maintenance of a position may be a good idea, but it leaves little room for cooperative approaches and a constructive solution to the conflict." at 53 and 54.

meeting each other part way and splitting differences. Saner points out that compromise benefits the parties as the conflict is resolved, but there is a risk that the exploration of other alternatives has also ceased.

Avoidance involves withdrawal from conflict in order to form an agreement. Saner describes that diplomatic quality is designed to postpone awkward issues. He points out that the risk is that there may be nothing lost, but there is also nothing ventured. The advantage is that avoidance can prevent damage to the relationship but Saner cautions that the issue may flare up and have to be dealt with later.

Accommodation is considered the polar opposite of competition whereby a party sacrifices his own interests (otherwise known as "forced obedience") in an attempt to cooperate. The result may be useful if the objective of the goal is in sight, but Saner cautions that this position risks being interpreted as a weakness by the opposing party.

Saner encourages the use of different permutations of these negotiation positions, but it would appear there is no particular normativity in these combinations used by negotiators as they are often improvised based on context. To move from one position or combination of positions to another position or combination thereof, negotiating parties must use negotiation tactics, referred to as "negotiation steps".

1.2.3 Negotiation tactics

Once the negotiation dance begins, parties must resolve the inevitable conflicts of their own interests with one another. They attain this objective by using tactics, also termed *negotiation steps* that operate to propel the negotiation positions forward and serve to identify and characterize the negotiations for the parties.[302]

[302] *Supra* notes 208. Campbell/ Docherty at 774 and 775. *See* Johannes Gettinger, Sabine T. Koeszegi and Mareike Schoop, "Shall we dance? – The effect of information presentations on negotiation processes and outcomes" Decision Support Systems 53 (2012), 161-174.

Hindriks delineates six steps of negotiation: *nice steps*; *silent steps*; *fortunate steps*; *concession steps*; *unfortunate steps*; and *selfish steps* indicating that "each step type in a negotiation typically has a distinct role or function".[303] Steps serve to move the parties from one position to the other in an attempt to portray a party's interests in the most favourable light to the opposing party(ies).

According to Hindriks, *nice steps* "move in the direction of the opponent but do not concede [their] own utility."[304] They are meant to engage the opposing party to a matching step in a forward direction that is in the party's interest. *Silent steps* display a confrontational "take it or leave it" attitude.[305] The power struggle is interplayed while each party holds their own position so; in fact, no movement forward, backwards or sideways is accomplished. Often, *fortunate steps* can serve to break the stillness of *silent steps* by creating alternatives in a sideways motion. These *fortunate steps* are often created "spontaneously in human negotiations.[306] Attitude of the parties is a factor that can promote *fortunate steps* by enticing the opposing party to do the same.[307] *Concession steps* help to reach a mutually acceptable outcome but may not entirely define them.[308] While they may contribute to accommodating competitive positions, they can also be interpreted as weaknesses by the opposing party.[309] *Unfortunate steps* occur when a party's preferences are not being completely understood by the opposing party.[310] They indicate a backward motion away from the parties' projected outcome. Unfortunate steps hinder negotiations and parties must attempt to regain their balance in negotiations

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[303] *Supra* note 227. Hindriks at 429.

[304] *Ibid*. Hindriks uses the example of a "trade-off strategy".

[305] *Ibid*. Hindriks elaborates: "the fact that parties sometimes repeat their offers, and may not make any concessions at all." at 429.

[306] *Ibid*. Hindriks refers to T. Bosse, and C.M. Jonker, "Human vs. Computer Behaviour in Multi-Issue Negotiation" in Proceedings of the 1st International Workshop on Rational, Robust and Secure Negotiations in Multi-Agent Systems, IEEE Computer Society Press, 2005, 11-24 at 469.

[307] *See supra* note 249. Lipsky/Avgar.

[308] *Ibid* at 429.

[309] *Supra* note 15. Ghauri at 19 and 20.

[310] *Supra* note 227. Hindriks: "Having a strategy that is able to perform such steps [fortunate steps] deliberately is beneficial, since such steps can be used to recover from moves away…as the result of *concessions* or *unfortunate* steps."at 429.

or the entire process may fail. *Selfish steps* are also competitive and "signal to the other party that a previous move is not appreciated."[311]

Negotiation steps are challenging motions that require the opposing party to concede backwards or apply *fortunate steps* in a sideways direction to induce alternatives. Hindriks explains that "[t]he percentage of *fortunate, nice and concession steps*…increase the opponent's utility…[without using other steps and] can be said to be (very) sensitive to the needs of its opponent."[312]

STAGES OF NEGOTIATIONS				
Pre-Negotiations	Face-to-Face Negotiations	Contract	Post-Contract	
NEGOTIATION STATEGIES (POSITIONS) – Over all direction				T

[311] *Ibid* at 429 and 430.

[312] *Ibid*. Hindriks at 430. Hindriks warns, however, that the other party does not necessarily share this sensitivity.

----------> • Enticing the business relationship • Gathering information; • Gaining knowledge of each party interests • Timing and deadlines • Planning strategies • Exchange of offers	----------> • Intensifying the business relationship • Exchange and conforming mini agreements	----------> • Solidifying the business relationship • Testing what has been understood	---------- • Mutation	--------> and renegotiation • Warranties
NEGOTIATION TACTICS (STEPS) Concrete line of actions propelling negotiation strategies forward				
• The power struggle convincing and concessions ….. • Movement towards sequencing strategies, and confronting strategies	….. • Promotion of all parties' interests	….. • Documentation of parties' interests	….. • Review of	….. Parties' interests

Dance research has identified that the human memory operates with cues that trigger a "feeling of either being balanced or unbalanced".[313] Studies were able to apply this cue process to body movements to improve dance. Cues also apply during negotiations as some of the movements during negotiations do not result from pre-meditated strategies and tactics, rather they are improvised based on intuition. These intuitive cues form a base for communications between negotiating parties. The result appears to be a normative divide since no one negotiating *séance* is identical to another, even between like players.

Processes of negotiations

Yet, if we meticulously inspect the cues generated between the parties, empirical research has identified probable reactions by an opposing party,[314] which contributes towards a better understanding of how mutually satisfactory goals are reached. The interaction is done through steps, like a dance: one party initiates a step and then the other party takes a step. These steps of

[313] Fatima Wachowicz, Catherine J. Stevens and Timothy P. Byron, "Effects of Balance Cues and Experience on Serial Recall of Human Movement", (2011), Edinburgh University Press, *Dance Research* 29.2, 450-463 at 464.
[314] *Supra* note 15. Ghauri; *See also* supra notes 70, 72 and 73. Manrai; Hall; Hofstede.

communications are generated from cues that synchronize the movements of the dance of negotiations and direct the manner of conduct exchanged between the parties.

2. The business negotiation relationship between parties negotiating from different geographic jurisdictions

There are many obstacles that can challenge TBN parties during the negotiation processes in any one negotiation step, negotiation position or negotiation stage. It has been established through empirical evidence and testing those negotiations require an extensive amount of cognitive and emotional functioning.[315] TBN parties are faced with the challenge of coping with the ordinary functioning of business negotiations and must, at the same time, address cultural roadblocks (in the large sense of the word), verification of items that are often taken for granted, such as the verification of the capacity of the party and corporate good standing (if applicable) and what appears like intangible cues and communications that may have spawned misunderstandings or assumptions between the parties.

Although parties often improvise while taking negotiation steps, it appears that there is a likely normative business patterning to the negotiation dance. Hall and Hofstede have performed extensive researches that have contributed to a greater understanding of this normativity that aids in the provision of how obstacles can be overcome during TBN. Identification of normative patterning between negotiating parties moves parties towards the achievement of negotiation goals. On another level, normative patterning aids to provide a manner to interpret the meaning of silent communications and signaling and address cultural roadblocks indigenous to TBN.

2.1 Synchronizing the patterns of negotiation so goals can be achieved

[315] *Supra* note 300. De Dreu at 298.

Understanding patterns of negotiation is intricate, since many of the movements are improvised. However, Manrai has relayed a way patterns of negotiation goals can be achieved by relying on Hofstede's long-standing empirical work.

How negotiation goals are achieved is based on how negotiating parties view their business relationship. Hofstede's polarized concepts of *Individualism-Collectivism* is the basis that distinguishes whether a cultural group accents the strength of the business relationship (prevalent in collectivism cultures, such as Japan and Sweden) or whether the parties are simply seeking a contractual deal (prevalent in individualism, such as North America). "[T]he expectations of the process have been described using a variety of bipolar terms, such as win-win versus win-lose, integrative versus distributive, and competitive versus cooperation,"[316] The orientation captures the "spirit" with which parties engage in the negotiation process."[317] Hofstede[318] offers contrasting orientation processes, such as masculinity/femininity theory (1980, 2001) and Hall's cultural context theory[319] (Hall, 1979),[320] while other commentators place a higher emphasis on the roles of high-context cultures that focus on the relationship versus low-context cultures, that focus on the end goal or contract. Manrai documented a nutshell of negotiation "constructs" that take into consideration cultural sensitivity.[321] The constructs include negotiation goals;[322] inclinations of the negotiators;[323]

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316 *Supra* note 70. Manrai at 82 and 83.

317 *Ibid.* Manrai at 83. *See also* Daniel C.K. Chow, "Culture Matters: Negotiating Globally: How to Negotiate Deals, Resolve Disputes and Make Decisions Across Cultural Boundaries", 18 Ohio St. J. Disp. Resol. 1003, 2002-2003.

318 *Supra* note 73. Hofstede identifies four cultural value dimensions: Power Distance; Uncertainty Avoidance; Individualism versus Collectivism; and Masculinity versus Femininity. In reality, masculinity versus femininity has nothing to do with gender, rather how a culture views dominant values, femininity relates to caring for others whereas masculinity is based on the strife for success and individual recognition.

319 *Supra* note 70. Manrai

320 *Supra* note 72. Hall's cultural context of communicates relates to the importance of communication and how negotiators communicate with one another: verbal or non-verbal communications which Hall argues can only be interpreted in context. This is where the high-context and low-context theories enter.

321 *Supra* note 70. Manrai examines the nature and characteristics of TBN, after considering the positions of Hall and Hofstede, of several proposed models of negotiating processes including Graham, Weiss and Stripp, Salacuse, Ghauri, Usunier, and Brett. Manrai also provides a useful overview of current studies and summary overview of Hofstede's cultural value dimensions, Hall's silent cultural languages, cultural context of communications, and cultural time systems, as well as a handful of scholars' positions on the nature and characteristics of transnational business negotiations. *See also supra* note 174. Graham; Jeswald W. Salacuse, "International Negotiation in International Business", *Group Decision and Negotiation* 8, 217-236, 1999; Jeswald W. Salacuse, "Negotiating Deals, Contracts, and Relationships" in *The Global Negotiator: Making, Managing, and Mending Deals Around the*

qualifications of the negotiators;[324] building the negotiation relationship;[325] processes of negotiations;[326] and perception of the outcome of the negotiation.[327]

"Negotiator's inclinations" target the outlook and various manners of thinking that are intrinsic to a negotiation party's culture, in the wide sense of the word. These "behavioral predispositions" influence the success or failure of the communications between the parties.[328] Manrai supports this construct with the use of Usunier (1996a)'s behavioral predispositions on party perception and power orientation combined with Weiss' framework that considers the time and degree in which risks are taken.

Qualifications of the negotiator and personality also impact negotiations. If a culture honours achievement then "education, knowledge, skills and experience" are fundamental to negotiations.[329] However, where the culture is status-oriented, "seniority, age, gender, family background and connections" become aspired as qualifications that a negotiator should possess.[330] Manrai suggests that the role that these qualifications has "not been adequately studied so far," but suggests that factors these contribute to a better understanding of how TBN are played out.[331]

The relationship building, as one of the "nontask activities",[332] is divided into two structures: "protocol related issues and rapport building activities at the negotiation table."[333] Naturally, these two structures diverge according to culture. For example, whereas high-context cultures will "devote

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World in the Twenty-First Century, New York, Palgrave Macmillan, 2003; Jeswald W. Salacuse, "Renegotiating Existing Agreements: How to Deal with "Life Struggling Against Form", Negotiation Journal, Vol.17(4), October 2001, 311.

322 *Ibid*. Manrai at 81.

323 *Ibid.* Manrai at 83.

324 *Ibid.* Manrai at 83 and 84.

325 *Ibid.* Manrai at 84.

326 *Ibid.* Manrai at 85.

327 *Ibid.* Manrai at 86.

328 *See also supra* note 15. Ghauri's attention to settings and punctuality and how impressions affect whether trust is created in the business relationship at 7.

329 *Supra* note 70. Manrai at 84.

330 *Ibid.*

331 *Ibid.*

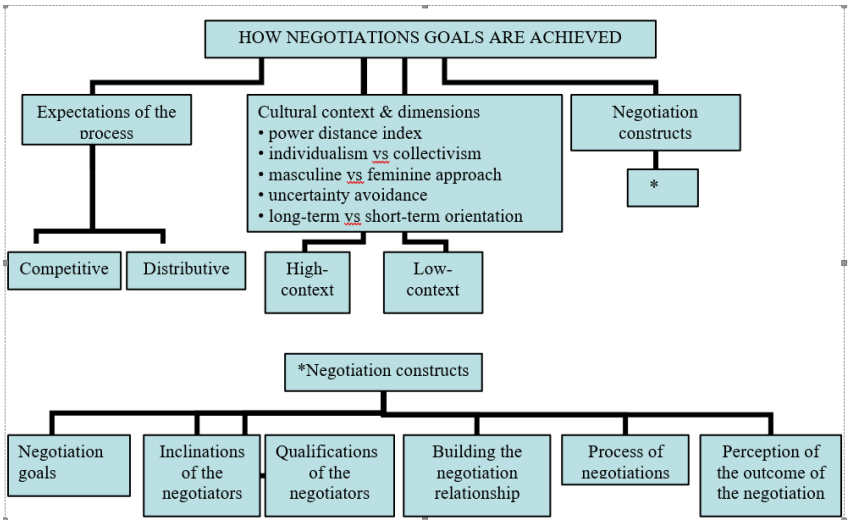
332 *Ibid.*

333 *Ibid.*

significant time and effort to building rapport,"[334] low-context cultures prefer to cut to the chase and make a deal. In either context, however, protocol serves as an important factor in the interaction between TBN parties. How business parties greet each other and silent languages of expression, including facial expressions and body language, even silence itself, contribute to the non-verbal intensity of these negotiations, cues which should not be forgotten.

Perception of the outcome relates to behavior at the negotiation table. Perception contributes to the successful progression of negotiations. The setting and scheduling, termed by Ghauri as "atmosphere"[335] begins the process of how the negotiating parties view each other and initiate the process of trust. The style of communications and the mode used to persuade the opposing party that negotiations are leading in the correct direction is contingent on the extent of cultural divergence and how parties reconcile their differences without entering a confrontational dispute[336] which could spoil the attaining of mutual goals.

Manrai's manner to identify how negotiation goals are achieved can be summarized by the following graph:



[334] *Ibid.* Manrai at 85. Manrai displays "high-context culture", using Japan as an example.
[335] *Supra* note 15. Ghauri at 8.
[336] *Supra* note 70. Manrai at 86.

Relationships in TBN are contingent on whether the parties are from high-context or low-context settings, considered influential factors of the negotiation processes during TBN.[337] Barkai concurs that it is essential to understand cultural dimensions when entering into TBN negotiations and that failure to do so "is likely to lead to impasse during the negotiations or a contract breach after the cross-cultural negotiation is completed",[338] resulting in great uncertainties.

All these constructs serve TBN parties to move forward during the function of negotiations to the ultimate purpose to achieve a mutually satisfactory benefit.

2.2 Silent communications and signaling

Starting with the first greeting, TBN parties must make impressions on one another.[339] Sensitivity to one another contributes towards building trust and promoting cooperation to build the relationship that will aid to accomplish the ultimate *outcome*. The relationship that develops as a result requires a minimum standard of fairness.[340] A negotiating relationship does not magically appear; it has been proven through empirical studies that mutuality cannot be attained without the effort of ultimately taking each other's interests to heart.[341] How much or how little attention a party accords to the opposing parties' interests should be of great interest to law since it is aids to indicate the extent of the meaningful arrangements exchanged between the parties through cues and negotiation communications.

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[337] *Ibid*. Manrai at 96. There are current commentators who have challenged, in particular, the work of Hofstede claiming that nations are not the best units for studying cultures, but Hofstede has retorted that this results from obsolete critiques that were rewritten prior to Baskerville's article and that comparative units are generally found within nations for the study of cultures.

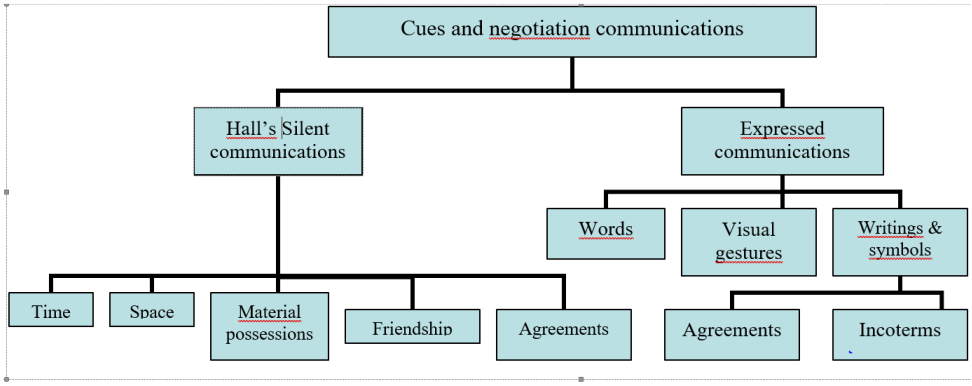
[338] *Supra* note 279. Barkai at 448.

[339] *Supra* note 72. Hall explains: "Then, when the stranger enters, and behaves differently from the local norm, he often quite unintentionally insults, annoys, or amuses the native with whom he is attempting to do business." at 87.

[340] Dean G. Pruitt, "Strategic Choice in Negotiation", American Behavioral Scientist, Vol. 27 (2) Nov/Dec 1983, 167-194. Pruitt cautions that there are different meanings to the term "trust" and in the context of business negotiations, (more specifically conditions that contribute to choosing the strategy of problem solving [which increase the odds of arriving at mutually satisfactory alternatives]) he considers the term trust relates to "a belief that the other party is concerned about our interests and hence is ready to yield or engage in problem solving" versus "a belief in the truthfulness of what the other says." at 181. *See also* Dean G. Pruitt, "Social psychological perspectives on behavioral model", Journal of Organizational Behavior, Vol. 13, No. 3 Special Issue Conflict and Negotiation in Organizations: Historical and Contemporary Perspectives (May, 1992), 297-301. In turn, fairness promotes trust. *See* Filipe Sobral and Gazi Islam, "Ethically Questionable Negotiating: The Interactive Effects of Trust, Competitiveness, and Situation Favorability on Ethical Decision Making, J. Bus Ethics (2013) 117, 281-296.

[341] *Supra* note 237. Thompson addresses the power of fairness as "an important aspect of pie slicing in negotiations that we need to expand upon…Fairness and concerns about pie slicing pervade aspects of social life from corporate policy to intimate social relations (Deutsch 1985)" and obviously lead to trust at 46.

We have observed that communications may be expressed through visual gestures and silent languages, oral agreements and various types of writings. We will begin investigating what is really meant by silent communications; those communications that are considered indecipherable by law and yet imperative for business parties to understand. Other forms of communications will be more fully examined under "Freedoms of contract" in our next chapter.



The quality of negotiation communications is fundamental to successful negotiations and actuates what is intended between the negotiating parties. Negotiations are a breeding ground for misunderstandings and assumptions. Effective negotiating parties strive to attain a certain commonality to better understand one another. One proposition is that "[t]he medium of negotiation is language."[342] However, the context of the words themselves may have different meanings to different cultures.[343] Furthermore, there are other sources of communications that have been unearthed.

[342] *Supra* note 208. Seminare Docherty (Narratives, Metaphors) at 847.

[343] Abhijit Biswas, Janeen E. Olsen and Valerie Carlet, "A Comparison of Print Advertisements from the United States and France", December 1992, *Journal of Advertising*, Volume XXI (4). Comparing Americans and Europeans regarding the purpose of communication, Biswas suggests: "Americans view communication as a process of transmitting messages for the purpose of control. It is a means of persuading others, changing attitudes, and influencing or conditioning behavior. By contrast, Europeans…view communication as a process through which shared culture is created, modified, and transformed." at 74. Biswas/Olsen/Carlet describe that: "The hidden or suggestive meanings that may be alluded to indirectly in the message may be important (Cundiff and Hilger 1984). Therefore, in high-context cultures where communication is shared, a recipient of a message is likely to derive meaning from the context in which communication occurs, reducing the need for explicit verbal messages. A low-context culture is one where messages are direct, and words contain most of the information to be sent. Messages must be explicitly stated or the meaning will be lost (Hall 1976)." at 74 and 75.

Hall's empirical fieldwork has suggested that "verbal communication is not enough…[that] the context in which the verbal communication takes place [must also be taken into account]".[344] Time and space become commodities that translate into values during the context of negotiations. These values allow the parties to collaborate between them to "work together to build options that were not obvious before…"[345] During TBN it is particularly crucial that parties be sensitive to cultural differences in visual gestures, timing, space, material flamboyancy, words and written communications that may have an alternate meaning from one's own culture. Although visual communications can provide a pathway to cooperation,[346] Hall's extensive research on silent languages enlightens our understanding of signals.[347]

Hall describes the "language of time" as an unspoken expression that shows a party's interest in the negotiation. He suggests that an inordinate amount of time taken to respond to a negotiating position in some cultures means disinterest whereas in some cultures[348] a long delay connotes a certain pondering towards building a relationship.[349]

The "language of space" is generally displayed when the parties choose an arena where the negotiations will take place. The atmosphere presented may, however, mean different things to two

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[344] *Supra* note 70. Manrai refers to Hall includes timing, space and the use of material possessions also contribute to context. *Supra* note 15. Ghauri includes background factors, atmosphere and process; whereby process itself has three elements: stages of negotiation, cultural dimensions and strategic elements at 8. Take for a simple example of a person selling the antique table. One party is thrilled to dispose of it to make space in the garage for a new sail boat. The purchasing party is pleased to have what is considered a bargain.

[345] *Supra* note 208. Docherty(Power) at 863.

[346] Janice Nadler, "Rapport in Negotiation and Conflict Resolution", 87 Marq. L. Rev. 875, 2003-2004. Nadler reports: "Because important components of rapport are linked with nonverbal expression and because most channels of nonverbal expression are accessible only visually …studies…demonstrate that visual access prior to decision making…encourages cooperation, leading to better collective outcomes." at 877 and 878. Nadler refers to a study of legal disputes by Johnston and Waldfogel which proved that settlement was more likely where opposing attorneys had met in the past at 879. In additional Nadler argues that to build a solid rapport in a business relationship entails cooperative behavior which can compensate visual communication limitations by identifying similarities between the parties; "the perceived affiliation" particularly in dispute resolution negotiations. *See also* Janice Nadler, Leigh Tompson and Leaf van Boven, "Learning Negotiation Skills: Four Models of Knowledge Creation and Transfer", Management Science, Vol. 49, No. 4, April 2003, 529-540.

[347] *Supra* note 72. Hall at 96.

[348] *Supra* note 208. Docherty: "In Newtonian physics, we measure time on a fixed linear scale. But *social time* is not just a matter of elapsed minutes or days or years. Social time is the trajectory of a human life; it has value for what we can do in it or what we cannot do in it." at 862.

[349] *Supra* note 72. Hall at 90.

different cultures.[350] Whereas some cultures prefer an ornate setting to display successful enterprises, other cultures prefer a relaxed and simple setting. Likewise, the comfortable personal space allowed when two people converse may be five to eight feet in some cultures and only eighteen inches in others.[351]

"Language of things" is not a universal silent language since the interpretation of one's personal possessions differs around the world. While North American culture may believe that "money talks" by flashing around in an expensive car or designer clothing, material possessions stand for dependability and respectability in European standards. The Japanese take pride in tasteful arrangements that need not be expensive to produce a proper emotional setting. Middle East businessmen do not judge a book by its cover; they are more concerned with family, connections, and friendship.

Friends and family throughout most of the world represent security; a social network to ensure that parties will help one another. These friendships are deep and are built over time through trust and cooperation. This is the "language of friendship".

The "language of agreement" is deceiving. Whatever happened to honour and the handshake? Commercial practices vary around the world. There exist informal customs that are not documented by rules. Even a concluded contract means different things to different business cultures. For example, North Americans consider that negotiations are accomplished once the contract is concluded. Other cultures see a contract as part of the continuum in the relationship which ceases only once the project is completed. Occidental cultures, for example, hold little importance to what is inscribed in a contract; rather it is the relationship that is important.

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[350] *Ibid*. Hall at 91. For example, Hall depicts how bare an American room may look to the Japanese since the furniture is generally up against the walls whereas the Japanese prefer to centre the room with a charcoal pit.

[351] *Ibid* at 91. Hall explains that material possessions, such as an expensive car, may speak success in North American cultures, but have little importance to cultures that value friends and family. at 93.

Signaling, semiotics, or the creation of cues that generate an understanding recognized between negotiating parties[352] can be tangible or intangible. An example of tangible commercial signals is found in INCOTERMS whereas intangible vehicles are found in customs practiced through signals that are recognized and applied by the merchants themselves, such as a bow or a handshake. Efficiency is what drives business negotiators to try to "speak a common language".[353]

While negotiating, parties recognize certain semiotics, familiar to their trade. Synchronizing negotiations builds trust and promotes cooperation and honesty, the two ingredients of a successful business relationship.[354] This amity builds business relationships and is signaled through semiotics,[355] symbols that transfer communications from one party to the other to attain synchronization of the parties' interests. To attain business amity, certain elements must be reconciled in transnational settings, such as cultural behavior, how to build trust, how to understand each-other's communications, interpreting attitudes, culture and personality of the negotiators. All these elements interplay while the processes of negotiation proceed, but the promises and agreements, the type of relationship the business parties aspire together remains, to a large extent, unrecorded by law.

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[352] Peter T. Leeson, "Cooperation and Conflict: Evidence on Self-Enforcing Arrangements and Heterogeneous Groups", Am. J. of Economics and Sociology, Vol. 65, No. 4 (October, 2006) at 893. Leeson depicts the semiotics: "Signaling through this shared practice allows heterogeneous traders to overcome the problems of uncertainty and informational asymmetries posed by their social distance." at 895. Leeson suggests that merchant law was created to form bridges to join merchants together in an organized and trustworthy fashion and further offers: "Sharing these "manners" created a "reputation" for trustworthiness that enabled intergroup exchange…*failure* to engage in common customs and practice signaled a *lack* of credibility and could destroy the possibility of exchange." at 898. Furthermore, he comments on communications: "Individuals are unlikely to cheat after signaling credibility for two reasons. First, given that no individual can signal credibility costlessly… Second, the relative price effect of engaging in shared customs or practices for the purpose of signaling makes cooperating cheaper and cheating more expensive." at 900 and 901. In a nutshell, Leeson sums up signals between merchants: "The necessity of engaging in the customs and practices of outsiders to signal credibility and enable intergroup exchange was thus widely known and accepted by traders." at 899. Semiotics were originally philosophically based on the science or study of the use and interpretation of signals which, in today's standards, has spread into the knowledge of many disciplines, using various mediums, including language or any other form of communication. *See also supra* note 48. Druzin; Evandro Menezes de Carvalho, "Semiotics of International Law", Law and Philosophy Library, Vol. 91, 2011, 3-12; Chaoqun Deng, "Study on Application of Semiotics Theories in Identifier Design:009 IEEE 10th International Conference on Computer-Aided Industrial Design & Conceptual Design, Nov. 2009 at 507-511. Deng, of the Art College of Huangshi Institute of Technology, refers to Charles Sanders Peirce, who along with Saussure he describes as the "pioneers of modern semiotics" to describe semiotics: "…a sign represents something, and there is a similarity between the sign and represented object, that is, iconicity, which can be sensed by the interpreter." at 507; Charles C. Lemert, "Language, Structure, and Measurement: Structuralist Semiotics and Sociology, American Journal of Sociology, Vol 84(4), 929. Lemert describes the sociologist's lens: "In sociology there is a necessary bond between language, structure, and measurement." at 929 and defines the study of semiotics as "the study of signs and their meaning. Semiotics is related to linguistics, but language is only one of many sign systems." Psychology seems to follow a different trend and Lemert refers to Coleman view of the social structure as a technical concept, "In other words, social structures exist in the theoretical language which establishes the conditions of their measurement." at 931. Marietta Auer, " Good faith : A Semiotic Approach ", European Review of Private Law 2, 279-301, 2002;

[353] *Supra* note 189. Oduntan at 93.

[354] *See supra* note 9. CCII. Swan at 7.

[355] *Supra* note 48. Druzin; *See also supra* note 352. Menezes de Carvalho.

The negotiating relationship is not only about communications and signaling. These signals serve to engage trust and credibility[356] that necessarily bear responsibility; in the form of legal obligations that would be imposed if adjudicators had sufficient evidence to understand the arrangements that have been made through these signals. TBN parties have created their own standards in which law has an interest, but because some semiotics are not recorded they may be misunderstood since there are no current legal tools with which to assess them.

2.3 Cultural roadblocks

Sensitivity is required between negotiators "since cultures are "far from frozen"[357] and even individuals within any given culture may not share the same values. There may be other factors at work, such as beliefs within a shared group, age, gender, values and styles of the negotiator's person etc.[358] Negotiations cannot be characterized through a "laundry list".[359] TBN face obstacles along the path, including, the innate tension in negotiations regarding self-interest, cultural roadblocks, in the large sense of the word, and deciphering signals that may have different meanings to different cultures.

We have identified the tensions of self-interest, in particular clothed in western arguments: "[m]ost negotiation models assume that "each individual human being pursues his or her personal values and self-interest…rationally…But this is not the only way to think about human beings and

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[356] *Supra* note 352 at 898. Leeson.

[357] *Supra* note 208. Seminaire Docherty (Culture and Negotiation) at 712. *See also* Russell Korobkin, "A Positive Theory of Legal Negotiation", 88 Geo. L.J. 1789, 1999-2000 regarding the complexity of the processes of negotiation themselves; Russell Korobkin, "The *Borat* Problem in Negotiation : Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts", 101 Cal. L. Rev. 51, 2013; Russell Korobkin, and Chris Guthrie, "Heuristics and Biases at the Bargaining Table", 87 Marq. L. Rev. 795, 2003-2004; Giuditta Cordero-Moss, (Ed), "Boilerplate Clauses", *International Commercial Contracts and Applicable Law*, CUP, Cambridge, UK, 2011; Richard Craswell, "The Sound of One Form Battling-Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action", 98 Mich. L. Rev. 2727, 1999-2000. For a difference perspective see Gunther Teubner "In the Blind Spot: The Hybridization of Contracting", 8 Theoretical Inq. L. 51, 2007.

[358] *Ibid*. Seminare Docherty explains that we must "enrich our definition of culture…socially transmitted values, beliefs and symbols that are more or less shared by members of a social group, and by means of which members interpret and make meaningful their experience and behavior." at 715.

[359] *See supra* note 279. Barkai*; Ibid*. Seminare Docherty warns that stereotyping cultures in negotiation can be dangerous and that we must apply caution to Western bias and generalizations. Docherty proposes an analysis based on three levels of culture: 1) Surface: Cultures differ in normative behaviors and institutions; 2) Just below the surface: norms, beliefs, values and attitudes; and 3) Deep level: invisible: assumptions, meaning-making and symbols at 715. *See also supra* note 357. Korobkin at 1789.

their motives."[360] Cultural roadblocks sensitize us to be wary of generalizations since "…every intercultural encounter is a complex improvisational experience…[but based on a] "pattern of…compulsions and permissions to act in certain ways and [their] prohibitions against acting in other ways."[361]

How TBN bridge these cultural roadblocks includes resolving the conflicts of self-interests versus working towards mutual goals, bridging cultural factors and language barriers, and deciphering each other's signals.[362] Parties must communicate in a synchronized fashion to structure understandings and agreements together. The mere idea of an agreement means different things to different cultures. In Western cultures, agreements serve as symbols of commitment whereas other cultures see agreements as a continuance in the intensity of the relationship.[363]

Cultural dimensions are only part of the differences in negotiating styles, values and behaviors of negotiators. Hofstede's empirical studies identify five dimensions of culture, including the "Power Distance Index";[364] "Individualism versus Collectivism";[365] "Masculine versus Feminine Approaches";[366] "Uncertainty Avoidance";[367] and "Long-Term versus Short-Term Orientation."[368]

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[360] *Ibid* at 716. Seminare Docherty introduces the concept of metaphors and scripts to demonstrate similarities: "Every culture, and every individual, carries a script…one script [may apply] to family negotiations and another script [applies] to business negotiations." at 721. See also Gary P. Ferraro, "Culture and international business : A conceptual approach" in The Cultural Dimension of International Business, Upper Saddle River, Prentice Hall, 1998.

[361] *Ibid*. Seminare Docherty.

[362] *Supra* note 352. Semiotic authors, including Leeson. See also Terence Brake, Danielle Medina Walker and Thomas (Tim) Walker, "Success in understanding culture", in *Doing Business Internationally: The Guide to Cross-Cultural Success*, New York, McGraw-Hill, 2003.

[363] *Supra* note 15. Ghauri. *See also supra* note 71. Hall at 93 and 94.

[364] *Supra* note 279. Barkai describes power distance as "a measure of hierarchy in a culture." at 411. In other words, high power index would indicate a high respect for status and therefore a leader is respected as having power versus low power where opportunities should be available to everyone. *See also supra* note 70. Manrai adds: "The extent to which the less powerful members of institutions and organizations accept that power is distributed unequally." at 72.

[365] *Ibid*. Barkai describes individualism "on how much a culture reinforces individual achievement" versus whether collective interests should be prioritized at 412. Barkai refers to Hofstede' *Software* at 78-79 to conclude that collectivist cultures "value harmony more than honesty" at 413. *See also supra* note 70. Manrai interjects: "A situation in which people are supposed to look after themselves and their immediate family only." at 72.

[366] *Ibid*. Barkai concludes that masculine cultures are competitive whereas feminine cultures are cooperative and care for others. at 414. *See also supra* note 70. Manrai explains: "A situation in which the dominant values of society are success, money and things." at 72.

[367] *Ibid*. Barkai references Hofstede's uncertainty avoidance index which "focuses on the level of tolerance for uncertainty and ambiguity within a culture. "A high uncertainty avoidance culture creates a rule-oriented society that institutes laws, rules, regulations, and controls in order to reduce the amount of uncertainty in the environment…[and] have a need for structure and ritual in the negotiation process." Barkai cautions that this uncertainty is not about risk avoidance rather how negotiating parties deal with uncertainty. at 416.

[368] *Ibid*. Barkai distinguishes between long-term (future oriented and "willingness to make sacrifices now I order to be rewarded in the future") versus short term, current results. at 417. *See also supra* note 70. Manrai states: "The extent to which people feel threatened by ambiguous situations, and have created beliefs and institutions that try to avoid such situations." at 72.

These factors will differ between two cultural poles which have been identified as "high-context" communications and "low-context" communications.

In high-context communications, non-verbal communications and inferences are prevalent whereas in low-context communications, words are the basis on which information is transferred.[369] Within the cultural dimensions are factors that affect TBN:

> "Culture is a socially shared meaning system…it consists of a group's subjective characteristics, for example, values and norms, and objective characteristics…artifacts and institutions."[370]

Understanding negotiations from a business perspective should give law insight of the importance of behavior during negotiations and the necessity of building trust through interdependence that is exchanged between TBN parties. We have reviewed the importance of deciphering these semiotics, that may infer a promise, an agreement or some aspect of the TBN parties' relationship, such as a duty of good faith, to promote successful negotiations. These elements identified by the business community are not in sync with law as law has not properly contributed towards the protection of these meaningful exchanges or, even worse, sabotaged them.

Section 3: The Influence and Intervention of Law

TBN parties revere operating autonomously in their dealings, without the intervention of law. In fact, TBN parties often interact with one another quite oblivious to law until they find themselves in the presence of an unresolved dispute. We have examined that business disciplines perceive that TBN parties are less likely to enter a dispute if they can focus on the purpose of negotiations; the

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[369] *Ibid*. Barkai at 289. *See also supra* note 209. Adair (Go-Go) at 363.

[370] *Supra* note 195. Adair/Brett at 37. Adair/Brett rely on Hofstede's empirical studies to posit that culture is most often segregated in terms of communication norms of either low-context and high-context but they can also have mixtures of both types of communications: "In mixed context dyads, both negotiators are comfortable with low-context communication, but the low-context negotiator is not accustomed to using or interpreting high-context communication." at 38; *Ibid*. Barkai also refers to Hofstede: "High-context cultures are more past oriented and value traditions over change; low context cultures are more present and future oriented and value change over tradition. Individualism is usually a characteristic associated with low-context cultures." at 408; and *supra* note 209. Adair at 356: "Low/high context characterizes cultures based on the degree to which they rely on words versus context to convey information. In low context cultures, people communicate directly and say in words what they want their listeners to hear. In high context cultures, people communicate more indirectly, relying on cues from the environment, nonverbal communication, and indirect statements to convey information that the listeners infer." at 356; *See also supra* note 73. Hofstede.

benefits that will be bestowed upon them once a mutually satisfactory and efficient goal has been harnessed, as the parties' relationship becomes more secure.[371] When social sanctions are insufficient to settle the dispute, a party may take action in a domestic court if there is a belief that the court will remedy a default or through international arbitration, which is favoured by Western business parties.[372]

Law *is* regulating negotiations, albeit "piecemeal". *Should* negotiations be regulated by law when there are so few juridical tools available? The purpose of law is to provide certainty as well as flexibility to human activities.[373] Piecemeal regulating of negotiations has led to inconsistency, uncertainty, unpredictability and destruction.[374] Parties are at a loss to know how the law will interpret negotiations as there are very few laws specifically dealing with negotiations. Whence, adjudicators must *fit* a remedy using general obligations of contract or extra-contractual doctrine, without the benefit of understanding all the communications since many understandings between TBN parties are considered inadmissible. Unfortunately, this leaves business parties at a loss to discern whether their agreements will stand the tests of contractual validity or whether they inadvertently fall into some other legal obligation.

1. When does law recognize legal obligations between TBN parties and what has law failed to recognize?

TBN parties travel through a plurality of legal systems. We have identified three sources of law that potentially regulate negotiations: domestic laws, transnational laws and party autonomy, but there is no consensus between them as to how negotiations should be categorized and, therefore, whether the parties have created legally binding obligations that the law will recognize and enforce.

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[371] *Supra* note 300. De Dreu at 927 (referring to Rubin, Pruitt, & Kim, 1994).

[372] *Supra* note 22. Carbonneau at 389.

[373] *Supra* note 11. Piazzon.

[374] *Supra* notes 12, 13 and 14. *See also supra* note 42. For an interesting discussion took place in the United States whereby Barnett questioned whether there are any other factors required to a successful promissory estoppel action resulting from the outcome of *Hoffman v. Stores* ("*Red Owl*") 133 N.W. 2d 267 (Wis. 1965). *See also supra* note 42. Ayres/ Klass at 523. *See also supra* note 42. *contra*: Robert E. Scott, Red Owl at 71-101.

We have used Canadian legal systems as models to demonstrate the differences and similarities that can occur in domestic laws regarding the domestic legal regulation of negotiations.[375] For example, under CCL, until a contract has been finalized, the parties are free to change their minds. QCL has more potential vehicles to admit negotiations as evidence in a courtroom, due to the acceptance of a subjective test of agreement as well as an overall concept of good faith.[376]

Both CCL and QCL will reward a party with legal protection if an agreement can be recognized as a contract.[377] But when negotiation agreements fall between the cracks of domestic laws, remedies born out of equity or tort under CCL and absence of good faith or delict under QCL have applied to negotiation disputes, but the results lead to uncertainty. Unfortunately, equitable exceptions and general obligations do not cater to the specific needs of TBN parties and there are no specific legislative rules relating to the negotiations under either source of Canadian domestic laws.[378]

There is no general consensus on the legal ordering of categories or legal concepts regarding obligations under private law, nor a simplistic formula to categorize legal obligations arising out of negotiations. The application of law is not always a single concept, rather a complexity of inter-connected matter.[379] To understand why negotiations do not fit into one of the recognized categories of legal obligations with any certainty, we will review a brief history of the development of categories

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[375] *Supra* note 36. *Jumbo King*. *See also supra* note 9. CCII. Swan clarifies: "Though the actual treatment of the problems that arise in negotiating relations is complex, the general attitude of the law is that, especially through the operation of the rules of offer and acceptance, negotiations are legally irrelevant and a contract only comes into existence on the acceptance of the final offer." at 146. Mostly, CCL will not admit entrance of negotiation communications into the courtroom unless there is a recognized, binding contract, and then, only for the interpretation of the contract.

[376] Article 6 C.c.Q. Parties must exercise their civil rights in good faith. *Supra* note 51. Justice Cromwell recognized the "broad duty of good faith" present in the C.c.Q. during the deliberations in *Bhasin*. Cromwell specifically referred to the scope of the duty of good faith under QCL: " which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights."at para. [83]. Cromwell refers to Articles 6, 7 and 1375 C.c.Q. Cromwell refers to J.-L. Baudouin and P.-G. Jobin: "[translation] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society". Cromwell further refers to: "*Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, at p. 436. at para. [83].

[377] *See* 1.1 in Section 1 of Chapter 2, Part I.

[378] *See* Section 3 of Chapter 1, Part I.

[379] Stephen M. Waddams, McCamus, J.D., Neyers, J.W., Waldron, M.A., J. Girgis, *Cases and Materials on Contracts*, 4th Ed., Toronto, Canada, Emond Montrgomery Publications, 2010. Waddams explains:"Often a legal obligation has been derived not from a single concept, but from the interaction of two or more concepts in such a way as to preclude the allocation of the legal issue to a single category."at 20.

of obligations under domestic sources of law, beginning with the historical development of general legal obligations under CCL, and then QCL.

1.1. Canadian common law [CCL]

During the 14th century, English common law (from whence CCL derived) was separated from continental Europe. The common law provided a system of writs for remedies of breach. In fact, the first common law contract law is reported to have developed out of the writ of *assumpsit* as a remedy for the breach of informal promises.[380] An injured party could not require specific performance of an obligation; rather the only available remedy was based on compensation for loss caused by the wrongful breach of a promise. When writs were abolished, the common law was left without "internal structure and thus was open to the influence of civilian legal science"[381] until the common law could develop its own sources of substantive rules.[382]

Blackstone initially suggested that the division of obligations should be separated between rights *in personam* and rights *in rem*.[383] During the volatility of 19th century British restructuring of its legal system,[384] British scholar, Anson,[385] struggled to complete a doctrine of obligations in which contracts were separated into two categories: initial obligations to *perform* an agreement and former *compensation* for loss caused by the breach of promise (carried over from the writ system). Following the abolition of the system of writs, Anson proposed a theory of obligations, dividing

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[380] John Cooke, and David Oughton, *The Common Law of Obligations*, London, Butterworths, 1989. Cooke/Oughton describes the remedy: "Assumpsit proceeded on the basis that the defendant had voluntarily assumed an obligaton." at 4.

[381] *Supra* note 96. Samuel 2010 Obligations at 8.

[382] *Ibid*. Samuel 2010 Obligations at 9. *See also supra* note 9. Swan explains: "The method of legal reasoning that the common law has developed (or which characterizes the common law) has certain features that sometimes make principled analysis difficult. The common law seldom starts from a statement of principle: its principles, such as they are, are constructed out of a backward look at what has been done to see what, if any, generalizations can be made from the "wilderness of single instances"...The lens has changed from time to time so that the generalizations that, through one lens, appeared clear and consistent, are, through another, vague, erratic and contradictory. If the application of the common law rules without thought for the consequences -- the reform of those rules being a matter for the legislature -- is one lens, and if the determination to make sense of the law and to forward the achievement or protection of the parties' expectations by the application of any rule or principle is another lens (or perhaps others), individual cases are likely to be decided differently depending on the lens through which the earlier cases are viewed. In examining the doctrine, it will be necessary to consider the lens that is offered, the choices that are available and the consequences of any choice that is made."at 168.

[383] *Ibid. See* Blackburn *Commentaries* in *supra* note 96. Samuel 2010 Obligations at 2. Classically, rights *in rem* were attached to property (that which is "owned") and rights *in personam* were attached to the person (that which is "owed") at 11.

[384] Sir William Reynell Anson, *Principles of the English law of contracts*, Chicago, Callaghan and Company 1887. Anson was active in the creation of the law school in *All Souls College* of Oxford University.

[385] A.G. Guest, (Ed.), *Anson's Law of Contract*, 26th ed., New York, Clarendon Press, 1984.

obligations into six general categories. These categories included *agreement*,[386] *delict*, *breach of contract*, *judgment*, *quasi-contract* and *miscellaneous*,[387] omitting the classical distinctions between private and public laws and the division of property and obligations.[388] Since the sphere separating private and public laws has been narrowing in modern days and contracts logically comprise rights of persons and transfers of property, perhaps Anson was on a trail of discovery. Unfortunately, Anson's categories were dismissed by a simplification, dividing personal obligations into only two categories of obligations, namely contract and tort, leaving common law in an historically heteromorphic position; not to mention incomplete.[389] Therefore, the only recourse for an injured party who failed to have a contractual or tort remedy was to approach the court of equity.

Following the joining of common laws with courts of equity, the English High Court opened a new category of obligations that offered a more flexible remedy between parties who were in a *contractual* relationship when contractual remedies could not be applied.[390] *Fibrosa Spolk Akcyna* v. *Fairbairn Lawson Combe Barbour Ltd*[391] was a war-time effort. A formal contract was signed to fabricate and sell specialized textile machinery required to a Polish company ["Fibrosa"] by an English company. The contract became frustrated due to German invasion into Poland during World War II, so the English company could no longer deliver the merchandise. Fibrosa demanded the return of the deposit delivered upon signing of the contract. It was denied by the English company as

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[386] *Supra* note 384. Anson at 9. Anson defines contract as: "the result of the concurrence of Agreement and Obligation: and we may say that it is an *Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others*." at 9 and 10; *See also* James R. Jordan, *Questions and Answers to Anson on Contracts Including an Analysis of each Division of the Law of Contracts*, Cincinnati W.H. Anderson & Co. Law Publishers, 1890. Jordan refers to "agreement" as the true contract at 3.

[387] *Ibid*. Anson gives an example: "…in cases of Trust or Marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent or at any rate remote from its main purpose or immediate operation." at 9. *See also ibid*. Jordan: "*Is agreement as thus defined a wider term than contract; Why*? Yes, it includes conveyances and gifts, wherein the agreement of the parties effects at once a transfer of rights in rem, and leaves no obligations subsisting between them; and agreement which create obligations incidental to transactions of a different and wider sort; as marriage or the settlement of property in trust." at 2.

[388] Since the sphere separating private and public laws has been narrowing in modern days and contracts logically comprise rights of persons and transfers of property, perhaps Anson was on a trail of discovery.

[389] William Blackstone, *Commentaries on the Laws of England*, A Facsimile of the First Edition of 1765-1769, Chicago, University of Chicago Press, 1983. The only recourse for an injuried party who failed to have a contractual or tort remedy was to approach the court of equity. *See also supra* note 55. In *Fibrosa*, the High Court in 1943 opened the scope to the third category of obligations.

[390] *Supra* note 55. *Fibrosa*. *See also supra* note 379. Waddams at 894 and *supra* note 9. Swan at 1177. *Supra* note 96. Samuel 2010 at 27.

[391] *Ibid.* Fibrosa.

they had used the deposit funds to build the specialized equipment, thus spiralling Fibrosa to file action against the English company to retrieve its deposit on the basis that they had not received the machinery. The motion was rejected at trial and appeal courts as it was impossible for the English company to perform under the contract and deliver the merchandise. Fibrosa appealed to the House of Lords. The High Court was in an untenable position, recognizing that one of the parties would suffer damage regardless of the outcome of its decision. The English company argued that it had spent the deposit funds manufacturing the specialized equipment for Fibrosa and could not sell it to a third-party purchaser. Nevertheless, in absence of contractual entitlement due to involuntary frustration of the contract, the court found an alternative remedy, opening the category of quasi-contract to distinguish the promise itself from the *performance* of a promise to a promise which induced a deposit, unjustifiably enriching the party holding the deposit.[392]

The legal consequence of *Fibrosa* was the birth of a third category of general obligations under the common law[393] known as "restitution", shading the principle of unjust enrichment. Perhaps one day it may be feasible to open a fourth category of obligations to accommodate negotiating parties. What would prohibit a Supreme Court from recognizing a new category of obligations, as it did under *Fibrosa,* based on a modernized legal negotiation theory referring to normative values established by normative patterning that bind negotiating parties together?[394] We must abide the *time* that negotiation communications can be tangibly recognized by either the courts or through legislative means for this outcome to occur.[395] Until then, we have investigated other resources.

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[392] The court recognized the hardship caused to the English company but considered that it was up to the legislature to provide for "equitable apportionment" of deposit funds, which incidentally tookhalf a century later to be enacted.

[393] *Ibid. Fibrosa.*

[394] *See supra* note 96. Samuel Obs describes the objection to a category of law such as *ius naturale* is that it would open the gate to an "infinite map." at 29.

[395] *Supra* note 379. Waddams offers three reasons why new categories of obligations should be considered, in which negotiations often fall:"Some modern writers have accepted the threefold division, but there are still many kinds of obligations that cannot be comfortably fitted within it...First, the content of the residual class are potentilly very large...Secondly, most of the kinds of obligations called "sui generic" have not been distinct from the the primary classes, but have contained elements of two or more of them...Thirdly, the admission of a residual class deprives the scheme of all excluding power: to establish, in response to a claim, that there is no obligation derived from contact, tort, or unjust enrichment is inconclusive, because it leaves

1.2. Quebec Civil Law [QCL]

CCL and QCL both recognize three sources of obligations but there are epistemological differences between these Western legal systems even though they share "similar social objectives (individualism and liberalism)."[396] Legal obligations under the civilian approach result out of rights (as opposed to common law that seeks remedies). Rights were developed out of a coherent structuring of Roman law principles, justified due to the provision of legal certainty, institutionally categorizing obligations in tidy categories and sub-categories.[397] Pothier's influence brought the concept of obligations into two divisions, separating obligations into contracts and *other causes*.

Within the structure of *other causes* lay quasi-contract, delict and the *ius naturel*, a miscellaneous residual category stretched to fit custom and usage (or "social circumstances that bind parties together"),[398] reminiscent of the definition of negotiations during the 15th century.[399]

Although civil law jurisdictions have traditionally followed Roman roots, the former four-part categories of contract, delict, quasi-contract and quasi-delict under the old Civil Code of Lower Canada [C.c.B.C] were reduced to three categories under the new *Civil code of Quebec* (C.c.Q.). Formerly, under QCL, there was no consensus of how obligations were classified,[400] but commentators have advocated that the reform of the civil code appears to have settled the matter by

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open the possibility that there is another unnamed and hitherto unidentified kind of obligation that may lead to similar or analgous legal consequences. It is equally difficult to reconcile a miscellaneous category with the image of a map; the notion of a limitless and permanently unknowable residual territory demonstrates the limits of the mapping metaphor in its application to law." at 23.[our underline]

396 William Tetley, "Mixed jurisdictions: common law vs civil law (codified and uncodified)", http://www.cisg.law.pace.edu/biblio/tetley.html#vi.

397 *Supra* note 96. Samuel 2010 Obligations at 4. Roman law was the foundation of obligations, "defined as 'a legal bond (*vinculum iuris*)...binding two persons." at 10.

398 *Ibid*. Samuel 2010 Obligations.

399 *Supra* note 183. Owsia at 155.

400 Benoît Moore, "La classification des sources des obligations: courte histoire d'une valse-hésitation", 36 R.J.T n.s.275, 2002 at 295; Benoît Moore, "La théorie des sources des obligations: éclatement d'une classification", 36 R.J.T. n.s. 689, 2002 at 695; Moore, Benoît, "De l'acte et du fait juridique ou d'un critère de distinction incertain", 31 R.J.T.n.s. 277, 1997.

classifying obligations primarily on the basis of source,[401] now considered divided between contracts and other acts or facts attached by law.[402]

Contracts were set up to be distinguished between nominate contracts (Articles 1377 to 1456 C.c.Q.: sale, hire, partnership, and loan and deposit) and innominate contracts (a flexible residual source of contracts). It was the legislature's intent to regulate nominate contracts in order to provide foreseeability and certainty to certain types of contract, thereby restricting freedoms of contract in a fashionable box filled with imperative public order regulations to protect the society at large or prevent abuse which could ultimately affect a certain group of persons or result in societal harm.[403] Innominate contracts form a residual category that is not nominate nor mixed,[404] less regulated by law, thereby promoting the freedom to exercise party autonomy.

In conclusion, both CCL and QCL join in harmony to protect rights and obligations formed under a valid contract. But, **what law has failed to recognize** cannot be viewed without a new lens. We have designed a negotiation umbrella to depict what law can visualize today. The current negotiation umbrella remains incomplete as it is unable to incorporate all of the significant communications engaged by TBN parties during negotiations. In commercial matters, law can only recognize agreements if they form a valid contract. Other sources of obligations must currently derive out of extra-contractual liability or custom recognized by law:

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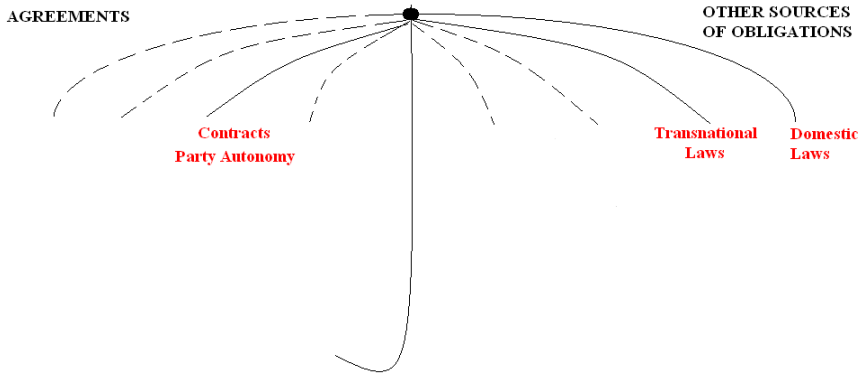
[401] *Ibid.* Moore (classification) also points out the exception of classification as to the effects of the obligation under 1372 C.c.Q. at 276.

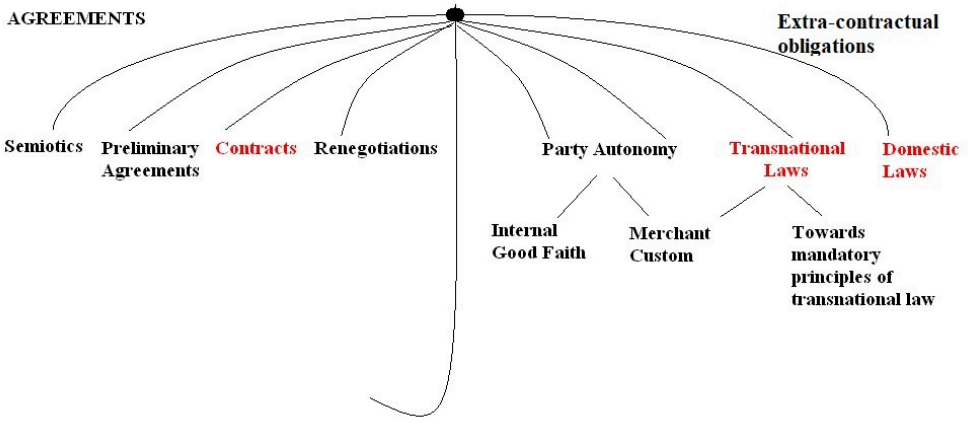
[402] Maurice Tancelin, *Des Obligations, en droit mixte du Quebec*, 7th edition, Montreal, Wilson & Lafleur Ltee., 2009; *See also supra* note 38. Baudouin/Jobin. There are various ways of classifying legal obligations under Quebec civil laws. Tancelin and Baudouin break down obligations according to their effects, object, intensity and source. *See also supra* note 400. Moore advises that we must first distinguish the definition of "source of obligation" into two categories which he calls "real" and "formal" at 695. According to Moore, a real source of obligations includes the substantive, normative, economic, social and political factors whereas a formal source of law is the legal structure of the obligation. Moore calls for an amalgamation of these sources.

[403] Pascal Fréchette, "La qualification des contrats: aspects pratiques", 51 C. de D. 375, 2010 at 383.

[404] *Ibid* at 402.



The business perspective brings to law the knowledge that negotiations begin in the pre-negotiation stage and follow a lengthy *formation* phase of contract, but not all semiotics are visible to law unless a contract is formed. In the context of TBN, contracts are but another stage linking the processes of negotiations together.[405] Using our new semiotic umbrella exposes other communications that could be recognized by law with the proper juridical tools:



TBN *are* ongoing business relationships, processing through various stages in a continuity, like the occidental point of view as a set of stairs that develops with intensity with each climb.[406] TBN must also be reconsidered as a relationship; a continuum comprising the *formation*, *performance* and *extinction* of the contract. The non-performance of a contract may result from the contract not providing for unforeseen obstacles that may arise during negotiations. Once the negotiation dance

[405] In western societies, the completion of a contract is often considered the finality of negotiations, whereas in occidental cultures, a contract is merely the continuation of a relationship. *See supra* note 72. Hall's language of agreement at 94.
[406] *Infra* note 497.

begins, the *formation* of promises and mini agreements that are meaningful to TBN parties also commences. The formation of contract in the context of TBN is contemplated as early as the pre-contractual and face-to-face stages within the system of negotiations, whereby promises and agreements are exchanged but unrecorded by TBN parties.

Business perception and behavior scientists have brought an awareness of the probability that TBN parties are creating rights and obligations with one another that law cannot envision. How can we illuminate these meaningful communications to law? With a new lens, a semiotic negotiation umbrella, law would be enabled to view a wider range of the business relationship, offering transparency during negotiations and better aid to dispute resolution. To accomplish the view of the umbrella requires a new LNT of TBN and a practical application of such theory, which will be discussed in Part II.

The business perspective has identified that TBN require preparation, including setting the atmosphere.[407] Attention to atmosphere includes understanding the silent languages and semiotic signals that occur during TBN.[408] Taking into consideration cultural dimensions ensures the opposing party that there is a readiness to form trust, which builds credibility in the business relationship.[409] Preliminary agreements are designed to organize what TBN have already agreed to, even though issues remain to be settled.[410] Contracts are not a finality of negotiations for TBN parties; rather they are simply part of the business relationship,[411] which may be deviated[412] or circumstances may

[407] *Supra* note 15. Ghauri at 8. See also supra note 64. Lewicki at 46.
[408] *Supra* note 72. Hall at 87.
[409] *Supra* note 279. Barkai at 448.
[410] *See also* 3. in Section 1 of Chapter 2, Part I for further discussion.
[411] *Supra* note 72. Hall's language of agreements at 93. *See also supra* note 70. Manrai at 82 and 83 regarding expectations of the process.
[412] *Supra* note 9. Swan CCII at 41.

change. TBN are characteristically long-term and often require renegotiations down the negotiation path,[413] that naturally require certainty that TBN parties' agreements will be recognized by law.

But different legal systems, in particular between domestic sources of law, approach contractual doctrine in different fashions, therefore a TBN party cannot be sure whether an agreement will be complete enough to be recognized as contractually valid (or misinterpreted) or whether other legal obligations may be imposed. There is also dissention regarding the application of the concept of good faith to negotiations between CCL and QCL.

1.3 The elusive concept of good faith

The concept of good faith is contingent on context.[414] Good faith has contributed to the rights and obligations of negotiation and contracting parties under the QCL and has begun to make crossroads to the general resistance of the concept of good faith in common law contracts in the rest of Canada. We will be examining how good faith is identified in contractual settings (to which we will include a discussion on negotiations, or the *formation* of a contract[415]) in greater depth in Chapter 1 of Part II, but a cursory note is necessary, for the moment, to tie good faith to one of the possible interventions of legal regulation.

It is imperative, under QCL, that parties exercising their civil rights must act in good faith. It suffices, for now, to say that the leading case in Canada that purports to protect honesty during the processes of negotiations is *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* [*Lac Minerals*].[416] The outcome of *Lac Minerals* has created a precedent that pre-contractual instruments

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[413] *See* 2. in Section 2, Chapter 1, Part I. This element is problematic under CCL that requires further consideration when a contract is renegotiated. *See Stilke v. Myrick* (1809), 2 Camp. 317; 170 E.R. 1168. Furthermore, it is not only the written agreements that form the relationship between TBN parties; there is an internal expectation of behavior in party autonomy between TBN parties. *Supra* note 237 at 42. Thompson discusses norms of fairness that promote trust. *See also supra* note 59 at 24. Lewicki describes interdependence.

[414] *Infra* note 1020. Crepeau. *See also* Pascal Ancel, «Les sanctions du manquement à la bonne foi contractuelle en droit français à la lumière du droit quebecois », 45 R.J.T. n.s. 87, 2011.

[415] *Infra* note 1040. *Addison*

[416] *Supra* note 267. *Lac Minerals.* The facts of the case are as follows: while parties were in the process of negotiating, Defendant misused confidential information attained from Plaintiff during negotiations and purchased a contiguous lot in competition with the on-going negotiations of a joint venture to resource a mine with Plaintiff. The court decided that negotiating parties must conduct themselves with a certain standard of honesty and good faith. The

of writing which are not considered contracts can, nevertheless, serve to prove lack of good faith during negotiations, such as breach of confidential information that causes damage to the party who suffers as a result of disclosed trade secrets.[417] Likewise, non-disclosure of material information pertinent for a party to assess whether negotiations can attain fruition of the mutual goals may be considered a breach of good faith.[418]

While the CCL and the QCL have not come to terms with a uniform manner to address how the concept of good faith should apply to negotiation parties, there has been a forward movement in the CCL towards the aspirations of the QCL concept of good faith under contract law. The CCL has been unwilling to recognize any general duty of good faith under contract law until the recent case of *Bhasin* v. *Hrynew*,[419] where the courts decided that a duty of good faith should be imposed by law on parties *performing* a contract. The CCL has not yet expanded the horizons of good faith to party intention nor has it widened the scope of a good faith duty during the *formation* (or negotiations) and *extinction* of a contract, as QCL now has after thirty years of transformation.

The breadth of good faith and how it is applied in contractual and negotiation matters deserves further expansion so that parties are not caught by surprise in breach of a duty or principle of good faith that may be imposed by law or presumed by party intention in virtue of the parties' relationship. We will also consider when the imposition by law for parties to conduct themselves in good faith impedes party autonomy or whether it is inherent to party autonomy.

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court held that Defendant injured the Plaintiff by taking dishonest measures and procuring the land wrongfully. Therefore, Plaintiff was entitled to protection by law so the court qualified that Defendant's action was equivalent to a constructive trust in favour of Plaintiff in order to protect the expectations of the Plaintiff.

417 *Ibid*. *Lac Minerals*.

418 *Comeau* v. *Société Immobilière Trans-Quebec Inc*. JE-97-112 (S.C.), in which a right of first refusal had been granted to a third party in parallel negotiations.

419 *Supra* note 51. See *supra* note 9. CCL. for Swan's explanation regarding the reason courts did not apply the duty of good faith easily which she considers due to a misunderstanding with a fiduciary duty. Swan retorts with the three standards of conduct, identified both by Justices Finlayson and Weiler in *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1, 196 D.L.R. (4th) 621, 14 B.L.R. (3d) 169, [2001] O.J. No. 714 (Ont. C.A.) and *Cornell Engineering* refers to both *Hartog v. Colin & Shields*, [1939] 3 All E.R. 566 (K.B.), namely, unconscionability, good faith and fiduciary standards, in order of intensity. *See*, however, that the American approach is more similar to QCL than CCL: Eric G. Anderson, "Good Faith in the Enforcement of Contracts", 73 Iowa L. Rev. 299, 1987-1988.

2. Domestic interference of party autonomy

Interference with party autonomy in TBN by domestic sources of law can occur on a contractual level or through extra-contractual traps. We will review the various disturbances that business parties should be aware of when entering agreements with parties of foreign domestic legal jurisdictions. We will also examine other domestic approaches that have arisen on a pre-contractual basis on the international stage to assess whether other domestic approaches simply create even more inconsistency in a transnational setting.

2.1 Contractual interference

It is more likely that CCL courts will be unwilling to recognize agreements between negotiating parties than its neighbouring civilian courts in QCL, inadvertently interfering with party autonomy and the freedoms of contract. Quebec laws have promoted the freedom and liberty of private parties to self-regulate. Furthermore, Quebec laws are willing to enter into the subjective intentions of the parties thereby having a greater ability to recognize obligations in agreements that are not complete by what is *really* intended by the parties.[420] However, certain promises fall short of being recognized by QCL which has no way to discern chameleonic communications inherent in TBN, let alone a manner to determine the terms of such agreements.[421]

There are obstacles that potentially interfere in business arrangements that bar law from recognizing undertakings that fall short of a contract, particularly under CCL due to the requirement of consideration each time a contract is altered and judicial interpretation of a contract since negotiations remain inadmissible as evidence, and the fact that the doctrine of contract is not specifically made for negotiating business parties.

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[420] *Infra* note 611. *TVA* at para. [40], [41] and [42].
[421] *See infra* note 434. *Denzell* at para. [30].

Consideration: For a contract to be binding under CCL, there must be an objective sign, generally evidenced by means of consideration. We observed that agreements between TBN parties are characteristically mini-interconnected agreements. This necessitates consideration *each* time the parties enter into a mini-agreement or the parties will not receive legal protection.

A prime example of this common law principle is found in *Stilke* v. *Myrick.*[422] Prior to the homeward maritime journey from the Baltic to London, the crew had requested increased terms of payment of wages with the captain due to the desertion of two seamen. The captain promised to divide the deserted seamen's wages between the remaining crew members as the homeward journey would be more onerous to the remaining sailors. Upon return, the extra wages remained unpaid, so the matter was filed in Court. The Court decided that no further wages were owed in absence of further consideration.[423]

QCL, on the other hand, has no such requirement and most probably would have allowed the amendment of the contract due to a 'meeting of the minds' under Article 1371 C.c.Q. that binds the parties together:

> "**1371**. It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence."

A written contract is not necessary to form a contract, necessitating only evidence of an "exchange of consents" or a "meeting of the minds".[424]

Interpretation of a contract: It is without a doubt that any court can misinterpret a contract in absence of specifically and unambiguously expressed agreements. The approaches in CCL and QCL are dissimilar since QCL is willing to first enter into the subjective matter in search for the real intentions of the parties. Only when there is no evidence of a subjective meeting of the minds, will

[422] *Supra* note 413. Although this response by law is arduous, the crew could have offered a peppercorn to seal the deal.
[423] *Supra* note 379. Waddams at 266 to 268; 278 to 279.
[424] *Mason Graphite Inc*. v. *Quinto Mining Corporation* [*Quinto*], 2016 QCCS 6342, Hamilton J. presiding at para. [42].

the courts turn to objective tests. On the other hand, CCL rejects subjective tests, so the parties find themselves assessed by what is objectively reasonable rather than what the parties may have truly intended. Unless the parties have expressed their intentions specifically and unambiguously they are subject to court interpretation.

According to one of the leading commentators on this subject in CCL, Swan expounds that there are three approaches that the courts can take to interpret an agreement. Firstly, the court's attitude is relevant; whether the court will take a narrow interpretation, meaning consider the literal meaning of the words in the agreement, or whether the courts will consider the overall purpose of the contract. Generally, the "courts must be guided by the reasonable expectation and purpose of an ordinary person in entering such contract" so that if the expressed wording is clear it will be honoured.[425] However, where the literal meaning "would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which [it] was contracted" [the court will choose the more reasonable construction] "that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties."[426]

Secondly, where the words of the contract are ambiguous, the court will look to what the parties intended, considering the contract as a whole.[427] When interpreting a contract, the court must determine whether the parties' agreement is contained in the written words expressed on the pages of the contract or on "some other stuff, different pages or even oral statements."[428] The general concept

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[425] *Supra* note 9 CCII. Swan Chapter 3, casebook at 20.

[426] *Ibid*. Swan Chapter 3, casebook at 20 referring to Mr. Justice Estey in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901. However, a provisio is stipulated specifically to consideration of the processes of negotiation. Swan quotes *Jumbo King Ltd. v. Faithful Properties Ltd*., [1999] HKCFA 38; [1999] 3 HKLRD 757; 2 HKCFAR 279 (Court of Final Appeal of the Hong Kong Special Administrative Region) at para. 59 as a demonstration: "The court is not privy to the negotiation of the agreement - evidence of such negotiations is inadmissible - and has no way of knowing whether a clause which appears to have an onerous effect was a *quid pro quo* for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reaonsable person rather than a pedantic lawyer would have understood the parties to mean." at 6.

[427] *Ibid*. Swan Chapter 3, casebook at 6.

[428] *Ibid*. Swan casebook at 36. Swan concludes that if the court decides that the written contract is the entire agreement between the parties, all other evidence is inadmissible. However, where there is a doubt, the written expression may not be the "final expression" of the parties. Oral evidence has been admitted if it relates to matters of custom that might alter the manner in which the contract is read. Swan quotes *Smith* v. *Wilson* (1832), 3 B. & Ad.

of the CCL regarding interpretation of agreements is that "it's not what a party might have intended to say; it's what the other party reasonably understood it to have said."[429]

Thirdly, the general approach is to dismiss negotiations as inadmissible since the parties may have resolved negotiation differences or assumptions that arose at the time of negotiations, so the contract is the exclusive conclusion of their common intention.[430] Consequently, even if a negotiation agreement is recognized by contractual doctrine, the parties may be subject to various interpretations of its meaning.[431]

QCL joins CCL as it also encounters interpretation issues regarding whether there is a "meeting of the minds",[432] necessitating that the essential elements must be present for law to recognize contractual validity.[433] Even when an agreement can be recognized by QCL, the terms of such a contract are left to judicial interpretation.[434]

728, 110 E.R. 266, (K.B.) where "the court stated that written "instruments [are] to be expounded according to the custom of the merchants or parties who make them." at 36. Swan turns to §2-202 of the UCC to display a more accurate description of the parol evidence rule: "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented...[in certain circumstances, including] by course of dealing or usage of trade." With regard to contractual interpretation, Swan stresses: "It is hard to overemphasize the importance of context...looking at the words of a contract in a vacuum, without considering the language of the contract as a whole and the surrounding circumstances, is a recipe for interpretative error." at 24. Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings" (1997), 114 S. African L.J. 656: "We use words in daily life against a background of knowledge which we assume that our listeners share and we need not therefore specifically mention. No uterance is ever complete in itself to convey the intended meaning. It depends heavily upon the existence of a vast background of facts and a framework of mental assumptions within which the speaker is operating, all of which are assumed to be known to the listener and not therefore require to be expressly stated."at 658.

[429] *Ibid*. Swan Chapter 3, casebook. Swan refers to the High Court of Australia in *Toll (FGCT) Pty Ltd. v. Alphapharm Lty Ltd*., 79 A.L.J.R. 129, at 136 (para.40): "...the principle of objectivity by which the rights andliabilities of the parties to a contract are determined [are not subjective beliefs]...The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to be. That normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." at 5.However, Swan reports that even the courts are loathed to depart from to general rule, Lord Hoffmann concluded:"The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was footnote 33 of §3.80. *See also supra* note 9 CCII. Swan casebook, ch. 3. Swan clarified that "claim[s] for rectification or estoppel…are not exceptions to the rule. They operate outside it."

[430] *Supra* note 9 CCII. Swan explains:"The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings, partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation." at 32. Swan quotes Lord Blackburn in *Inglis* v. *John Buttery & Co*. (1878), 3 App. Cas. 552 at 577. *See also* Lord Wilberforce in *Prenn* v. *Simmonds*, [1971] 1 W.L.R. 1381, at 1384: "...where negotiations are difficult, the parties' positions...are changing and until the final agreement, through converging, still divergent. It is only the final document which records a consensus."

[431] *Supra* note 380. Cooke at 112.

[432] *See Tradezone Securities Inc.* v. *Industrial Alliance Securities Inc*. 2010 QCCS 336; *Multipix Communications Inc.* v. *Midland Walwin Captial Inc*., 2013 QCCA 2058.

[433] *Supra* note 418. *In the matter of Quinto*. Hamilton, J. expresses the material elements of a contract: "the parties, the price, when it was to be paid and why it was being paid" at para. [38].

[434] *Denzell Merchandizing Inc. (Twice as Fun Inc.)* v. *Calego International Inc*., 206 QCCS 2814; *Parkland Vladec Inc.* v. *Bill Chen and 7623526 Canada Inc*., 2017 QCCS 132.

The doctrine of contract is not specifically made for business parties: The doctrine of contract is not focused on business parties, rather it is an "all-purpose tool, available to merchants engaged in obvious exchanges and to anyone else who would choose to make use of it...The principal problem which this feature of the law creates is that inappropriate generalizations are made."[435]

As such, the static nature of contract cannot follow the mini, sometimes incomplete agreements prevalent in TBN. For example, "agreements to agree" have been interpreted by CCL courts as non-binding when they fail to create enforceable promises.[436] Parties must pass two requirements to have their agreements recognized by law:

- transparency: parties must have clearly and voluntarily expressed their intentions to have their agreement enforced (or not to have ramifications);[437] and
- the parties' commitment must pass the test of indefiniteness.[438]

We cannot emphasize the importance of transparency in communications enough, yet there is no current manner to record the bulk of the promises and agreements in TBN with transparency and definiteness.

The test of indefiniteness requires that the parties have clearly *intended* that their agreements be enforceable by law. A court will consider whether any reasonable expectations or reliance has

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[435] *Supra* note 9. Swan § 2.9 CCL. Swan educes that "[t]he doctrine of consideration is regarded as a "fundamental principle", a rule, a principle, that underlies the whole law of contract. It has been said that a "bargain is not formed merely by mutual assent. There must be some exchange of values. Something must be given or promised". at 167. *See also* Swan`s definition of "consideration": §2.30 The first and most obvious problem is that of defining consideration. The model of the legally enforceable promise is the commercial exchange. There are three general types of such exchanges: (1) the exchange that is completed by, for example, the simultaneous exchange of goods for cash; (2) the exchange of promises when both parties promise to perform in the future, sometimes called the wholly executory exchange; and (3) the situation where one party has performed and the other has not, sometimes called the half-executed contract. Any individual commercial relation may, of course, involve only one, any two or all three types. (It is worth noting that many modern commercial relations are structures for future cooperation and in such relations, a franchise perhaps, many exchanges may occur over a long period. The types of exchanges just described do not fit easily into such relations.) §2.31 What is common to each type is that the parties are exchanging commercial equivalents and that the reliance of each on the other permits needs to be satisfied and plans made." at 188. *See also supra* note 379. Waddams addresses the cut and dry bargain promises that are legally enforced: "an agreed-upon exchange, and the existence of a bargain has been the chief criterion for the enforceability of promises in the common law. The constituent parts of a bargain are intention, mutual assent to sufficiently certain terms (commonly called offer and acceptance), and an exchange of value (commonly called consideration)." at 173.

[436] *Ibid* at 521. Swan refers to *Courtney & Fairbairn Ltd.* v. *Tolaini Brothers (Hotels) Ltd*.

[437] *Supra* note 11. Hogg's twin pillars.

[438] *Supra* note 9 at §4.160. Swan presents: **"**The general problem of "indefiniteness" is...whether the parties have done enough that they can reasonably ask the court to enforce their agreement...Can a court be convinced that the parties have stepped from the non-legal world into the world of a legal relation?...There is ample justification for the general principle that an agreement that lacks important terms should not be enforced." at 522.

occurred between the parties or whether the strict formalities of contract are at stake.[439] In the latter case, there is no manner to regulate negotiations.

Although CCL has been reluctant to enforce agreements to negotiate in good faith, the law has been known to do so under limited circumstances,[440] but Swan cautions civilians, who have no difficulty recognizing an agreement to negotiate in good faith, not to become too "excited" about these exceptional circumstances as they are distinguished by the fact there is evidence of an existing contractual relation.[441] QCL have a wider scope to recognize agreements, since negotiating parties can be modelled around a subjective intent based on the conduct of the parties.[442]

Apart from contractual interference,[443] there are also extra-contractual traps that may arise, particularly where a valid contract cannot be recognized.

2.2 Extra-contractual traps

When a court is unable to apply a contractual remedy, it may turn to other aspects of law which are clothed in the form of extra-contractual liability. It is beneficial for TBN parties to have a manner to express which promises and agreements that they consider legally binding. Otherwise, on a legal level, the waters in which business negotiators swim become even more opaque since their

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[439] *Ibid* at 507. Swan: "§4.141 An important factor in the resolution of any question of indefiniteness is the attitude that the court brings to the task. A court which accepts that both reliance and the parties' expectations are important is more likely to find that an agreement exists than one which thinks that the satisfaction of the formal requirements is vital. Swan refers to *Fraser* v. *Van Nus* at 521. §4.161 *Canada Square v. VS Services*. Canadian courts have become quite accustomed to recognizing that there may be an enforceable obligation to negotiate even within a relation that is too vague and uncertain to be enforced at 522.

[440] *Ibid.* Swan refers to *Empress Towers Ltd. v. Bank of Nova Scotia*, [1991] 1 W.W.R. 537, 50 B.C.L.R. (2d) 126, 14 R.P.R. (2d) 115, 48 B.L.R. 212, 73 D.L.R. (4th) 400, [1990] B.C.J. No. 2054 (B.C.C.A.). However, the general rule is found in §4.159. Swan refers to *Walford v. Miles*, the House of Lords emphatically rejected an argument that there could be an enforceable obligation to negotiate in good faith. Lord Ackner said: "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the determination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith". However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations."at 522. *See also supra* note 205. Trakman. *See also* Louis Péloquin, "Droit contractuel: La lettre d'intention", 40 R.J.T.n.s. 175, 2006.

[441] *Ibid*. Swan at 523. Swan maintains that a more viable relief would be based on either the expectations of the parties or the protection offered by promissory estoppel granting remedy to a person who has relied on the promise of another to his detriment. Swan expounds: **"**§4.195 What all these cases have in common is a concern that the conduct of negotiations (or, if there are no negotiations in any real sense, then the conduct of the offeror at the pre-contractual stage) is subject to rules and that the content of these rules reflects the expectations of the parties and the need to prevent unfair surprise. The importance of these cases to the argument for a wider acceptance of an obligation of good faith at the negotiation or pre-contract stage is that they illustrate that the courts are concerned about bad behaviour and will protect relations of all kinds at that (or those) stage(s)" at 540.

[442] On the other hand, QCL would address the imperative principle of good faith in accordance with Article 6 C.c.Q. to aid in deciphering a more objective approach.

[443] That is, lack of consideration in CCL, juridical interpretation and lack of juridical tools.

arrangements may be absent of legal recognition and enforcement or, alternatively, the parties may have inadvertently fallen into extra-contractual liability, falling outside of expressed party consent.

Canadian legal systems do not approach extra-contractual liability in the same manner. The CCL has a propensity to apply equitable promissory estoppel, tort or restitution whereas the QCL will generally apply an imperative standard of good faith or turn to custom and usage, quasi-contractual or delictual matter to identify a breach of a legal obligation in absence of agreement.

2.2.1 Canadian common law [CCL]

Extra-contractual obligations can be divided in CCL between obligations based on reliance of a promise (promissory estoppel), an implied obligation (based on restitution), tort and, potentially, the fledgling duty of good faith which will be further discussed in Chapter 1 of Part II. Consequently, when a court cannot find a valid contract between negotiating parties, nevertheless, there are other legal obligations that may be applied to negotiation parties.

Promissory estoppel: *Central London Property Trust Ltd. v. High Trees House Ltd.*[444] is the landmark case solidifying the principle of *promissory estoppel* and the right for a party to be protected by law if a promise has been made that another party has relied on to its detriment with the expectation that the promise would be honoured. Promissory estoppel is an equitable claim based on a promise to undertake to do or abstain from doing something[445] that falls short of contract.[446]

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[444] A landlord expected more rent, without further consideration, than originally agreed upon under a pre-war concession. The court considered that a promise intended to create legal relations could not be revoked. *Ibid*. Swan explains the impact of High Trees: "§2.215 In *High Trees*, Denning J. said: has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel, are not really such. They are cases in which a promise was made which was intended to create legal relations and which to the knowledge of theperson making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. Insuch cases the courts have said that the promise must be honoured."

[445] *Supra* note 9. Swan classifies contracts: "§1.38 One of the most pervasive features of the law of contracts is the power of the courts to recognize that different kinds of relations require different treatment. While any valid contract can be regarded as the same as any other valid contract, in the sense that both will have been made in accordance with the rules of offer and acceptance and each party's promise will probably have been bought with consideration, the law recognizes that there are other relations which are protected by the law of contracts.§1.39 The doctrine of promissory estoppel as illustrated by Lord Denning's judgment in *Central London Property Trust Ltd. v. High Trees House Ltd.*, for example, protects one party's reliance where, *ex hypothesi*, there has been no effective change in the underlying contract. The doctrine of promissory estoppel is based on the fact that one party relied on something said or done by the other in circumstances where that reliance was both reasonable and expected. The remedy which the court will give will be what is necessary to protect that reliance...In another class of contracts, the courts may focus on the fact that, if the defendant is not made to pay the plaintiff, it will be unjustly enriched... Just as promissory estoppel protects one party's reliance on the other and may be supplemented by a tort remedy, so too recovery in the kind of cases that have just been mentioned could be justified on restitutionary grounds" at 160 and 161.

There is no certainty in a claim of promissory estoppel. Two elements are necessary to attain a remedy in promissory estoppel:[447] there must be a promise[448] and there must be reliance on that promise.[449] As promissory estoppel is a remedy granted through the equitable power of the courts,[450] it is up to the discretion of the courts to decide whether there was any unfairness and whether there was reasonable reliance that merits protection. To establish reliance, the promisor must pass the test of foreseeability. In other words, it must be objectively reasonable that any promisor in similar circumstances would have expected that the promise would induce the other party to act or forbear to act on a matter. *Waltons Stores (Interstate) Ltd. v. Maher* cited by common law commentators stands for the reasons that a court will invoke equitable remedies. Justice Brennan presiding:

> "The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon."[451]

Promissory estoppel has been used to protect reliance of a promise in an offer, generally a repeated promise, or misrepresentations of a misleading offer. In absence of party choice, there are inconsistencies in the application of reliance remedies: "Much ink has been spilled over the question

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[446] *Hammersly v. De Beil*, 12 Cl. & F. 45 is known for its discussion on whether arrangements, specifically on a matrimonial level could bind a person if, in fact, he entered into the marriage. The House of Lords found that the arrangements were intended by virtue of the solemnization of the marriage.

[447] Promissory estoppel has been used by CCL courts to remedy where the duty of good faith has not been identified due to resistance.

[448] *Supra* note 42. Barnett (*Is Reliance Still Dead?*) at 8. The promise must be backed by a formality that clearly shows an intention to be legally bound and Barnett gives examples of a seal, consideration, expression of intention to be legally bound or writings bearing the signatures of both parties.

[449] *See supra* note 9. Swan at §1.39. *See also ibid* Barnett at 8. The promisor must have knowledge that the promise has induced the promise and Barnett demonstrates three potential ways of proving this: 1-that the promise inducing reliance is so substantial; 2- the expectation by the promise is that the promise is enforceable and the promisor is aware of the reliance; 3-when the promisor responds in silence to a promisee's reliance. *See also* Randy E. Barnett, Contract: Cases and Doctrine (2d ed. 1999) at 872.

[450] *Ibid*. Swan refers to *Sail Labrador Ltd. v. "Challenge One" (The)*, [1999] 1 S.C.R. 265, 169 D.L.R. (4th) 1, 44 B.L.R. (2d) 1, [1998] S.C.J. No. 69 (S.C.C.) footnote 13 Swan explains:"The first is the power (originally an equitable power) to relieve against forfeitures, and the second is the general principle governing waiver and promissory estoppel. The first is based on the power of the courts to protect against unfairness; the second on the need to protect reasonable reliance."at 236. *See also supra* note 42. Ayres/Klass at 523. Ayres and Klass reverse the lens arguing that to prove a promissory-fraud claim there are four factors supplementing nonperformance: 1) the intent of the promisor at the time the promise was made; 2) that the promise "reasonably relied on the promise"; 3) that proximate harm was suffered as a result of the nonperformance; and 4) the misrepresentation made by the promisor was "knowingly or recklessly."Ayres and Klass claim that since the bar is so high to prove and enforce promissory fraud that there is no "threat to the [doctrinal swamp] of consideration and therefore the law should impose damages in support of "fail dealing and the reliable flow of information." at 523.

[451] [1988] 165 C.L.R. 387 (Aus. H.C.) In the following paragraph, Justice Brennan refers to *Dillwyn v. Llewelyn* to assimilate a contractual relationship to that of a "relationship arising from equitable estoppel." at para. [25].

of whether contract-like liability should attach in pre-contractual negotiations".[452] This remark refers to cases like *Hoffman* v. *Red Owl Stores, Inc*.[453] The question is whether damages should be awarded based on pre-contractual misrepresentations of intent (promissory fraud, a derivative of promissory estoppel),[454] or upon consent.

During the 1980s and 1990s, scholars exposed concerns regarding the role of reliance. When Barnett wrote *The Death of Reliance*, he claimed that there was a consensus that detrimental reliance was not *sufficient* or *necessary* for a successful promissory estoppel action.[455] The epistemological debate circled around whether the contractual regime could be "viewed as protecting one party's *right* to rely on the commitment of another"[456] or whether, in fact, reliance should remain a tort remedy. Barnett also questioned whether there are any other factors required to commence a successful promissory estoppel action.[457]

The danger is that there is no way to predict which promises will be enforced and which promises are simply considered outside the law.[458] Scott cautions that promissory estoppel liability, in particular that found in *Hoffman v. Red Owl Stores* ("*Red Owl*"), creates uncertainty and unpredictability. Following a great deal of investigation, Scott argued that *Red Owl* is a misleading precedent that has been overturned in a more recent Wisconsin case.[459] Nevertheless, a number of commentators still consider *Red Owl* a viable precedent.[460]

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[452] *Supra* note 42. Barnett at 515.

[453] *Supra* note 43. *Red Owl*.

[454] *Supra* note 42. Ayer/Klass suggests that;"Repeated assurances without performance can be evidence both of lack of intent and of a low probability of performance…[therefore]…the law should back them up by imposing liability when [representations] are false. And when such misrepresentations are made knowingly or recklessly, punitive damages are appropriate." at 516.

[455] *Supra* note 42 at 2.

[456] *Ibid* at 3. Once again referring to *The Death of Reliance* at 522.

[457] *Supra* note 42 at 523. Ayres/Klass.

[458] *See supra* note 15. Ghauri; In law *see* F.H. Buckley, "Contract as Convention", 16 George Mason Univ. Law & Econ. Research Paper no. 11-03, 2011. http://ssrn.com/abstract_id=1740686 at 16.

[459] *Supra* note 42. Scott refers to *Beer Capitol Distributing, Inc. v. Guinness Bass Import Co*., 290 F. 3d 877 (7th Cir. 2002) at 3. *See also supra* note 46 at 25 where Hondius refers to Farnsworth who suggests that the *Red Owl* case would not be successful in England.Scott cautions that "conventional wisdom among contemporary scholars' succumb to the principle that 'courts will impose promissory estoppel liability for reliance investments undertaken prior to any agreement between commercial parties.'" at 238. Scott refers to E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations", 87 Colum. L. Rev. 217 (1987); Michael B. Metzger & Michael J. Phillips, "The Emergence of

Restitution: Unlike promissory estoppel which is meant to remedy the enforcement of a promise that falls short of a contract, restitution is an alternative source of obligations under CCL, based upon an implied contract in the form of unjust enrichment so compensation can be awarded if a party has benefited from another without compensation (*quantum meruit*) in absence of a contract. Restitution is a legal fiction whereby recovery restores the parties to the state or position they would have been had a contract been concluded.

We recall that this category of obligations opened when a contractual claim could not be exercised by an injured party by the High Court under the *Fibrosa* case.[461] The concept is now one of a toggle: to be entitled to make a claim in restitution, the injured party must prove, in parallel, that there was a benefit in which he was impoverished, and that the same impoverishment entered into the patrimony of another. A claim for restitution can be made even when a contract is unenforceable,[462] having no requirement of expressed party consent. Some kind of relational basis is necessary, however, for a court to grant a remedy in restitution.[463]

It is more difficult to make a claim in restitution applicable to negotiations as, under CCL, parties are considered free to walk away from negotiations and the costs incurred to prepare for an impending contract are considered to be at a party's own risk.[464]

Exceptionally, a court will allocate compensation on a quantum meruit basis. This matter was discussed in the case of *Countrywide Communications Ltd* v. *ICL Pathway Ltd.*[465] The question,

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Promissory Estoppel as an Independent Theory of Recovery", 35 Rutgers L. Rev. 472, 496-97 (1983); and Ralph B. Lake & Ugo Draetta, Letters of Intent and Other precontractual documents 177. Good faith was considered clothed in promissory estoppel due to the reluctance of application by CCL courts.

460 *See Dixon* v. *Wells Fargo Bank, N.A*, 798F. Supp 2d336 (D. Mass.) 2011 and *Channel Home Centrals Division of Grace Retail* v. *Grossman* 795 F. 2d 291 1986 U.S. App. 26657.

461 *Supra* note 55. *Fibrosa*.

462 *Supra* note 9 at 288. Swan refers to *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, [1994] 1 A.C. 85, [1993] 3 All E.R. 417 (H.L.); and *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 3 All E.R. 895, [1995] 1 W.L.R. 68 (C.A.).

463 *Ibid* at 477. Swan references *Nicholson v. St. Denis*, 57 DLR (3d) 699.

464 *Easat Antennas Ltd*. v. *Racal Defence Electronics Ltd.* [2000 All ER(D) 845]; *Regalian Properties Pic and Another* v. *London Docklands Development Corporation* [1995] 1 WLR 212. *See also* Martin Hogg, "Restitution following termination of a contract: a contractual or enrichment remedy", Edinburgh Law Rev. 2015, Vol 19(2) 269.

during a bid for tender, was whether a reasonable claim for *quantum meruit* could be made when speculative work was completed during the bidding for a large IT service contract. The court found insufficient definiteness to formalize a contract. The Court considered four factors that contributed to whether a quantum meruit remedy could be allocated,[466] and then decided that Countrywide should be compensated due to Pathway inducing Countrywide to provide services free of charge that Pathway benefited from.[467] But the case could easily have gone the other way.

The tort remedy: The third remedy regarding obligations imposed by common law is tort, which has negative connotations of a party doing something wrongful to another. Tort is meant to provide a minimum standard of behaviour in law that cannot be contracted out of.

In the proper functioning of negotiations, this notion should not apply. However, we do not deny that there may be circumstances where the parties have over-stepped their boundaries to one another. TBN parties must be aware that if they behave in a manner that falls inside of a domestic jurisdiction, their behaviour may be sanctioned in tort.

Common law courts consider causes of action and therefore look to individual torts for a remedy rather than a civilian concept of delictual fault. The nature of tort is that it is a civil wrong that a court can remedy. Three examples of tort remedies that could apply to situations concerning business negotiations include negligence, misrepresentation causing economic interference with business activities and third-party interference with a contract. If the parties were more transparent

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[465] [1996] C No 2446, Coram: Nicholas Strauss QC J.

[466] The Court determined four factors: whether the services were ordinarily given free of charge; under what circumstances the services were to be performed, in other words, whether the parties were "simply negotiating" subject to a contract; the nature of the benefit received by the Defendant; and what disabled the formation of the contract.

[467] *See supra* note 9. CCL Swan at §4.2.2.1.1 and §8.1.7 at pages 549 and 1044 et s. *See*, specifically, Section §4.212. *See also* Eric M. Homes, "A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation", 39, U. Pitt. L. Rev. 381, 1977-1978. Homes concurs: "In an effort to keep the pure theory of contracts *pure*, courts in… failed to articulate the real grounds for decisions. Their fictions led to inequity, uncertainty and unpredictability. Rather than recognizing the lack of good faith as an appropriate invalidating device, courts masked their decisions in the guise of interpretation and construction, implication, want of mutuality, particularized rules of offer and acceptance, mutual mistake, and lack of consideration. By using such covert tools, courts concealed the good-faith concept…But with a change in societal values and expectations, the standard is being unearthed." at 388. Restitution does not require evidence of absence of good faith for an injured party to receive compensation, but effectively replaces a duty of good faith.

during negotiations, perhaps it would be easier to catch such circumstances at an earlier stage, rather than after negotiations have completely broken down.

Prior to these ventilations, a word of caution for those readers accustomed to civil law actions; contracting parties need to bear in mind that even parties to an agreement can be subject to liability under tort in CCL in concurrent liability with another remedy.[468]

Negligence is one possible application of tort, applying when a party owes a duty of care to another party when it is reasonably foreseeable that the action will result in harm to another. Unfortunately, it has been noted that certain duties of care result in confusion; whether the remedy should be categorized as a contractual remedy or a tort,[469] causing further uncertainty.

Misrepresentation causing economic interference with business activity is another example that may incur legal liability. For example, false representation made by a party leading another party to act (or omit to act) is considered deceitful.[470] A court may find a tort remedy even where a person has remained silent if there is knowledge of falsehood in a statement made by another with the intention to deceive.[471] The threat lies in how a court will categorize the obligation.[472]

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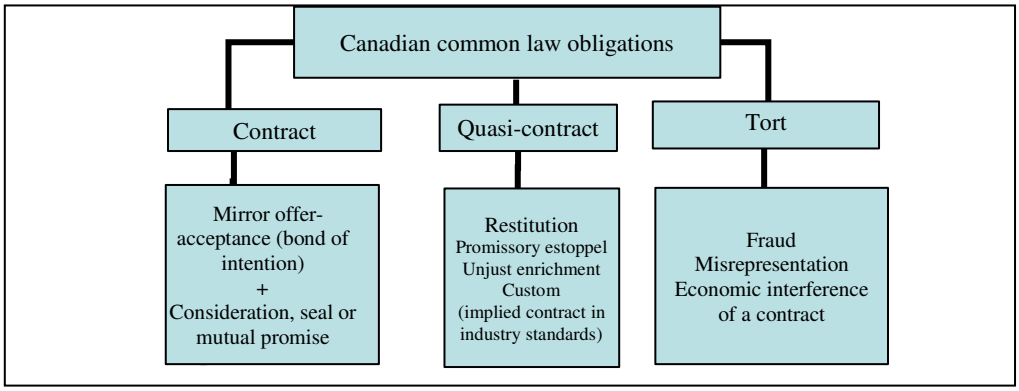
[468] *Central Trust Co. v. Rafuse*, [1986] 2 R.C.S. 147. The contract did not exclude liability specifically so the court distinguished between ***what*** is to be done (get a mortgage which was specified in the contact) and ***how*** it is to be done (reasonable care) and considered the matter under the law of tort. *See also* Allen M. Linden, Lewis N. Klar and Bruce Feldthusen, (Ed), Canadian Tort Law, Cases, Notes and Materials, 12th Ed, LexisNexis Canada Inc., Canada, 2004. Linden explains: "While no definition of a "tort" has yet been made that affords any satisfactory assistance in the solution of the problems we shall encounter, the purpose, or function, of the law of torts can be stated fairly simply…in short doing all the things that constitute modern living – there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another." at 1.

[469] *Supra* note 9. Swan observes: "Canadian courts have complicated things by occasionally adopting a tort analysis of negotiations and then considering whether one party owed the other a duty of care in the circumstances. Such an analysis is not likely to be satisfactory -- apart from the fact that duties of care have never been extended to protect negotiating parties -- because a focus on a duty of care cannot encompass or reflect what is inherent in the concept of expectation. What is needed is a broadening of the concept of contract to include not just arrangements given legal force when or because the offeree has accepted the offeror's offer, but relations characterized by the existence (provable by direct evidence) of expectations arising from the parties' interaction whether or not an actual contract exists."at 146: §1.18.

[470] *C.R.F. Holdings v. Fundy Chemical International*, [1982] 2 W.W.R. 385. The seller claimed that the debrie on the land was excellent fill, but the slag was radioactive. The court considered that the seller',s statement was equal to misrepresentation, classifying it as deliberate half-truth and incomplete disclosure.

[471] *Sidhu Estate v. Bains*, [1996] 10 W.W.R. 590. Defendant made a misrepresentation to a potential investor about his company. He convinced his sister to invest in a three-way telephone coversation with a second investor whereby the brother made a false representation to thes sister that the second investor did not correct (he said nothing). This silence was deemed a misrepresentation.

[472] *Supra* note 47. Mr. Justice Leggatt presiding in Yam Seng declared: "Such conduct would plainly infringe the core expectation of honesty discussed earlier." at para.[156]. For example, the decision in *Yam Seng* contained overtones of the duty not to disclose false information, but since an agreement had been signed between the parties, the court relied on a contractual duty of good faith to provide the necessary guidance to contrary standards of commercial dealing which the parties would reasonably have taken for granted.



Economic interference with a contract may occur when a person purposefully frustrates a contract or makes it difficult for a person to perform under a contract[473] for his own economic gain.[474] Unlawful interference with economic relations does not require malice, merely knowledge that there is a contract.[475] One of the leading cases, *Martel Building Ltd. v. R.*[476] dealt with how much a negotiation party must disclose to avoid a remedy in tort, dodging the real discussion that Swan has advocated these past thirty years of whether there was a breach of a duty of good faith.[477]

2.2.2 Quebec civil law [QCL]

QCL approaches other sources of obligations in a codified manner including quasi-contracts (Articles 1482-1496 C.c.Q.), delictual responsibility (1457-1481 C.c.Q.) which may occur when damages and causality can be proved between the parties, and *ius naturel* that includes custom and usage. Quasi-contracts are considered juridical facts; implied contracts or obligations that have their source in a factual situation that the law will sanction. Delictual offences include minimum requirements of human behaviour, including breach of confidentiality, certain disclosure issues, bad

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[473] *Torquay Hotel Co. Ltd. v. Cousins* [1969] 2 Ch 106. The labour law case demonstrated frustration of performance of a contract thereby reducing the effect of past precedence [*Lumley* v. *Gye* 118 E.R. 749 (1853)].

[474] *OBG v. Allan*, [2008] 1 A.C. 1.

[475] *Quinn v. Leathem* [1970] AC 495.

[476] 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, [2000] S.C.J. No. 60 (S.C.C.). *See supra* note 9. Swan refers to Mr. Justice Iacobucci and Major JJ (at para. 67): "Their principal reason for this conclusion was that parties who engage in negotiations gain a competitive advantage by acquiring information and that to force one party to disclose information that it had acquired would, in their words: "It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of gotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent." at 549.

[477] *Ibid. Martel* at para [73]. *See also 978011 Ontario Ltd.* v. *Cornell Engineering Co.* (2001) 2001 CanLII 8522 (On CA), 12 B.L.R. (3d) 240 at para. [32], 53 O.R. (3d)783 (Ont. C.A.). Leave to appeal to SCC was refused [2001] S.C.C.A.

conduct and, at times, parallel negotiations[478] that may incur damages when causality can be proved between the parties. Filing concurrent actions is forbidden under QCL, so a choice of action must be taken before filing a claim in Quebec courts.[479]

Quasi-contract: Unjust enrichment is treated in Quebec as a quasi-contract. Whereas CCL can also remedy unjust enrichment as a tort, QCL limits the scope of unjust enrichment to the quasi-contractual sphere of an implied contract. The cause or legitimate justification must result from an implied agreement in a relationship or a legal or natural obligation.[480] Domestic tribunals have awarded damages where one party has invested in the project to his detriment upon justifiable reliance of the other party's promise or conduct,[481] but this is a difficult feat in commercial matters.[482] There must be proof that the impoverishment of the one party results in the enrichment of another.[483] Rather than using the term "cause" QCL considers that this impoverishment-enrichment balance must be absent of any justifying reason that could otherwise explain the enhancement of a party.[484]

Delictual obligations: There is always a general duty to abide by a certain standard of conduct determined by the legislature in the form of delictual obligations. If a person fails to respect that duty, a delictual obligation forms and the law will sanction the wrong,[485] providing a minimum, imperative standard of behavior against such tactics of fraud and misrepresentation, suspiciously resembling a toggle of good faith. Delictual obligations are governed separately from contractual obligations, considered under the structure of Articles 1457 to 1481 C.c.Q.

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[478] *Supra* note 434. Péloquin at 187 and 188.

[479] Article 1458 C.c.Q.

[480] *Supra* note 402 at 404. Tancelin cites *Cie Immobilière Viger* v. *Giguère* at 383. *See also supra* note 38. Baudouin/Jobin at 637.

[481] *See Hasenhuendel c. Quebec (Minister of Finance)*, 2016 QCCS 808.

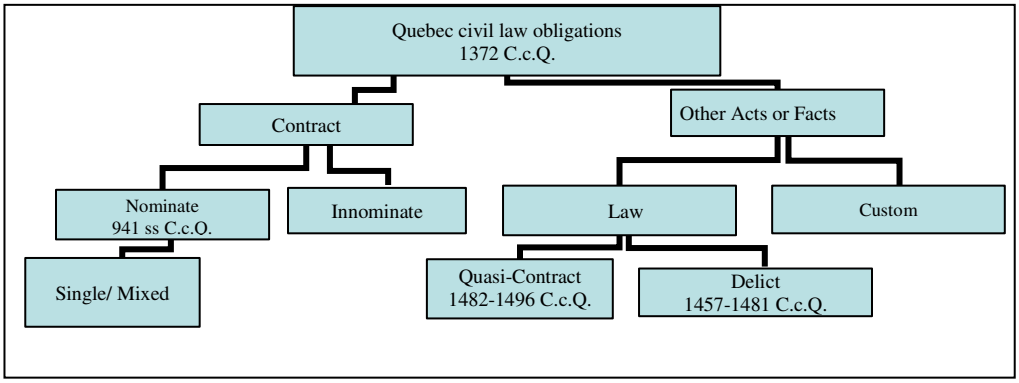
[482] In commercial matters under QCL quasi contract is exceedingly difficult to prove. There are five criteria required to apply for the right to unjst enrichment under Articles 1493 and 1494 C.c.Q. There must be enrichment; impoverishment; a co-relation between the two; absence of a legally recognized justification to the enrichment/impoverishment co-relation and absence of any other recourse.

[483] *Supra* note 38. Baudouin/Jobin at 635.

[484] *Ibid*. Baudouin/Jobin at 637. Parties can therefore specifically contract that impoverishment is at the risks and perils of one of the parties to avoid liability in commercial settings under unjust enrichment.

[485] Article 1457 C.c.Q.

There is no longer a distinction between a voluntary illicit act and an involuntary one, now considered more globally under the umbrella of civil liability.[486] Delictual breach is normally considered in the form of compensatory damages,[487] to place the injured party back into the position prior to the breach.[488]



We have witnessed an array of possible obligations that may be imposed upon TBN parties under Canadian laws regardless of their intentions, demonstrating how business parties can fall subject to liability under a larger umbrella of various shades. The uncertainty lies in the faulty characterization of what negotiating business parties are actually *doing*, leaving business parties meandering in a legal mirage.

Extra-contractual remedies are not well suited for the ordinary function of negotiations. Yet, the difficulties in assessing when a legal obligation has arisen during the *function* of negotiations are found in the lack of transparency and uniformity. Current Canadian laws cannot measure when the negotiation dance has begun, therefore, law cannot evaluate when legal obligations arise during negotiations, unless the script of the plume is impending. In other words, we have no juridical tools to document when business parties consider that the pre-negotiation stage of negotiations has begun. To

[486] *Supra* note 402. Tancelin, obligations at 33.

[487] Articles 1590 C.c.Q. Compensatory damages place the creditor back into the position he would have been if the breach had not occurred: Article 1611. C.c.Q. There must have been a forseeable consequence to the fault. *See also supra* note 38. Baudouin/Jobin at 877.

[488] Punitive damages are not targeted in commercial settings, as they are generally awarded in Quebec only under exceptional circumstances limited to cases subject to the *Consumer Protection Act* or *Charter of Rights and Liberties*.

appraise this uncertainty even further, pre-contractual liability, embraced in some national jurisdictions, is just as discordant to TBN.

2.3 Pre-contractual liability

Regulating obligations arising out of negotiations in some other domestic legal systems, internationally, has been to impose pre-contractual liability. The interest in pre-contractual liability escalated in the late 1980s and into the 1990s documented by the efforts of Hondius.[489]

Pre-contractual liability must be taken into context, as it arises as a result of a relationship and expectations of the parties to that relationship. Some examples of pre-contractual liability include good faith conduct as an expectation during the negotiations,[490] the preservation of confidentiality of trade secrets,[491] disclosure of material facts,[492] and cooperation in good faith towards a mutually rewarding goal.[493]

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[489] *Supra* note 46. Hondius. He gathered a collection by commentators from various jurisdictions at a conference held in Montreal. Hondius identified four primary areas where pre-contractual liability has been identified by domestic courts on an international scale, including tort/delict.Hondius refers to Art. 1382 of the French *Civil Code*: "The prevailing attitude of civil law courts has been to base precontractual liability on the general tort provision of the Civil Code. This at least is the case in the Civil Law countries which have been influenced by French law. In the Civil Law countries with a significant German influence, this is…different for the very reason that contractual liability often offers more to the other party." at 11 and 12. "In several jurisdictions, unfair precontractual dealings are more specifically regarded as an *abuse of right*. The development of this doctrine is described in the very interesting report by Professor Legrand from Quebec. According to him, the theory owes much to the work of the French author Josserand in the first quarter of the century." at 12. [Our emphasis]; breach of contract: Hondius distinguishes French and German law systems: "Unlike the French Civil Code and its progeny, German law does not have a general principle of non-contractual liability. Von Jhering therefore had to resort to an ingenious construction: an implied contract between the parties, with the object of conduct of negotiations in good faith…More in general, the construction of a *pactum de contrahendo* is often used by legal scholars in civil law countries in order to consider parties bound." at 12. [our underline] "The difference between liability under tort and liability for breach of contract, is rapidly diminishing in many jurisdictions…One area where the distinction between liability in contract and in tort may be of interest, is that of private international law." at 13; estoppel: "In the absence of a general duty of bargaining in good faith, the courts of common law countries have sometimes resorted to the principle of estoppel…Traditionally, common law courts have only adhered to estoppel when it is invoked by way of defence." at 13. [which was reversed by *Waltons Stores (Interstate) Ltd. v. Maher (1988)*, 164 C.L.R. 387 (H.C.A.)]; and restitution/unjust enrichment: "The law of restitution, or unjust enrichment, can provide a further possible remedy for a case where expense has been incurred in the expectation that a contract will eventuate, and this expectation proves to be unfounded." Hondius then refers to Farnsworth for a common law perspective: "If liability is based on unjust enrichment, claimant must be able to show that its services resulted in an actual benefit to the defendant." at 13. Included in the collection is Legrand, representing Quebec, who recognizes pre-contractual liability only as a consequence of a *breach* of good faith obligations. Other commentators, such as German commentator, Lorenz, rest in defense of *culpa in contrahendo* and the recognition of pre-contractual liability as the creation of a relationship under *contractual* doctrine. Shiji Kawakami enters the occidental viewpoint and Farnsworth outlines an overall pragmatic common law perspective. See also Joachim Dietrich, "Classifying Precontractual Liability: A Comparative Analysis", Legal Studies, Vo. 21, no. 2, June 2001.

[490] Conduct during Negotiations must be made in good faith. This conduct may furnish the *interpretation* of the contract: 2001 (1 Ob 49/01i) Court: Oberster Gerichtshof Spanish Co (SP) v. Austrian Co. (AUS) http://www.unilex.infor/case.cfm?id=736 AUS refused to pay for goods (fruits and vegetables) delivered on the basis that it was not the actual seller but acted as an agent for the buyer (with whom he shared the same address). Although the Court found that the question of agency (who was the Seller) was excluded from the jurisdiction of CISG by virtue of Art. 4, nevertheless the validity of the contract could be explained by the aspect of good faith during negotiations according to Art. 7(1) CISG. It was reasonable for SP to rely on the "apparent authority" demonstrated through conduct at [6].

[491] *Supra* note 46. Hondius refers to several examples in chapter 9, para 3 b. and more specifically, "An example of a breach of confidence is provided by the English case of *Seager* v. *Copydex Ltd.* ([1969] 2 *All ER* 718; see also Chapter 8 para 3 c.) Plaintiff, who had invented a type of carpetgrip, sought to persuade defendants to market it. However, negotiations broke down. Subsequently, the defendants unconsciously made use of the idea which plaintiff had given to them in confidence. Plaintiff was awarded damages on the basis of reasonable compensation for breach of confidence. French and Italian law likewise recognize the duty of secrecy regarding confidential, personal or proprietary matters concerning the other party. It should be

Obligations can be considered contingent on the intensity or stage of negotiations although it is common in legal domestic families that parties to negotiations are free to break off negotiations, at least during initial stages of negotiations,[494] insofar as they have not exchanged promises, constructed agreements, or have partially performed a contract evidenced through party conduct.[495]

A good example of the division of obligations into stages of negotiations is found in a Dutch landmark case, *Plas* v. *Valburg*[496] that distinguishes between three stages of negotiation to determine whether any liability exists.[497]

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remarked that the duty to observe such secrecy occasionally is not based on a duty to negotiate fairly, but rather on copyright law, *negotiorum gestio*, unjust enrichment, etc." at 21.

[492] *Ibid. See* arbitration award *supra* note 40.

[493]*Andersen Consulting Business Unit Member Firms (ACBU) v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative* (AWO) 2000 (9797) Court: ICC International Court of Arbitration, Geneva, http://www.unilex.infor/case.cfm?id=668 (US v. Swiss). Uncooperative acts in the conduct of the parties were interpreted by the Arbitrators as intentional and therefore contrary to the principles of good faith and dealing under Art. 1.7 Unidroit Principles. Who says Unidroit Principles don't have teeth: The degree of the principle was awarded on a "best effort" basis under 5.1.4(2) of 2004 Edition. For an approach between two civil law parties: 2001 (VIII ZR 60/01) Court: Bundesgerichtshof Spanish Co (SP) v. German Co. (GER) http://www.unilex.infor/case.cfm?id=736 The adjudicators imposed contractual liability for non-disclosure of "standard" exemption terms during negotiations leading to the formation of contract. A contract for the sale by GER of a used milling machine including installation failed causing SP to hire installers. GER defense was the exclusion of liability in the standard termed contract. The Court concluded that SP was not in a position to have known about the exclusion and that the general principle of good faith in Art. 7(1) CISG requires that the parties cooperate and give necessary information to one another.Hondius has offered some examples of situations that can result in pre-contractual liability, such as the quantum of the contract, [*Supra* note 46. Hondius turns to Dutch laws: "According to the Dutch report, decisive elements will be, first and foremost, the circumstances of the case, and more in particular the justified reliance created by acts of the other party (footnote indicates Chapter 14, para 3) Likewise, the Japanese national report mentions the following circumstances, which should be taken into account:(a) Type of transaction: If the object of the contract is very expensive, courts may be reluctant to recognize the conclusion of a contract without any written document." at 15.] the intensity of the negotiations, [*Ibid*."(b) *Progression of negotiations*: In a Japanese case involving a written agreement which only had to be signed, it was held 'When the preparations of the contract have reached this stage, it is proper to impose on the other party the duty not to fall short of the expectations of the one party and to make efforts to faithfully conclude the contract'. " (footnote Chapter 13, para 3 c (ii)) at 11.] the extent of the parties' investment, [*Ibid*."(c) *Preparatory work*: If partial performance is tacitly permitted, this may lead to liability. Similarly, earlier commitments and contractual relations may also be relevant." at 16.] reasonable reliance on another's commitment(s), [*Ibid*."(d) *Initiative in negotiations*: In itself this is not relevant; however, assuming a positive attitude thereby inducing the other party to expect the conclusion of a contract, may be relevant." at 16.] the reason for the breakdown in the relationship, [*Ibid*."(e) *Cause of frustration*: The Japanese reporter recognizes four classes – cases in which legal requirements for valid performance are for some reason not fulfilled, cases in which economic circumstances have changed so much that the transaction has become unattractive, cases in which during negotiations a more attractive trading partner appears, and cases where important matters which have been pending since the start of the negotiations could not be arranged after all." at 16.] and whether oral or written representations took place. [*Ibid*."(f) *Oral agreement and interim document*: If parties intend to have a formal written document or a contract by notarial deed, Japanese courts tend to presume that they have agreed to finalise the contract and therefore do not admit enforcement without such formal contract." The Quebec report strongly supports the view that this is an important fact to be considered. (Quebec supports this view also: Chapter 17, para 4 a.)".]

[494] *Ibid.* Hondius at 18.

[495] *Ibid*. Hondius at 19.

[496] *Supra* note 46. Hondius refers to *Plas* v. *Valburg* at 23.

[497] *Ibid*. "i) an initial stage where parties are free to break off negotiations, without any obligation to compensate the other party; (ii) in a continuing stage, a party may be free to break off negotiations, however, under the obligation to compensate the other party for expenses incurred; (iii) in a final stage a party is not allowed to break off negotiations and violation of this obligation may give rise to compensation of the other party's expenses and, in addition, the profits that would have been made by that party." See Hondius at 23 and Chapter 14, para. 3 regarding the battle of the norms.This manner to regulate is somewhat similar to the Japanese response (which does not recognize pre-contractual liability per say) that envisions negotiations as a set of stairs whereby each stair intensifies the negotiations and the likelihood to incur liability if negotiations are ruptured. Hondius refers to the Japanese commentator, Shoji Kawakami. Kawakami explains the Japanese point of view regarding intensity of the relations:"The progress of negotiations has, in some literature, been called 'the degree of ripeness of the contract' (*Keiyaku no jukudo*) and that shows a new aspect." (footnotes removed: references to Japanese doctrine). "Although the idea of the degree-of-ripeness of contract is sometimes mentioned today, the ways in which this concept is used have changed and they different shades of meaning. The common factor in these statements is the idea that there are some middle stages imposing special duties different from the general duty in tort law of care, a duty placed upon the negotiating parties. For a better understanding of this idea, we may

While this response strives to find a solution so that law can determine when obligations arise during negotiations, it is laden with basic problematics. The Dutch response over-regulates negotiation parties, removing the autonomy from the parties with presumptions that may or may not reflect the specific circumstances that have arisen between the parties during the processes of negotiations. Even in the initial stages of negotiations, trade secrets may be exchanged or one of the parties may be trying to obtain information by negotiating, never intending to go through with any deal. Looming liabilities may arise on a pre-contractual basis even when no contract or agreement has ensued.[498] Furthermore, the intensity of the negotiation relationship remains, currently, unrecorded between the parties.

"Legal ramifications in the early stages of negotiation are probable at inception."[499] Yet, there is no viable way to measure the stages of negotiation or the intensity of negotiations unless it is specifically expressed by the parties themselves and, therefore, no certainty of when a legal obligation will be imposed by law. Consequently, there is no safety zone, as even unilateral promises can incur pre-contractual liability during any stage of negotiations.[500]

A further concern is that there is no uniformity in domestic laws as to whether or not negotiations can be admitted into a court for the purpose of interpretation of the contract.[501] There have been instances when pre-contractual duties impacted intended contracts.[502] For example, when there is knowledge that there are legal obstacles that may result in the invalidity of the contract, a party may have a duty to disclose this awareness to the opposing party.[503] Material disclosure that would enable a party to determine that negotiations would be frivolous could be included to this

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imagine a staircase running from zero at the first contract between parties to 100% at the completion of the contract, appropriating special legal effects to each step of the stairs." at 218.[our underline]

[498] *Supra* note 46 at 15 to 17. Hondius.

[499] *Supra* note 176. Fontaine at xviii.

[500] For example, *trade secrets. See supra* note 267. *Lac Minerals*.

[501] *Supra* note 36. *Jumbo King*.

[502] *Supra* note 46 at 46. Hondius.

[503] For example, if a specific format is required for the validity of the act of sale or lack of material disclosure.

list.[504] In some jurisdictions, negotiations cannot be ruptured arbitrarily where a concluded contract is in sight.[505] In other words, there is no certainty.

Should pre-contractual liability be considered under the doctrine of contract or tort or neither of the two? Characterization of pre-contractual liability is not uniform. Most jurisdictions that recognize pre-contractual liability will do so through remedies of tort/delict.[506] However, most German civil law pre-contractual liability rests on a contractual pedestal,[507] in the form of an implied contract.

The father of the concept of *culpa in contrahendo*,[508] Rudolf von Ihering, did not enjoy immediate embrace of his concept, both in his own German jurisdiction and in subsidiary civil law systems.[509] The ideology behind the concept is that when a visitor enters a shop, she *might* enter into contractual negotiations with the store keeper.[510] Surprisingly, the concept of *culpa in contrahendo* is

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[504] *See supra* note 267. *Lac Minerals*.

[505] For example, Japanese and Dutch laws.

[506] *Supra* note 46. Hondius: "In Belgium, France and Venezuela, precontractual liability will generally lie in tort." at 25.

[507] Even Japan (which is highly influenced by German civil law) has considered this position due to the emphasis of Japanese law on relationships, to date it has denied adopting the Germanic approach or any other recognition of pre-contractual liability. *Supra* note 46. Hondius: "The concept has stuck. In Germany, the subject has always remained a textbook and classroom subject. Switzerland, according to the national reporter Dr. Franz Schenker, has copied German developments…[followed by Turkey]…In Austria, after a long time of silence, *culpa in contrahendo* has been the subject of scholarly debate since 1970. In Japanese legal writing, the theory of *culpa in contrahendo* has been discussed since the 1920s." (Foot note refers to Chapter 13, para. 4(2).[p. 214 Previous dealings] at 4.

[508] *See* Allan Farnsworth regarding American law in, "Formation of Contracts and Precontractual Liability", ICC Institute of Business Law and Practice, ICC Publishing S.A. no. 440/9 ISBN 92.8420107.1 at 240. *See also* Diane Madeline Goderre, "International Negotiations Gone Sour: Precontractual Liability under the United Nations Sales Convention", 66 U. Cin. L. Rev. 257, 1997-1998.Goderre observes that *culpa in contrahendo* has its foundation in the Roman law of obligations that recognized specific cases where an injured party could recover even if the contract was void. The doctrine originated as a solution to perceived weaknesses in the German common law." [which was lacking in protecting commercial needs]"The doctrine is classified as a contract theory, though it encompasses negligence which is considered a tort under a common-law system." "Liability is imposed either when the fault of one party has prevented the formation of a contract or where one contracting party has failed to inform the other party of circumstances that might have prevented the other party from entering into the contract…[c.i.c] has influences the majority of civil-law systems, including those in France, Switzerland, Austria, and even some socialist systems." at 267; E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations", 87 Colum. L. Rev. 217, 1987; Werner F. Ebke, in ICC: Institute of International Business Law and Practice, Formation of Contracts and Precontractual Liability**,** ICC Publishing S.A. no. 440/9, 1990 ISBN 92.842 0107.1.

[509] *Ibid* at 21. f.n.: *Neue Juristische Wochenschrift* 1962, 31.) The reasoning for the contractual remedy is that the tort action would have been prescribed and the injured party left without remedy."The first case discussed under the heading by the German reporter does not perhaps raise objections. A woman had entered a department store in order to buy a linoleum floor-cover. When the employee with whom she discussed the matter tried to pull out the roll in which the woman was interested, due to his negligence two other rolls fell and injured the woman and her daughter. The *Reichsgericht* held the store liable on the basis of a precontractual relationship between the prospective buyer and the department store…"[509] However the shortcomings to this application are obvious: "A department store was held liable on the basis of *culpa in contrahendo* when a visitor slipped on a banana skin and fractured a leg, even though the visitor had not yet entered into contractual negotiations when the accident happened."

[510] This manner of qualification would be considered repugnant under common law. *See supra* note 91. *Walford*. Even Japan (which is highly influenced by German civil law) has considered this position due to the emphasis of Japanese law on relationships, to date it has denied adopting the Germanic approach or any other recognition of pre-contractual liability.

now well adopted in German courts[511] as an implied contract, recognizing that a relationship has taken place between the parties.

The challenge with the German position is that it is inconsistent with other jurisdictions that approach pre-contractual liability under the scope of tort, and those jurisdictions that prefer to deal with pre-contractual liability as a matter of good faith.

What we learn from the German approach is the relational aspects of negotiations are recognized; that negotiation parties have formed a relationship deserving of more than a tort response.[512] This approach is insufficient, however, as it does not distinguish the intensity of the negotiations, nor the terms and conditions applicable in the processes of negotiation.

The Peril: Perhaps the most disturbing element of the uncertainty of pre-contractual liability is that it is not evident when obligations during negotiations will be recognized by law and under what circumstances an agreement will fall outside of contractual recognition.[513] Preliminary agreements are meant to evidence the seriousness of the negotiations through agreements that provide parties with a manner to plan affairs that are ancillary to the buy-sell agreement even though there are matters that require further exploration. This is particularly prevalent in long-term TBN where the economic stakes are high and where one or more parties invests, speculatively or not, in the project for a long period of time. An agreement to agree sets out the terms the parties have settled on while leaving open terms for secondary matters to be discussed later. While some jurisdictions will recognize an agreement to agree, other jurisdictions will consider failure to reach an agreement regarding ancillary

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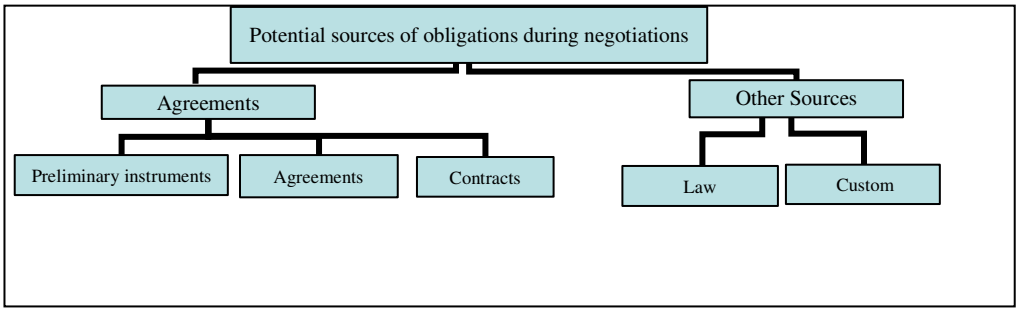
[511] *Ibid* at 4.

[512] Some of the German civilian jurisdictions have adopted the doctrine of *culpa in contrahendo* to impose a general duty of care which is considered a contractual duty even in pre-contractual settings. *Supra* note 46. Hondius explains that the German reporter offers the reason that the liability is not based on tort since para. 831 GBG does not afford "victims the same protection" at 20. Japan does not embrace this concept, rather, a "contract must be considered 'as part of an accumulated social relationship, not as an isolated fact, because human and social relationships formed the background to the legal dispute around the transaction before the contract was made and they will continue to exist and accumulate after its performance." *Ibid.* Hondius at 26. Chapter 13 para. 5 c. *See also* Robert M. March, "The Japanese Negotiator/Subtlety and Strategy Beyond Western Logic", Tokyo/New York (Kodansha) 1988 at 111-112. The Japanese model has spread to American authors, such as Macneil's "Relational Contract" Hondius refers to Macneil, "Relational Contract: What We Do and Do Not Know", 1985 *Wisconsin Law Review* 483) at 27. and embraced in Holland where "A new category is being developed, the category of a legal relation." at 27. *See also* Paula Giliker, "A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French, and Canadian Law, C.U.P., The International and Comparative Law Quarterly, Vol. 52, no. 4 (Oct. 2003), pp. 969-993.

[513] *See* 2.3 in Section 3 of Chapter 1, Part I for further discussion.

details a breach in the obligation to negotiate,[514] while jurisdictions like CCL will not generally recognize such an agreement at all.



Conclusion: For law to regulate TBN and impose behavioral standards to TBN it must first come to a greater understanding of when negotiations begin, the functioning of negotiations, how TBN parties communicate with one another, and the relevance of successful negotiations.

Although law has few tools to regulate negotiations and no globally accepted *sui generis* rules that apply directly to international deal making, law *is* currently regulating using various legal vehicles,[515] including the imposition of a duty of good faith[516] "under the shadow of the law."[517] As a result, negotiation obligations stumble like misfits between various categorizations of legal obligations,[518] contributing to the threat that business negotiations are burdened with uncertainty as to how legal obligations will be recognized or imposed by law.

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[514] *See supra* note 508. Farnsworth at 23. Farnsworth distinguishes an agreement with open terms from an agreement to negotiate which does not bind the parties to reach an ultimate agreement and therefore incurrs no contractual liability.

[515] Including contract, such as implied contract, pre-contractual liability, equity and tort/delict but the threat is that law has not specifically characterized negotiations.

[516] Reziya Harrison, *Good Faith in Sales*, London, UK, Sweet & Maxwell, 1997.

[517] *See supra* note 78. Mnookin is cited by several commentators, including *supra* note 53. Carrie Menkel-Meadow at 766 and *supra* note 78. Hollander-Blumoff at 392 who applied Mnookin's ideas to a business association is facilitated by a relational theory.

[518] *See supra* note 84. Gilmore at 87 and 88. *See also* commentaries in the amalgamation in Omri Ben-Shahar and Ariel Porat, (Eds.) *Fault in American Contract Law*, New York, Cambridge University Press, 2010. Contractual doctrine is used when adjudicators recognize and enforce an agreement or contract. Courts may distinguish the existence of an implied contract or an implied term in a contract, considered a legal fiction. *See supra* note 516. Harrison. Under the doctrine of tort (delict) (or in some jurisdictions under contractual doctrine), pre-contractual liability may be imposed on negotiating parties. *See supra* note 46. Hondius. The exceptional jurisdiction of Germany considers pre-contractual liability culpa *culpa in contrahendo* which is a contractual remedy.

We have learned from other disciplines that the negotiation dance is more than just strategies and tactics. It involves the building of a relationship, maintaining trust and cooperation.[519] Negotiations are the path of communications taken by the parties to arrive at successful destinations.[520] To guide this path of negotiations, law must provide TBN parties with the certainty that the arrangements they intend to be binding will be recognized by law.[521]

Hondius has noted that some jurisdictions require good faith conduct while the parties are negotiating.[522] However, there is no common consensus that negotiations must be conducted in accordance with a duty of good faith,[523] nor the nature and scope of such a concept if it could be applied to negotiations. While American law draws closer to QCL by recognizing a duty of good faith and fair dealings in commercial contracts, it is not clear how the UCC is applied to negotiations.[524] CCL and QCL remain poles apart as the CCL has only begun the fledgling exercise of recognizing a duty of good faith when parties are *performing* duties under a contract.[525] All sources of law could potentially recognize standards of good faith that have been expressly accepted by the parties themselves, if only there was a way to record such standards privately between the parties.

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[519] *See supra* note 15. Ghauri at 33; *supra* note 49. Usunier at 130; *supra* note 59. Lewicki at 25; *supra* note 237. Thompson at 46; *supra* note 352. Leeson at 898. *See also supra* note 70. Manrai demonstrates that negotiation behavior focuses on Manrai's latter constructs: "…a cooperative exchange of information;" and "…a common goal and a final outcome." at 76 and 78. Other disciplines have revealed a patterning of behavior between negotiating parties. *See also* Bianca Beersma van der Schalk, Gerben A. van Kleef and Carsten K.W. De Dreu, "The more (complex), the better? The influence of epistemic motivation on integrative bargaining in complex negotiation", Eur. J. Soc. Psychol. 40, 355-365 (2010).

[520] *Supra* note 15. Ghauri at 7. Domestic negotiations are not absent from cultural encumbrances, but do not face the same plurality as TBN. *See* Ghauri's explanation of why setting the atmosphere impacts the quality of communications at 14. Jean-Claude Usunier, "La dynamique culturelle", dans *Commerce entre cultures: Une approche culturelle du marketing international*, Paris, Les Presses de l'Université de France, 1992." Usunier recognizes that intercultural relationships are more challenging, but that intra-cultural relationships may face remonstrance when building trust between the parties. *See supra* note 59. Lewicki for empirical evidence on trust. *Supra* note 72. Hall on silent languages that impact culture, whereby communications may be direct or indirect, verbal, written or silent.

[521] If law could grasp the moment that negotiations begin, the normative patterning during the functioning of negotiations, the meaning of negotiation communications, the relevance of successful negotiations and how negotiation goals are communicated and achieved, law would be in a better position to guide TBN party conduct more efficiently.

[522] *Ibid*. Hondius indicates that Japanese courts appears to have upheld "a duty to negotiate faithfully towards a conclusion of contract" at 24.

[523] Some jurisdictions, as we have seen under QCL, have an overall presumption of good faith rather than recognition of pre-contractual liability. When parties are exercising their civil responsibility and although commentators consider that the processes of negotiation are included in this presumption, the C.c.Q. does not specifically address negotiations or the standards that parties must use when negotiating. *See* Sylvette Guillemard, « Tentative de description de l'obligation de bonne foi, en particulier dans le cadre des negociations precontractuelles », (1993) 24 R.G.D. 369-395.

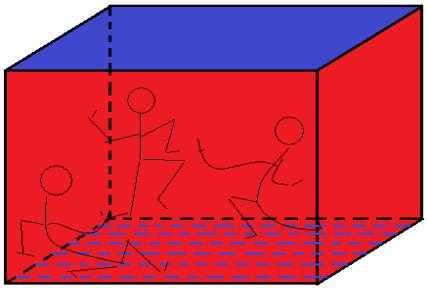
[524] *Supra* note 508. Farnsworth refers to UCC 1-203 and Restatement §§205 at 21.

[525] *Supra* note 51. Bhasin.

CHAPTER 2 WHAT IS THE ROLE OF PARTY AUTONOMY IN THE LEGAL BALLROOM, comprised of three sources of law (Domestic Laws, Transnational Laws and Party Autonomy)

We will now isolate our scope from extra-contractual liability and concentrate on when, and under what circumstances, voluntary exchanges and communications taking place during the processes of negotiations are recognized by the sources of law. To prepare for this analysis we will examine the quantum of support of autonomy given to TBN parties by the three sources of law and the feasibility of considering party autonomy as its own juridical order during TBN.

If law could design an ideal setting, particular to the TBN dance, involving a plurality of legal sources working together uniformly, it could metaphorically be identified as "the legal ballroom." Envision, idealistically, TBN parties performing the negotiating dance in the legal ballroom that represents a tri-dimensional plurality of regulatory sources of law:



The dancers position themselves and, using cues, determine the dance they will perform. This dance structure represents party autonomy and the ability for parties to fashion their own arrangements. Even though some of the steps may be improvised, within each negotiation dance structure is a configuration subject to unwritten rules of etiquette, understood to some extent by the negotiation dancers. The walls of the ballroom support the ballroom structure, promoting the parties to dance but barring the dancers from over-stepping the boundaries of the walls, representing domestic laws. The floor and ceiling serve to support our dancers yet, while sheltering the parties; they cannot leap higher than the ceiling. The floor and ceiling signify transnational laws.

Alas, the legal ballroom is but an image that does not reflect current dissymmetry between sources of law, but we aspire that it could, if the negotiation dance movements were recorded in an authentic institutional setting. To attain the ideal infrastructure for TBN parties to arrange their business dealings, law must have a manner to illuminate the meaningful communications exchanged between TBN parties with transparency and offer party choice of the nature and scope of behavioural standards within proper standards of law.

Law must rank the circumstances where law is willing to support party autonomy, protecting the efficiency, autonomy and certainty TBN parties yearn to achieve. To fully accomplish this exercise, unwarranted interference to party autonomy must cease. Our goal in this chapter is to illuminate the role of party autonomy and expose where law supports autonomy and how further support of party autonomy could enhance TBN needs.

We have identified three uncoordinated sources of legal regulation applicable to TBN that produce a plurality of colliding sources of laws, whereby each source of law competes for governing domination. While each regulatory source of law has a role to play, necessarily, it would be beneficial to seek cooperation between these sources of law.[526]

There appears to be a consensus that party autonomy is recognized and supported by both domestic and transnational sources of law to the extent that parties have clearly and voluntarily expressed themselves in a specific, unambiguous and valid agreement, insofar as they have not breached public order. However, promises and mini agreements that fall short of recognition by law fall out of legal protection for the most part.

[526] *Supra* note 207. Zhang explicates: "[Choice of law] not only impacts the freedom of the parties to choose governing law, but also affects the applicable law by which the parties would be bound." at 517. Zhang remarks that the purpose of this procedural aspect is to ensure that the parties' substantive agreements are protected in the manner in which they have understood: "The international community has generally agreed that as long as the parties are free to make a contract, they should have the same freedom to select the law to govern the contract, subject to certain limitations imposed by the law." at 552 and 553.

We will begin by reviewing current domestic laws regarding the exercise of party autonomy in the form of freedoms of contract dividing our analysis into Canadian common law [CCL] and Quebec civil law [QCL]. We have identified a divergence in the interpretation of contracts between the QCL's subjective attitudes of the "meeting of the minds" versus the objective tests of the manifestation of assent in the CCL to determine whether an agreement can pass the tests of contract validity, worthy of domestic enforcement. The divergence between the two Canadian systems manifests an inconsistency in legal regulation of TBN, yet we have not even traversed Canadian borders to other international responses of law.

Following the domestic exercise, we will shift our attention to transnational sources of law, a plurality within its own system of laws. There is no consensus on how many sources of law exist within transnational laws, but we will reflect, particularly, on TGPL which rely on the voluntary compliance of the parties as opposed to a Sovereign fist.

Once the influence of transnational laws has been examined, we will study the nature of party autonomy to ponder the role of party autonomy during TBN. We will consider the *will theory* and its effect on party autonomy during TBN. Then, the focus will turn to self-regulated industries, where we will observe that these small, heterogeneous groups function satisfactorily due to isolated community values. But this method of regulation is not considered suitable as a regulatory system in the global market where there is no legal security. The recipe for recognition of a juridical order will be dissected using Rocher's five criteria. Our conclusion will advocate that party autonomy, in the context of TBN, should be recognized as its own juridical order and that TGPL are moving towards a source of mandatory rules for party autonomy.

The conclusion of our findings in each of the three sources of law will lead to a comparative law analysis in the start of Part II which intends to expose whether party autonomy is sufficiently

supported. We will also address the impact of a duty of good faith on party autonomy. These elements will lead to the proposition of a new legal negotiation theory made for TBN.

The dilemma: There are no specific rules pertaining to negotiations in either the CCL or QCL, and precious few in transnational laws. Consequently, party autonomy remains without structure since there are no juridical tools to distinguish whether TBN parties are simply exchanging information or whether they are forming legally binding promises or agreements. As a result, business parties cannot be sure how their negotiation communications will be interpreted in law, particularly whether a contract has formed (or not). For example, legal fiction may be exercised based on implied contracts which risks misconstruing the true intentions of the parties, since the assessment is made through objective presumptions,[527] not what the parties may have agreed to. Party autonomy is not currently operating at full capacity, often falling short by producing partial arrangements that cannot be recognized by law.[528] Relational aspects of negotiations are not easily accessed by law, in absence of markers, including difficulty to assess when negotiations begin.

Law has failed on two counts. Notwithstanding that there are virtually no specific legal rules pertaining to negotiations, there is currently no manner to document undertakings that TBN parties desire to be legally binding, other than a valid contract. Law cannot detect other negotiation communications exchanged by the parties that parties intend to be legally binding nor determine the extent of legal obligations of these arrangements.

Secondly, since there is no uniformity regarding the categorization of negotiations, it is not predictable when an implied contract may be imposed upon the parties or whether some other remedy will be found to fill the gaps of insufficiency that law encounters this human activity.

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[527] *See supra* note 9. Swan regarding CCL and *supra* note 38. Beaudouin and Jobin explain the QCL objective test when there is no obvious "meeting of the minds".

[528] *See* 3. in Section 1 of Chapter 2, Part I regarding preliminary agreements.

To intervene or influence legal regulation of TBN, law must first find a uniform manner to recognize obligations arising during negotiations. To recognize when obligations arise during negotiations, we must first ascertain whether negotiations have begun. If they have begun, then rights and obligations are probably accruing.[529] We suggest that the best outcome, under current laws, would be to provide the parties themselves with a method to record when negotiations have begun between themselves.

Section 1: Domestic Sources of Law: How Can Business Negotiation Arrangements be Recognized by Law?

Domestic sources of law will recognize and enforce a valid contract. However, is this sufficient to promote the autonomy required by TBN parties? Regrettably, even a valid contract is subject to judicial interpretation if it proves to be ambiguous and the outcome may not reflect what was intended between the parties.[530] Furthermore, if no contract can be identified but facts lead to a court "finding" an implied contract, the terms and conditions may not reflect what the parties themselves meant.

Although our study is qualitative because of very few specific rules governing negotiations, we will demonstrate how exceptions to the popular assumption that there are no legal ramifications during negotiations may take business parties by surprise. Likewise, if an agreement that negotiating parties intend to be legally binding cannot be recognized and protected by law, a similar shock ensues.

Negotiations are popularly viewed as freedom *from* contract or juridically norm-free;[531] bearing no legal ramifications and, therefore, they are not considered regulated. Holmes Norton

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[529] *See supra* note 176. Fontaine/De Ly.

[530] *See* 2.1 in Section 3 of Chapter 1, Part I.

[531] *Supra* note 15. Ghauri. In an interdisciplinary business perspective: Ghauri's opening paragraph presumes: "Business negotiation is a voluntary process and parties can, at any time, quit the process." at 3. Under CCL *see supra* note 379 at 173. Waddams equates "bargains" with "offers" which must have three components: intention, mutual asset to sufficiently certain terms and exchange of value (consideration).

further advocates that "[t]here is "no practical way to monitor the process."[532] She is not wrong since current legal process has no trade mechanisms to document or track negotiations.

One reason why negotiations are under-regulated by law reposes on the fear of interference with the natural regulation of competition and concern to undermine the stability of the doctrine of contract.[533] The second argument is that the law cannot monitor negotiations,[534] since most of the negotiation processes are not transparent to law. Law cannot always grasp the meaning of semiotic communications, identified by behavioral scientists as sequences within a normative behavioral framework, exchanged between business parties.[535] Thirdly, negotiations do not easily fall within recognized valid contract or agreement.[536]

Under both CCL and QCL, the formation of a legal obligation is dependent on its source.[537] The categories of sources of obligations influence whether a legal obligation has been formed and guide the probable content and intensity of the obligations and, accordingly, the remedy. A review of Canadian laws reveals support of party autonomy through the principles of freedom of contract, but the relational aspects of a contract are not shared and the application of law to negotiations is divided.[538] Whereas CCL views the law of contract as a bargain exchange, QCL embraces contracts as relational agreements which identify a greater range of legal agreements.

We will review the various forms of freedom of contract. Freedom *to* contract,[539] freedom *from* contract;[540] and freedom to agree later[541] are tools designed for the exercise of party autonomy

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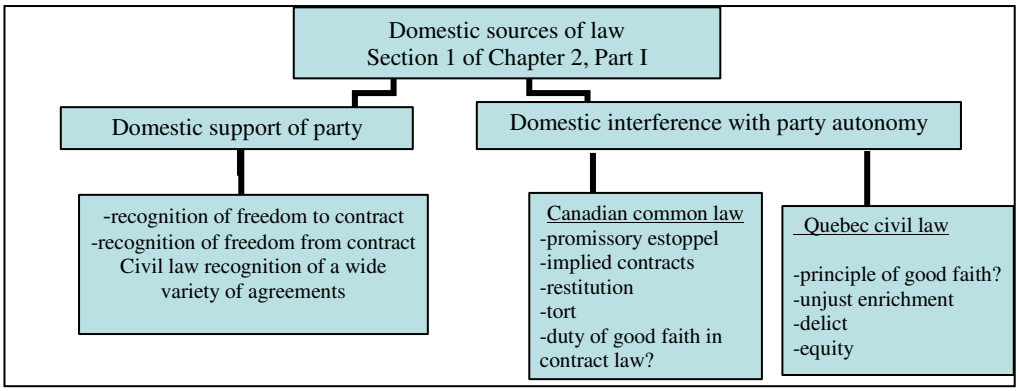
[532] *Supra* note 1. Holmes Norton.
[533] *Supra* note 47. *Yam Seng* at para. [121].
[534] *Supra* note 72. Hall.
[535] *See* 2. in Section 2 of Chapter 1, Part I.
[536] *Supra* note 379. Waddams.
[537] *Supra* note 96. Samuel 2010 Obligations at 27; For QCL *see* Article 1372 C.c.Q.
[538] Under CCL, contracts are considered bargains whereas under QCL contracts are relationships.
[539] *See* discussions and nuances between party autonomy and freedom to contract in supra notes 204 and 207. Meng and Zhang. *See also* Florian Rödl, "Contractual Freedom, Contractual Justice, and Contract Law (Theory)", 76 Law & Contemp. Probs. 57, 2013.
[540] Our divisions were originally taken from a Wisconsin Symposium that shed great clarity on the distinction of the freedoms of contract which we have transported for our discusion into Canadian laws. *See* Todd D. Rakoff, "Is "Freedom from Contract" necessarily a Libertarian Freedom?", 2004, Wis. L.

under domestic laws. Freedoms of contract were developed in industrial states under contractual doctrine to accommodate business needs and abide business parties' freedom to contract, or not. During the *laissez faire* era, the development of contractual doctrine, parties were considered masters of the ceremony until law realized the inequities that could arise between unequal bargaining powers. As law began to recognize that unfairness could result out of these freedoms, law reacted by imposing certain limitations, since freedoms of contract could not be a "free-for-all".



As domestic protection of party autonomy is now subject to certain limitations, we will investigate the extent and quality of these *freedoms* as they pertain to negotiating and how autonomy is slowly chipping away due to over regulation, the inability of law to recognize business arrangements, and misinterpretation of business parties' intentions during negotiations. The application of freedoms of contract to long-term business negotiations does not reflect business reality in TBN, particularly due to the static nature of contracts. In TBN, agreements must remain dynamic and flexible to cater to the relationship between TBN parties that continues to mutate.

Rev. 477. Although there is a commentator who argues that freedom from contract is outside the perimeters of party autonomy. *See also* David P. Weber, "Restricting the Freedom of Contract: A Fundamental Prohibition", 16 Yale Hum. Rts. & Dev. L.J. 51, 2013.

[541] Omri Ben-Sharar, "Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts", 2004 Wis L. Rev 389. *See also* Robert E. Scott and George G. Triantis, "Incomplete Contracts and the Theory of Contract Design", 56 Case W. Res. L. Rev. 187, 2005-2006.

1. Freedom *to* contract

The principle of freedom *to* contract operates via juridical tools that assure contracting parties that the law will enforce their agreements.[542] Freedom relates to the coveted norm of the *liberty* of a person to decide what they will do with their own property. In other words, what they will purchase (or sell), the quality of the object, how many and for what price. Insofar as the contract is not illicit and parties have adhered to the rules of validity of contracts and public policy, their efforts are rewarded by the enforcement of their agreement (or compensated for lack of performance) under domestic laws. The law has no interest in the price of an object, insofar as value is exchanged, as this depends largely on the eye of the beholder.[543] Therefore, agreements are considered a "form of private legislation between the parties…when entered into freely and voluntarily", that binds the parties together.[544]

On a domestic front, negotiation parties can only be sure to benefit under freedom *to* contract if a valid contract can be identified by adjudicators. In the context of negotiations, divergence between CCL and QCL on how contractual validity is assessed alienates the two Canadian legal systems. Attempts to bridge this rupture have not been investigated in any thorough fashion by law.[545]

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[542] *Supra* note 42. Lake/Draetta refer to Restatement (Second) of Contracts §1 (1981): "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." at 25.

[543] Even the common law where consideration is a condition of validity of the contract a blind eye is turned on quantum. "A peppercorn, kitten or a robe" is sufficient consideration in the common law in Prof. Matthew Harrington's Common law contract course in the Fall of 2013 at the Université de Montreal. What is important to one party may not have the same significance to another; such as diamonds and water or a garage sale chandelier; the old antique that clutters the garage. *See also supra* note 223. Menkel Meadow's explanation of dividing a chocolate cake. *See also supra* note 208. Seminare Docherty (power). Docherty explains that time and space becomes commodities that must be taken into consideration as values during the context of negotiations. These values allow the parties to collaborate between them to "work together to build options that were not obvious before…" at 863.

[544] *Supra* note 49. Samuel 2010 at 85. As opposed to stemming from sources of legislation that permit parties to contract. [our underline].

[545] A solution may be on the horizon; a dim glimmer of hope for some sort of merge between the systems may lie in the consideration of whether a duty of good faith during negotiations could be considered under Canadian laws. *See* Tamara Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of Bhasin v. Hrynew and the Organizing Principle of Good Faith in Common Law Canada", SSRN: https:11abstract=2758844, March 30, 2016.

1.1 Canadian common law [CCL]

Contracts have held front row seats in the obligation theatre. It is well established that parties, in general terms, are free to make their own arrangements together insofar as they are expressly and unambiguously stipulated and adhere to recognized standards of contract law.

The modern solution to this dilemma is the creation of standard form international contracts intended as "one size fits all" in order to have *something* that could bind TBN parties of a particular trade once negotiations are complete. As we have witnessed during business and behavioural scientists' perceptions,[546] TBN are never parallel, even between the same parties, and therefore, an all-purpose contract cannot reflect the deals entered into between TBN parties.

Common law contracts were historically divided into two sub-categories: *conventio* (by agreement) or *consensus* (by promise or pact).[547] In earlier days, only a *conventio* was recognized as a manner to form legal obligations between parties and a mere promise or pact (*consensus*) did not create actionable legal rights. It was not long before the general acceptance of customary and mercantile laws rebutted this presumption due to the normative foundation of customs that could render a pact or promise enforceable.

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[546] *See supra* note 59. Cova at 253; *see also supra* note 49. Usunier at 113; *supra* notes 195 and 209. Adair.

[547] *Supra* note 96. Samuel at 97: "English contract law is, then, built upon the notion of enforceable *promise* rather than agreement and this distinction is more than academic. In the civil law tradition the emphasis on consent (*consensus*) and agreement (*conventio*) has given rise to an idea of contract as essentially subjective. The contractual bond is based on the coming together of two wills. In the common law, in contrast, the idea of promise is much more objective; it is a 'thing' that once launched assumes a life of its own and upon which others might well rely.'" Further on, Samuel continues: "The distinction between promise and agreement is also reflected in the role that subjective intentions play in the formation of a contract. Here it has to be said that it is not true that *consensus* has no role in the common law because offer and acceptance does have a subjective dimension. If by chance two offers for example one to sell an item and one to buy this precise item, were to cross in the post and that cross-offers were identical in terms of price and the like there would not be a contract. There has to be *consensus ad idem* between the parties."referring to [*Shogun Finance Ltd* v. *Hudson* [2004] 1 AC 919, at para 123 per Lord Phillips.] at 105. Samuel points out two aspects to the consensus principle: 1) "The subjective aspect is that of intention and the meeting of the minds. In the cross-offers example there is certainly an intention to sell and an intention to buy on identical terms, yet the minds themselves have not been brought into contact." 2) "On the other hand there is an objective dimension. An acceptance can be sufficient to create a contract even if the acceptor had no subjective intention to accept on the terms offered. As Lord Diplock has stated, 'what is necessary is that the intention of each *as it has been communicated to and understood by the other*...should coincide'." [*The Hannah Blumenthal* [1983] 1 AC 854 at 915 (emphasis in original). Therefore, Samuel concludes that the court decided that the lack of consensus *ad idem* prevents the formation of a binding contract. *See also supra* note 386. Jordan refers to Anson's point of view at 2: to become a promise requires acceptance of an offer.

CCL supports the ability of the parties to contract insofar as a mutual, mirrored offer and acceptance has been established;[548] the parties have legal capacity to contract,[549] a reason for the enforcement of a contract exists;[550] and the parties have the intention to create legally enforceable obligations.[551] This intention must be expressed specifically by the parties and demonstrated with an objective sign, such as consideration, a seal or a mutual promise, but is still subject to judicial interpretation.[552]

The mere fact that a promisor initiates an offer does not make the promise legally binding until it is accepted.[553] A promise by one party given reciprocally and simultaneously in consideration for a promise by another can be considered legally binding.[554] But the parties must have specifically expressed the promise or they will be subject to an objective test of what a reasonable person would have reasonably understood under the same circumstances.[555] A mere promise to enter into a contract

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[548] *Supra* note 379. Waddams refers to *Embry vs. Hergadine-McKittrick Dry Goods Co*., 127 Mo.App. 383, 105 S.W. 777 (Mo. App. 1907): "The inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts."; *Larken v. Gardiner* [1895] 27 O.R. 125 (Div. Ct.) at 191. If an objective manifestation is not met the contract will not be enforced: *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs*. *See also* Waddams at 205. *Ibid*. Lake/Draetta affirms that a contract must be based on mutual assent ["Manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined." Restatement (Second) of Contracts §22(2) (1981).] and there must be a mutual agreement, that is, "a promise of which the offer has been duly accepted."

[549] *Supra* note 42. Lake/Draetta refer to Chitty §§ 531-606, G. Greismore, Principles of the Law of Contracts 9 (1969) at 26.

[550] *Ibid.* Consideration in the common law, meeting of the minds in civil law "There must be consideration. [Restatement (second)…§§ 71-94 (1981) reference to Chitty ch. 39 (1983)] at 26.

[551] *Ibid* at 42. Lake/Draetta describe: "The offer is not considered to be a part of the negotiation stage of a transaction. An offer must contain all the elements of the contract, which will be concluded upon its acceptance. Consequently, a mere invitation to enter into a negotiation does not qualify as an offer. An offer can, of course, follow a phase of preliminary negotiations." at 50. *See contra* under German law: "The offer…is a unilateral declaration of will (Willenserklarung) expressing the firm intention of the offeror to bind himself toward the offeree through the simple acceptance by the latter. Consequently, the offer must have such a content as to make the conclusion of a contract possible as soon as the acceptance occurs." [conditional offers are recognized] Lake/Draetta also refer to Chitty § 123. *See also* Restatement Section 2.1A(3): "Consideration is thus best seen as a limitation on the ability of parties to obligate themselves. Some commentators have identified a weakness in the doctrine in this regard, in that a promise may well intend to be contractually bound but still not give a counterpart performance that meets the requirements of "good consideration," in which case an agreement would fail as an enforceable contract…The relation between intention and consideration as contract elements is a close one. Both are indicia of seriousness, and both are important in the effort to distinguish between promises that the law enforces and those that it does not." In this respect the doctrine of consideration plays a conceptual role in the determination of when letters of intent can be considered to actually be contracts." [*Channel Home Centers v. Grossman*, 795 F. 2d 291 (3d Cir. 1986] at 37].

[552] Historically, common law contract depended on proper motive, which was considered too uncertain in a mercantile exchange by the 16th century, creating the necessity to have a tangible motive supported by consideration or seal.

[553] *Supra* note 380. Cooke at 5. Interestingly, Lord Mansfield attempted to support this factor, cited by Cooke, *Pillans and Rose* v. *Van Microp and Hopkins* (1765) 3 Burr 1664., but this attempt was overturned by 1778 in *Rann* v. *Hughes* (1778) 7 Term Rep 350 n.

[554] *Ibid. See* Cooke's citation *Lea* v. *Exelby* (1602) Cro. Eliz. 888, 78 ER 1112.

[555] *See supra* note 9. CCII. Swan, Chapter 3, Casebook at 5.

is not likely to be enforced under CCL.[556] Therefore, incomplete negotiation promises risk to be unrecognized and unenforceable by law.

"The common law recognizes a number of interests which it regards as deserving of protection."[557] Contracts were designed so that business parties could arrange their affairs and feel secure that the law would protect reasonable expectations.[558] Intervention by law on contracts is meant to put the injured party in the position that the party would be if the opposing party had performed the obligations under the contract. But when the parties' arrangements during negotiations are invisible, courts can only vacillate by pegging meagre facts, which may be misconstrued, into alternative sources of remedies. Since there are virtually no *sui generis,* or specific rules governing negotiations under domestic laws, (with exception to one article in the Italian *Codice Civile* that requires negotiations to be performed in good faith[559] and Dutch case law[560]) domestic courts have used fictitious manners to recognize obligations that arise during negotiations.[561] Negotiation obligations are sometimes recognized under the auspices of "implied contract", as if the courts could consider the parties' implied intentions using an objective standard of what reasonable persons would intend under similar circumstances.[562]

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[556] *See supra* note 9. CCL Swan at 521, section §4.156 In the context of agreements to agree, Swan depicts: "I promise that I shall enter into a contract with you." Such a promise is said to be unenforceable and there are a great many cases that support the proposition that an agreement to agree will not be enforced. One of the cases usually cited to support this proposition is *Courtney & Fairbairn Ltd. v.Tolaini Brothers (Hotels) Ltd.*[1975] 1ALL ER 716 referred by Swan at 521.

[557] *Supra* note 380. Cooke at 41.

[558] *Supra* note 9. CCL Swan discusses the purpose of Canadian contract laws: "Those functions are derived from the fact that the Canadian economy is based on markets and on the freedom of individuals and business entities to plan their relations as, in general, they see fit. At a very basic level the purpose or function of the law of contracts is to protect the reasonable expectations of the parties to any contract. This statement of the purpose of the law is vague but it is not vacuous. It emphasizes the importance of the parties' actual expectations as matters of fact which may be subject to proof and it entails the need to consider what the application of any rule (or the achievement of any result) will do to those expectations." at 155.

[559] Article 1335 of the Italian Codice Civile.

[560] *Supra* note 46. Hondius refers to *Plas* v. *Valburg* at 23.

[561] For example, implied contracts and pre-contractual liability.

[562] Fitting like a square peg in a round hole in law. Although behavioural scientists have recognized a certain normative patterning in negotiations, an objective standard would be very imprecise where negotiation parties must improvise. *See* 1.1 of Section 2 in Chapter 1, Part I.

1.2 Quebec civil law [QCL]

QCL values freedom to contract.[563] A contract in Quebec requires consent[564] from legally capacitated parties who have a cause and an object (essential material elements); the primary consideration of which is the real intention of the parties and whether they have concluded "a meeting of the minds."[565] The Quebec contract is not viewed as a bargain, rather as evidence of a relationship.[566] A contract is, therefore, an exchange of consent between two or more capacitated parties with no specific formalities.[567]

Interpretation of the contract is subject to categorizing the type of contract. If the contract is considered to fall into a nominate category, the civil code provides a bucket list of specific tools to be applied by adjudicators. However, if the qualification falls into innominate categories, there is no intended additional intervention by the legislature (other than public policy, including the overall principle of good faith) and therefore contracts are de-regulated to allow freedom of contract to operate.[568] Where there are no expressed terms, the Court may rely on the literal meaning of the contract[569] or may infer terms by the conduct of the parties.[570]

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[563] *See supra* note 402. Tancelin explains the will theory : "Cette théorie [l'autonomie de la volonté] repose sur la philosophie individualiste de l'école du droit naturel…La liberté de l'individu ne devrait être restreinte normalement que par sa volonté propre qui est dite pour cette raison, autonome, c'est-à-dire soumise en principe à aucune autorité supérieure…L'instrument juridique par excellence de la limitation de la volonté…est le contrat." at 56.

[564] Under Quebec civil law, the contract is the supreme expression of the parties' obligations in which consent is sufficient. *See supra* note 38. Baudouin/Jobin at 142 and 143.

[565] Under Article 1412 C.c.Q., the object of the contract must be "envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract." See Article 1378 C.c.Q. regarding the meeting of minds: "A contract is an agreement of wills…"

[566] *See supra* note 205. Trakman.

[567] Article 1385 C.c.Q. reads: "1385. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form. It is also of the essence of a contract that it have a cause and an object." *See also supra* note 38. Baudouin/Jobin at 92. This Article presumes that the contract does not fall within legislative specifications found in nominate contracts.

[568] *Supra* note 403. Fréchette at 419.

[569] *Sarrapuchiello v. Frank Marconiand Marzcorp Oil & Gas Inc*. 2016 ACCQ 1993.

[570] *See supra* note 434. *Denzell*, *Parkland*.

2. Freedom *from* contract

Freedom *from* contract is the legal presumption of absence of legal liability unless the parties have expressed otherwise, under the general rule that an agreement must be freely and voluntarily entered into.[571]

2.1 Canadian common law [CCL]

There is a presumption under CCL that no contractual obligations arise unless the parties have specifically committed to a validly binding offer and acceptance.[572] Parties may also specifically exclude legal ramifications by expressing this intention in preliminary documents, such as letters of intent.[573]

2.2 Quebec civil law [QCL]

A subjective test is used to ascertain whether a contract has ensued or not under QCL. However, where parties have not expressly stipulated the subjective desire not to be bound by legal consequences, their intentions must be evaluated under an objective test.[574] Under QCL, where parties have expressly stipulated their desire not to be bound by legal consequences, freedom *from* contract is upheld as vehemently as freedom to contract.[575]

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[571] Brian Bix, "Background Rules, Incompleteness, and Intervention", 2004 Wis. L. Rev. 379. Bix qualifies: "…that one is bound to the extent – *and only to the extent*- that one has voluntarily undertaken such obligations. " at 384.

[572] *See supra* note 9. Swan: "Though the actual treatment of the problems that arise in negotiating relations is complex, the general attitude of the law is that, especially through the operation of the rules of offer and acceptance, negotiations are legally irrelevant and a contract only comes into existence on the acceptance of the final offer." at 146. See also an interesting commentary on classic comprehension of contract creation as a "light switch" and a call for a broader approach: Charles L. Knapp, "An Offer You Can't Revoke", Wis. L. Rev. 309, 2004 at 321.

[573] *Ibid*. Swan §2.266 at 317.

[574] *Supra* note 38. Baudouin/Jobin.

[575] *Soulieman* v. *124128 Canada Inc.*, 2015 QCCQ 10861 (CanLII) demonstrates that freedom of contract includes the freedom not to enter into a contract at para. [44]. Furthermore, the principle of good faith is not meant to limit freedom of contract, rather to set a standard of honesty and loyalty during negotiations. at para [52]. *See also Joginder Singh* v. *Daljit Kohli Trio Properties Ltd.*, 2015 QCCA 1135 at para. [44].

3. Preliminary instruments: freedom to agree later

Freedom to agree later is entangled with misleading propensities. Preliminary agreements have been considered as a "safe zone" in the negotiating game based on freedom *from* contract.[576] Letters of intent could circulate between the parties and, if they were *labeled* as such, both the juridical and business worlds considered, popularly, that there would be no legal consequences.[577] This *game* providing a "safe zone" is as innocent as the child's game of tag; but TBN are not played in a playground. There is no "safe zone" in TBN, only uncertainty in law.[578]

The reason commercial parties draw up preliminary instruments is for planning purposes. Preliminary agreements offer TBN parties a manner to set up ancillary matters to the buy-sell agreement with third parties, such as transportation, research on tariffs and taxes, or to provide evidence necessary to obtain financing.[579] Lake/Draetta describe the importance of letters of intent as pre-contractual instruments.[580] They are occasionally used for investigation purposes to ascertain whether there is a prospective business relationship with the intention not to create legal obligations. However, there are other instances where preliminary agreements are used to promote a budding

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[576] *Ibid*. Swan Chapter 6 at 16: "It is customary to refer to a letter of intent as a "non-binding agreement…in fact, One part will be binding commitments…the other part, the non-binding aspects of the letter of intent, deal with the terms that are intended to be in the definitive agreement, price, financing, payment terms, etc. These terms are "non-binding" because the buyer has not committed to pay any price and the seller has not committed to the sale." at 16.

[577] *Supra* note 42. Lake/Draetta refers to *Dunhill Secs. Corp. v. Microthermal Applications Inc.*, 308 F. Supp. 194 (S.D.N.Y., 1969), 'the court noted: "A letter of intent is a customary device used within the financial community, and it is clear that the financial community does not regard such a document as a binding agreement, but rather, as an expression of tentative intentions of the parties." at 7. *See also* Marcel Fontaine, « Les lettres d'intention dans la négotiation des contrats internationaux », 3 Droit et Pratique du Commerce International 2 (1977) at 10. *See contra:* Johanna Schmidt, « Les Lettres d'intention" in Lesguillons (Ed*.), Revue de Droit des Affaires Internationales*, International Business Law Journal, no. 3-4, 2002. Schmidt warns that this may not always be the case : « Lorsqu'un personne entame des relations économiques avec une autre, elles peuvent souhaiter exclure par avance la création d'une obligation contractuelle. L'efficacité juridique de telles déclarations d'intention est variable. » at 259.

[578] *Supra* note 176. Fontaine/ De Ly at xviii. "Legal ramifications are probable from inception."*See also supra* note 42. Lake/Draetta attest: "there is no commonly recognized formula with which U.S. parties to a precontractual document may remove uncertainty as to their intentions. Early cases suggested that a presumption existed in favour of treating agreement contemplating subsequent agreements as nonobligatory until the subsequent agreement was reached. [Corbin § 107]" at 72 .On the other hand, Lake/Draetta also refer to *Raisler Sprinkler Co. v Automatic Sprinkler Co*., 171 A. 214 (Del. 1934). "*See also Clanton* v. *Baines Oil Co*. 417 So. 2d 149 91982) (a letter of intent, called by its preparer "suggested Draft of Intent," was held to constitute an agreement to agree.)." is either subtler or vaguer…and increasingly imposes good-faith obligations during the negotiation stage." at 59.

[579] *Supra* note 42. Lake/Draetta exhibit another factor: "We have noted that one of the main uses of letters of intent is to provide assurances to third parties such as financing institutions. In this case the letter was requested by the party seeking to deny its effect." at 102.

[580] *Ibid*. Lake/Draetta explain: "Despite their uncertain legal status, letters of intent are useful devices, and can play a legitimate role in the negotiation of business transactions…It may also serve as a frame of reference for an analysis of the legal effects of letters of intent." at 11.

commercial relationship[581] and determine those aspects that the parties agree to mutually bound even though there is a need to enter secondary communications before the "bargain" is solidified.[582]

In TBN, there are a series of mini-agreements that take place during the processes of negotiation. Due to a plurality of cultures and legal jurisdictions how these mini-agreements are understood is not uniform.[583] The freedom *to agree later* can best be explained by the business principle that the parties "cannot eat the whole pie in one mouthful."[584] Nevertheless meaningful undertakings are being exchanged, some which remain vacant to law.

Parties who have not ascertained the extent of the pie face three possible scenarios. Firstly, the parties may wish only to investigate whether they are even willing to plan a business venture together. They desire to remain window shopping. If, on a second level, the willingness to enter into a business relationship exists, then the parties may recognize that they are committed to a business relationship together but only a rough framework has been carved between them.[585] Sometimes the parties have agreed to some concrete terms or made promises to one another, but the agreement between the parties remains incomplete. Lastly, the terms may be conditional on a mutually satisfactory accommodation between the parties. Nevertheless, the parties have agreed to proceed forward and invest time and capital into the mutual project that they are committed to. This investment can become a source of legal obligations, depending on the interpretation of the parties' conduct in a court of law.

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[581] *Ibid*. Lake/Draetta argues that the: "…seriousness of intention in the precontractual sense is normally an intention to advance the negotiation. In large and complex transactions, business people make numerous contracts with numerous potential suppliers, customers, and partners before substantial negotiation of a contract begins." at 12.

[582] *Ibid*. Lake/Draetta display:"…the mere fact that a precontractual agreement leaves some matters to future agreement does not render it void, and both English and American courts are willing to construe missing nonessential terms, provided that an intention to create a contract is shown.[Chitty § 111.]" and "In many circumstances not even the price is an "essential" term" at 60.

[583] *Ibid*. "Since [the increasing numbers of transactions that involve parties that are foreign to each other] such parties are the products of different cultures and legal systems, they may have only a vague idea of the ethical and legal effects of their negotiations. Such insecurity creates an understandable desire to reduce negotiations to writing at a relatively early stage…The common law and the civil law conceptions of contract are so different that one can only point out differences in approach to precontractual agreements and indicate how different documents might be treated in both systems." at xix.

[584] *See supra* note 15. Ghauri. *See also supra* note 30. Schwartz/Scott at 678.

[585] The general direction of the parties is outlined between them but the road to attain their goals may not be firmly established. There may be obstacles along the way; there may be roadblocks or unexpected detours.

Preliminary agreements may take on various forms, including letters of intent, agreements to agree later[586] and agreements to negotiate in good faith. We must identify the *degree* in which a writing or conduct can initiate obligations or neutralize any "safe zone".[587] In other words, when do parties step from "the non-legal world into the world of a legal relation?"[588]

3.1 Canadian Common law [CCL]

The general presumption in CCL is that until an offer has been "unequivocally accepted, there is no relation of any kind."[589] However, we have observed that commercial business parties conducting long-term transactions prefer to deal with matters of a certain timeframe and therefore proceed with mini, inter-connecting agreements as the deal unfolds.[590] These mini agreements often fail to be recognized under CCL, and therefore an extra-contractual remedy may be considered to be implied by the parties, encroaching on party autonomy rather than identifying the will of the parties.

The large concern is what the courts will do in the event of a dispute. To determine whether an obligation is owing, courts may consider whether the matter brought before the courts is between strangers or whether it is between negotiating parties who have been doing business together in the past.[591] If they have, in fact, done business together in the past and have no specifically expressed contract, past dealings can take precedence on the basis of conduct, leading courts to believe the parties would proceed on a similar basis. The CCL justifies its position by setting an objective test of what a reasonable person would do.

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[586] Pertaining to when a number of matters discussed have been agreed to but secondary issues which have not yet been entirely determined.

[587] *Ibid*. Lake/Draetta refer to I.G. Delaume, Transnational Contracts Booklet 1, 35 (1988): "It has also been implied that the phrase "letter of intent" denotes a document that "seeks only to arouse the interest of a prospective partner" and is thus more preliminary than a "letter of understanding" or a "memorandum of understanding," which are characterized as "interim arrangements…which have a binding character." at 6.

[588] *Supra* note 9. Swan CCL at 522.

[589] *Ibid* at 524. Swan further elaborates the value of expectation:"§4.168 The recognition of this expectation runs counter to the structure of contract-making that the traditional rules envisage. That structure assumes that, until the offer is unequivocally accepted, there is no relation of any kind." at 524.

[590] *Ibid*. Swan characterizes: "In many situations which occur in practice, the parties see themselves as making a deal one step at a time so that the final "acceptance" builds on a lot of smaller "acceptances". at 524.

[591] *Ibid* at §4.172. Swan teaches: **"**The key to understanding what the courts are likely to do and to developing a principled basis for what the law is, is the recognition that the relations between the parties can exist across a broad range. At one extreme, are the negotiations conducted by those who, until those negotiations began, had no knowledge of each other's existence. At the other end, are those who have been doing business for years on terms that each has understood and accepted." at 524.

Qualification of the agreement is another matter. For example, a letter of intent may contain two parts. One part may be "non-binding", serving to enumerate details of anticipated projections while another part may be intended to legally bind the parties, such as confidentiality.[592] Preliminary agreements are meant to articulate common understandings. Swan clarifies that "[b]oth a letter of intent and a term sheet regulate the rights and obligations of the parties while the definitive agreement is being negotiated."[593] But the line between binding and "non-binding is not always clear: "one of the serious risks of a letter of intent is that, in spite of the lawyers' careful drafting, what is intended to be a non-binding agreement may, perhaps through the conduct of the parties, become a binding agreement."[594] Consequently, incomplete agreements or preliminary documents that fall short of contractual recognition fall into a pit of uncertainty, both in terms of contractual validity and interpretation.

3.2 Quebec civil law [QCL]

For the most part, "agreements" have a wider range in Quebec since an agreement need not be complete under QCL as long as the parties have consented to definite terms.[595] Unlike her English sister, even if the agreement is incomplete,[596] QCL courts will identify an agreement unless it is missing material elements.[597] For example, in *Ahmed Soulieman and 9285-8869 Quebec Inc.* v.

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[592] *Ibid* at 317 para. §2.266. Swan partitions letters of intent: "One part, dealing with the details of the proposed deal, sometimes identified as the "non-binding" provisions of the letter...[and] will go on to acknowledge that the terms of those paragraphs are not intended to create any legally binding obligations or agreement between the parties. The second part, dealing with the conduct of the parties during the negotiations...will deal with the buyer's right of access...and…obligation to keep the information that it has obtained from the seller confidential. These binding provisions might deal with issues of disclosure to third parties, the existence of a break-up fee and how the process will be brought to a conclusion if the parties do not proceed to the stage of a definitive agreement." at 317.

[593] *Supra* note 9. CCII Swan (Chapter 6) at 17.

[594] *Ibid* Swan at 18. Swan refers to *Texaco v. Pennzoil Co*. (1987), 729 S.W. 2d 768 (Tex. Ct. App.).

[595] *See* supra note 38. Baudouin/Jobin.

[596] Barring fraud, mistake or any other illicit matter.

[597] *Supra* note 575 at para. [65]. A lessee visited the premises belonging to Defendant in order to set up a restaurant business. The lease was presented as a net net lease of $2,500.00 per month. The parties agreed that the lease could be a duration of two years. Soulieman allegedly declared that the terms suit him perfectly and that once he acquired the occupation permit, liquor license and architectural plans, he would sign the lease. No written documents were signed between the parties. After having his restaurant licensing refused, the lessee took action against the lessor for repayment of expenses incurred by him as a result of the pending lease.

124128 Canada Inc. [*Soulieman*],[598] the Court dismissed the action as it considered that material elements were missing, and therefore the parties were not recognized to be in a contractual relationship.[599] The court further ruled that the invitations were *merely* pursuing negotiations, [600] referring to *Joginder Singh* v. *Daljit Kohli Trio Properties Ltd*. [*Singh*][601]:

> "Freedom of contract, as a demonstration of free will, which entails freedom not to enter into a contract, is the rule. In and of itself, refusal to enter into a contract is not considered blameworthy and no personal liability may ensure from such a refusal…"[602]

The task of the Court of Appeal in *Singh*[603] was to determine whether the parties had entered into an agreement or whether they were simply negotiating with the view to outline future discussions.[604] The court considered that the parties had not entered into a binding contract.

Article 1385 of the C.c.Q. is clear: "A contract is formed by the sole exchange of consents between persons..." However, there are very few examples where a meeting of the minds was considered by the courts to have taken place in absence of strong evidence.[605]

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[598] *Ibid*.

[599] *Ibid. Soulieman*. at para. [65].

[600] *Ibid. Soulieman*. The court considered that the lease was contingent on the solvability of Soulieman and that the discussions were merely invitations to "poursuivre les negotiations" at para. [67].Though the Court in *Soulieman* spent some time discussing the principle of good faith but concluded that high expectations of having a contract form is not conclusive of a breach of good faith at para. [65].

[601] *Supra* note 575.. The court dealt with the matter of whether negotiations were ruptured abusively.

[602] *Ibid*. *Soulieman* at para. [66]. *See also Construction Canada v. Bibliothèque et Archives nationales du Quebec*, 2012 QCCA 1228, J.E. 2012-1346. The Court ruled that: "…no one has to enter into a contract or make a promise to contract and there is a corerelative right to terminate negotiations. That such negotiations are generally undertaken with the anticipation that a contract will ensue does not mean that one party cannot change his or her mind along the way, even at the last minute." at para. [40].

[603] *Supra* note 575. *Singh*.

[604] *Ibid*. *Singh* at para. [109] the real crux of the matter: "At best, this Memorandum was a pre-contractual arrangement by which the parties agreed to continue working towards a final agreement that would require the consent of the other Kripa's shareholders. The Court considered that the MoU was "not sufficient to constitute a binding and executory contract and could at best be construed as a pre-contractual arrangement that required further negotiations between the parties as well as the approval of the other…shareholders." at para. [27] and [109]. The Court also turned to the matter of good faith for justification of its conclusions. It was considered that the rupture of negotiations did not lead to loss of opportunity or advantage of compensation of profits when a contract had not been conducted at para. [106]. *Singh* is of particular interest as it also raises questions of juridical security which are of concern in international trade. If a party does not have the capacity to contract, the contract may be caduc.The appellant was the president, founder and controlling shareholder of an oil-drilling company. He had collected private investors who held privileged shares, allegedly not participating in the running of the company. Unlike previous inventors, Singh required controlling votes when investing so the parties entered into a Memorandum of Understanding [MoU]. The question before the Courts was whether the MoU was a binding offer to purchase agreement or negotiations *towards* an offer to purchase shares. The trial judge concluded that the appellant had acquiesced to the MoU and therefore it became legally binding and that the respondent was entitled to rely on appellant's authority to represent the company as a whole. However, the Appellant Judge concluded that there were essential material elements missing in the MoU, hinging its decision on the fact that the shareholders could not be bound by the representations of appellant, and therefore the agreement could not be a binding contract.

[605] *See supra* notes 429 and 431. *Tradezone*, *Multiplex*, *Denzell* and *Parkland*; and *infra* notes 611 and 618. *TVA* and *Papagiannis*.

In *Syndicat de Copropriété Le Versailles v. Heywood Buildings Inc.*[*Heywood*],[606] an agreement was signed between the parties to settle their dispute "out of court". Plaintiff argued that the agreement constituted a settlement, having the essential elements required to conclude a meeting of the minds. Defendant disagreed. The Court found that there was a valid transaction that could be homologated by the Court, but nevertheless delivered interesting obiter:

> "Pre-contractual negotiations, even when pursued with all possible honesty, loyalty and good faith, may not succeed, and the right of each party, in the end, not to enter a contract hangs over all negotiations (except in the rare circumstances where…) there is an actual contractual obligation to enter into a contract."[607]

For the courts to recognize an agreement, it must be sufficiently clear that the parties arrived at a "meeting of the minds".[608] The constitution of a "meeting of the minds" is considered to have taken place between two parties who are capable of contracting with regard to a specific cause and object, emphasizing a flexible manner to emphasize the liberty of persons to arrange their own affairs.[609]

More challenging, once a Court recognizes an agreement regarding a proposed business venture exists, the agreement is subject to **interpretation** (unless the parties have stipulated their

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[606] 2014 QCCS 5634.

[607] *Ibid* at para. [65]."Nor is a contract ambiguous simply because general terms are used by the parties. Article 1431 C.c.Q. stipulates that the clauses of a contract cover only what the parties intended, however general the terms used."The Court turned to Article 2631 to determine what a "transaction" constituted: "a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations"…at para. [36]. Once the existence of the transaction be established, it "has the authority of a final judgment." at para. [42] referring to Article 2633 C.c.Q.The judge in *Heywood* emphasized the constitution of contractual formalities under Quebec law: "[52] A contract, and not just one of transaction, is formed by the sole exchange of consent between the parties [1385 C.c.Q.], whether that be express or tacit [1386 C.c.Q.] and without the need in most cases for a specific form." *See also ibid. Heywood.* Morrison, J. considered that: "A contract is not ambiguous simply because the parties do not agree on its interpretation [citing *Messageries de presse Benjamin inc.* c. *Publications TVA inc*. 2007 QCCA 75.] at para [64].

[608] *Michael Publishing Company Inc.* v. *Companies Warnaco du Canada* 2003 CanLII 37910 (QCCQ). [*Michael Publishing*] Marengo, J. considered that there was no contract due to absence of a material fact.However, a missing term may be *replaced* by a verbal or implied fact where the Courts can identify a "meeting of the minds" of the parties.

[609] *See supra* note 426. *Multipix*. *See also ibid Michael Publishing* where it was considered that there was no meeting of the minds as an essential element of the contract (the rate) was missing, therefore the court considered that there was no contract and the Applicant's claim was denied. *See also supra* note 434. [*Denzell Merchandizing*]. The court held that there was no meeting of the minds with regard to the terms of cancellation of the contract "and more particularly on the applicable standard of what would constitute a cause of cancellation for cause, let alone what the financial consequences of such cancellation would be."at para. [32].

terms expressly and unambiguously) to ascertain whether any contractual obligations were breached, and therefore whether quantifiable damaged that should be compensated.[610]

There are dangers when no written agreement has taken place. The court held in *Groupe TVA Inc.* v. *Bell Expressvu Limited Partnership*, [TVA v. BEV]:[611]

> "The evidence as to the scope and content of the alleged verbal affiliation agreement is contradictory. The only evidence that is clear and uncontradicted is that there was a meeting of the minds as to the rate of royalty payable by BEV to TVA for the distribution of its LCN service to its subscribers."[612] The court considered that: "…notes and unsigned drafts [were not] evidence of the agreed and objective "*volonté réelle*" of the parties as to their rights and obligations *inter se*. It is clear to the Court that the negotiations between the parties were unfruitful and reached an impasse. The reasons for these impasses are both contradictory and, moreover, irrelevant. The Court is satisfied that, other than as to the payment of royalties, there never was in fact a meeting of the minds as to the scope and content of a complete affiliation agreement to be entered to by the parties." [613]

Although the court recognized that a meeting of the minds took place, there was insufficient evidence to construe that the agreement reached any further than a simple payment of royalties. The scope of what constitutes a meeting of minds is consequently comprised of factual evidence. Since there was no further evidence available to the courts, additional rates and audit rights were unenforceable.

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[610] *See supra* note 426. *Tradezone Securities*. Failure to prove that within the contract was a binding agreement as to proprietary trades resulted in the inability to recover damages for proprietary rightsat para. [99]. Therefore, only unrealized profits could only be compensated if they could be proved to be "direct, certain and foreseeable." at para. [100]. Since the contract had provided that a written notice to terminate the contract unilaterally incurred a penalty only after a delay of six months, the court held that the only eligible compensation that could be enforced was the six-month period prior to the notice of termination.Although there was a written contract between the parties, the court considered that to determine whether an agreement existed with regard to *proprietary trade rights* within the contract, "actions sometime speak louder than words and can be evidence of an individual's intention"at para. [61]. Furthermore, the terms of termination must be determined at para. [66].The Court recognized a binding agreement between the parties under Article 1378 C.c.Q whereby a "contract is defined as an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation." However, the question was whether it extended to proprietary trade rights specifically or not.

[611] 2012 QCCS 4169. An action for an injunction and to seek compensation of royalties from Defendant was instituted. TVA accused BEV of "account stacking" its subscribers to avoid paying such royalties since TVA had been remunerated in accordance with the number of subscribers of a certain programming, referred to in the judgement as LCN programming. BEV contested the motion on the grounds that no affiliation agreement was concluded and, therefore there was no audit clause to prevent account stacking. To determine whether royalties were due as a result of the account stacking, the Court considered whether there was an oral affiliation agreement between the parties. Since the parties had been conducting business together and habitually paying out royalties, BEV argued that the agreement was limited to payment of a rate of royalty frequently found in affiliation agreements.TVA contended that additional provisions, including audit rights, (based on the number of BEV subscribers of satellite television "Direct-To-Home" broadcasting) were agreed to between the parties in several exchanges.

[612] *Ibid. Groupe TVA* at para. [37].

[613] *Ibid. Groupe TVA* at para.[40], [41] and [42]. Furthermore, when subjective evidence is not apparent, and it is objectively reasonable to assume that the parties would have intended an implied obligation in virtue of this meeting of the minds, the courts have enforced obligations.When the courts cannot find a contractual, by virtue of the parties' intentions, it may impose an obligation based on customary practice or the principle of good faith; an objective test of what reasonable parties would have concluded.

The uncertainty of whether parties are considered in a contractual arrangement even though no agreement has not been formalized compounds with the fuliginous uncertainty of the extent of rights and obligations between the parties when they are not expressly stipulated by the parties. Nevertheless, the courts are awarding damages, the application of which remains decidedly opaque,[614] since there are still instances when semiotic communications remain undetected, and therefore the terms of the contract cannot be recognized.[615] Buffoni, J. presiding in *Denzell Merchandizing Inc. (Twice as Fun Inc.)* v. *Calego International Inc*. [*Denzell Merchandizing*] identified this concern when determining whether there was a meeting of the minds in connection with the cancellation of a contract:

> "In the absence of a written contract, the challenge is to determine what exactly the parties agreed upon, especially in the event of termination of their business relationship…[616] Although no written agreement was ever finalized, let alone signed, both parties agree that some sort of verbal contract existed between them. They do not agree as to what it

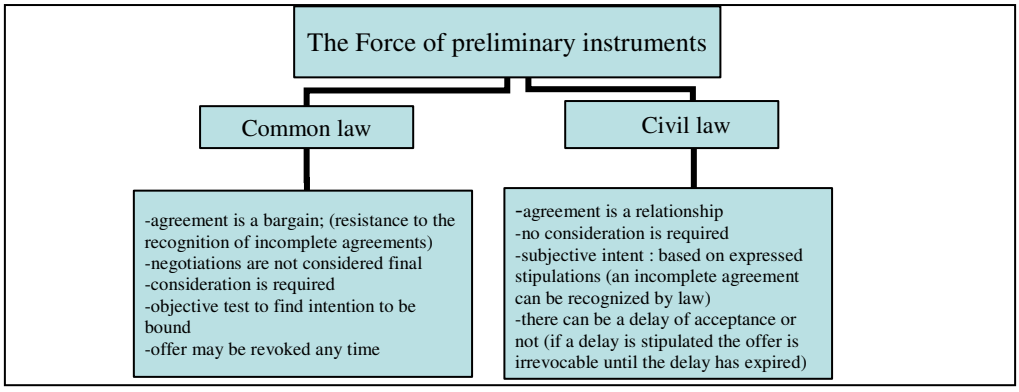
[614] Incomplete agreements can be recognized on the same basis if there is a "meeting of the minds". We have seen that the uncertainty in recognizing an oral agreement is that the parties are subject to court interpretation of their conduct, custom or reliance on the principle of good faith. The danger of recognizing an incomplete agreement is also that the parties themselves have not expressly stipulated the precise terms and conditions of the agreement, and therefore the courts must deduct what the terms of the agreement were in accordance with facts that are admissible in court. An illustration of this dilemma is found in the recent case of *supra* note 428. In *Parkland*, a lease was entered into between Parkland, the owner of a commercial immovable property and Bill Chen and his numbered company, the operator of food supermarkets stationed in Toronto. The lease was subject to the physical modification of the building by Parkland in order to accommodate Chen's needs and a sketched configuration of such modification was annexed to the lease. The lease contained a clause whereby it could not be modified without the written consent of the parties. *See Parkwood* para. [121] Section 20.12 of the lease was reproduced: "THIS LEASE MAY NOT BE AMENDED OR MODIFIED IN ANY RESPECT EXCEPT BY THE WRITTEN CONSENT OF THE PARTIES HERETO OR AS OTHERWISE SPECIFICALLY PROVIDED FOR IN THIS LEASE." and the Court's response that the lease did not provide provision for modification of the configuration of the property. at para. [123]. During a 16-month negotiation period, Parkwood and Chen lobbed back and forth on a new configuration. Meanwhile, Parkwood did not disclose the difficulties it was encountering with city official permission. After proposing different configurations, that Chen considered upon professional advisement would not suit his needs, Parkwood's impatience led to a demand that Chen take possession of the leased property. Chen's lawyer responded with a notice to terminate the lease. Two issues concerned the court: 1 - *Whether the lease was ever amended by the parties*;2 - *Whether Chen was free to break the lease on the grounds that Parkland had failed to honour its obligations under the contract*.In Parkwood, although Plaintiff argued that Chen acted in bad faith for not considering alternate solutions and accused him of abandoning the idea of a store in Quebec, the court turned more attention to the conduct of the parties. The Court was disturbed by Parkwood's non-disclosure of the difficulties it was encountering with the city officials. The parties were in negotiations for a lengthy period of time while considering various configuration plans to modify the property to satisfy Chen, thus the Court would have to consider whether the parties intended to modify the original contract, and if so, what the new terms and conditions of the new agreement would entail. *See also supra* note 434. *Denzell Merchandizing*. *See also supra* notes 429 and 431. Discussion in *Tradezone Securities*. *Parkwood* at para. [145] & [147]. Furthermore, when Parkwood insisted on a second security deposit, which was paid by Chen in the anticipation that the construction was about to begin, the court was perturbed by the true intentions of Parkwood. Therefore, the court concluded that since the *Plaintiff*, Parkwood, had failed to honour its obligations under the lease, there was no reason why Chen would not be free to break the lease. The Court ulcerated the return of the second security deposit and arbitrated expertise fees at $75,000.00 to be paid by Parkwood out of the original claim of $196,189.18 due to the lack of hard evidence provided by Defendant (paid in cash). To avoid an estimated outcome by the court, had the parties documented the negotiations (such as the necessity for Chen to consult with expert advise, proof of communications between Parkwood and the City, and reasons for the second security deposit), the communications would have indicated to Defendant that negotiations would be frivolous to continue, thus alleviating the requirement of extra costs.

[615] *Supra* note 434. For example, in *Denzell Merchandizing Inc.*, after doing business for three years together, Plaintiff was served a formal notice to terminate their business relationship. Plaintiff filed an action for the sum of $350,000 US, representing the guaranteed income if the "contract" was carried to full term, due to premature cancellation of a verbal contract. During the early course of business, draft contracts had circulated between the parties (which were never signed) neither of which had preempted termination of the business relationship.

[616] *Ibid. Denzell Merchandizing* at para. [3]. *See also supra* note 608. *Michael Publishing*.

included."[617] The fact that it [what happens if the contract is cancelled] was not brought up during the three years the relationship lasted is not surprising since the parties were capable of carrying on business together without resolving an issue that may never have surfaced."[618]

A preliminary agreement can be a binding legal document if it leads to a common intention of the parties: "The common intention of the parties rather than adherence to the literal meaning of the word shall be sought in interpreting a contract."[619] Establishing the common intentions is the challenge and courts must perform gymnastics to determine party intention regarding the terms and conditions of the agreement based on the court's interpretation of the conduct of the parties in the context of the circumstances.



[617] *Ibid. Denzell Merchandizing* at para. [17].

[618] *Ibid. Denzell Merchandizing* at para. [30]. *See also 4379047 Canada Inc.* v. *Christos Papagiannis* [*Papagiannis*], 2017 QCCS 90 (CanLII). During a lengthy and costly legal battle, a memorandum of agreement [MOA] was signed in order to cease the lawsuit and negotiate terms of settlement. The legal issues that the Court examined were whether the MOA was a legally binding agreement and, if so, whether Plaintiffs had suffered any damages as a result of abusive negotiations. The Court concluded that the MOA was not, in fact, a legally binding document.

[619] *Supra* note 618. *Papagiannis* at para. [46] refers to Article 1425 C.c.Q. *See also Sobeys Québec Inc.* v. *Coopérative des consommateurs de Sante-Foy* EYB 2005-9832 (C.A.) The Court conceded that "the common intention of the parties can be challenging at times" and cited *Sobeys* as an illustration that literal appearances do not always reflect the true reality of the "volonté réelle" of the parties. *See also Mercille v. 9221-8247 Québec Inc*., 2016 QCCA 49, para. 48. *See also Dunkin'Brands Canada Ltd.* v. *Bernice Inc. et al*, 2013 QCCA 867 where the Court of Appeal considered that the trial judge did not err in considering implicit obligations which "flowed from the general nature of franchise agreements versus relying "solely on the express terms of the contractual agreements." at para. [4] and concluded that "the trial judge found that expres and implied contractual obligations were binding upon te parties.This is, in fact, typical of the interpretation of contracts by courts in commercial disputes."at para. [29]. During a lengthy and costly legal battle, a memorandum of agreement [MOA] was signed in order to cease the lawsuit and negotiate terms of settlement. The legal issues that the Court examined were whether the MOA was a legally binding agreement and, if so, whether Plaintiffs had suffered any damages as a result of abusive negotiations. The Court concluded that the MOA was not, in fact, a legally binding document, nevertheless addressed how a preliminary agreement can be a binding legal document if it has lead to a common intention of the parties under Article 1425 C.c.Q. which reads "The common intention of the parties rather than adherence to the literal meaning of the word shall be sought in interpreting a contract." at para [47]. "Hence, one needs to look at the documentary evidence available as well as the subsequent conduct of the parties to find out whether they considered the MOA to be a legally binding agreement." at para [47].

Not all semiotics are accessible and often terms and conditions exchanged through non-verbal semiotics cannot be evidenced in court.[620] Furthermore, when an adjudicator is interpreting a matter in dispute, it must not exceed the boundaries of the intentions of the parties and "re-write" the contract between the parties.[621]

Conclusion: We have observed that Canadian domestic laws, in principle, support party autonomy insofar as a valid contract can be recognized. Where the parties have been expressly specific and unambiguous, domestic laws will enforce the legal rights and obligations assumed by the parties when exercising their rights of freedom *to* contract. Furthermore, domestic laws, in principle, support the parties' desire not to create legal ramifications when they have specifically chosen freedom *from* contract. There remains a presumption in favour of freedom from contract during negotiations.[622]

More problematic, however, is the freedom to agree later. While QCL have a wider range of agreements that can be recognized by law, both Canadian systems suffer from the inability to interpret more intangible semiotics exchanged during negotiations unless there is evidence to show that the parties implied specific terms through conduct or oral exchanges. There is great uncertainty as to whether domestic laws will recognize and enforce a business negotiation agreement, particularly under the constraints of tests of validity of contract required in the CCL. Applying contractual obligations specifically to business negotiations is problematic since the former obligations are static whereas the latter are dynamic.

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[620] *See supra* note 352. Semiotic authors. *See also* Kevin M. Teeven, "A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation", 43 Duq. L. Rev. 11, 2004-2005; and Donald J. Smythe, "The Scope of a Bargain and the Value of a Promise", 60 S.C.L. Rev. 203, 2008-2009. Adjudicators must also ascertain whether or not the parties' rights have prescribed. For example, in Germany, c.i.c. is a doctrine of implied contract and is used by adjudicators to remedy an injured party who would otherwise be preempted to the short prescriptions of the delictual remedy.

[621] *Coderre* v. *Coderre*, 2008 QCCA 888 (CanLii). The Court of Appeal concurred with the trial judge that dismissed the homologation of an arbitral award since the arbitrator was considered to have exceeded his powers when striking out stipulations of a settlement rather than interpreting the intention of the parties. The Court considered that the arbitrator had corrected "the effect of a change of circumstances that the parties could not have foreseen." at para [18] referring to para. [62] of the trial case.

[622] *Supra* note 571. Bix. *See also supra* note 607.

The second obstacle is how law determines the intensity of an obligation arising during negotiations since current regulation depends on whether the parties have clearly expressed the extent of the obligations or whether negotiations fit into other categories of law. The source of the obligations directs the adjudication as to whether there is an obligation and, consequently, the type of remedy or sanction that can be imposed. Yet, adjudicators are asked to make decisions using so few tools to determine what actually transpired.

Under contractual doctrine, even an expressed agreement is subject to interpretation and, more often than not, agreements created during the processes of negotiations remain purposely open to further terms. Partial agreements or agreements to agree later remain enigmatic, particularly to the CCL where mere consensus between the parties is insufficient.

If negotiations are considered virtually norm-free and only have an occasional purpose of interpreting the circumstances of the contract, at first blush, they would appear to have a minor role to play in law. But alas, the plot thickens and like all general rules, negotiations have been laden with disturbing exceptions.[623]

Whether negotiations have been successful or not, they can produce consequences; some of which are legal ramifications and often a surprise to one or more of the negotiation parties. During the exchange of communications, commitments are understood by the parties; investments of time and capital, and risks taken by one or more of the parties. Uncertainty is inefficient; for the law to contribute to the regulation of negotiations it must provide certainty.

[623] *Supra* note 46. Hondius at 11-14: In the common law under estoppel, restitution, trade usage, reliance and unjust enrichment. Grouping French civil law jurisdictions in another category which regard precontractual liability only on a delictual level and German-oriented jurisdictions who generally prefer the doctrine of c.i.c. which applies a contractual doctrine. In a nutshell, Hondius recognizes that precontractual decisions are more complex than "decisions that are usually analysed in the contract law-and-economics literature." at 8. These exceptions have been considered by some commentators to be equivalent to interference to the exercise of party autonomy. *See* Tahila Sagy, "What's So Private about Private Ordering?", Law & Society Review, Vol. 45(4), 2011; *see also supra* note 204. Meng. A closer look might question whether these eruptions are exceptions or whether they are a sign that domestic laws are in process of formulating a new perspective regarding negotiations, if only they had the tools to view party intention.

Section 2: The Foundation of Transnational Laws

➢ What are transnational laws?

> "Faced with an international landscape that 'looks more like a maze of sheep tracks crisscrossing over a mountain range, half-hidden in the undergrowth and interrupted by streams and rocks, linking high peaks and barely known valleys, legal scholars struggle to make sense of the new legal reality progressively imposed by the seamlessly irresistible power of globalisation."[624]

There is no established definition of transnational laws other than to say that they are rules that regulate human activity that crosses national borders. Unlike public international law which regulates law between States, transnational laws apply to all persons; individuals and moral entities, as well as governments, who exercise their civil rights with one another. These rules are generally relating to concepts of law that are recognized widely by a plurality of sources of law, tested through a comparative analysis to ensure that, even though terminologies may differ, a similar concept of law is accepted widely by States, such as prohibition of human trafficking and terrorist offences. Gaillard considers that unanimous acceptance by States is not required.[625]

Philip C. Jessup's concept of transnational law and the distinction between international law and transnational law was documented in 1956.[626] The composition of transnational laws is "not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems…a collection of rules which are entirely anational and have their force by virtue

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[624] S*ee* Antoine Duval, "Lex Sportiva: A Playground for Transnational Law", European Law Journal, Vol 19., No. 6, November 2013, 822-842 at 824. Duval further surmises that « the transnational space is dominated by…'nouveaux intervenants.'» and that "Globalisation does not necessarily entail, however, that the nation states are disappearing, evaporating. The new transnational space is a complex 'assemblage' of levels, structures and organisations. One could easily fall for the reductionist view of a transnational space, which is limited to the sphere of action of international organisations, the extraterritorial intervention of states or the transnational activity of private entities. .

[625] *See* Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?" 17(1) Arb Int'l. 59 (2001) at 63. In an alternative view from laissez-faire doctrine, Gaillard states: "transnational rules…are derived from various legal systems as opposed to a single one, and more generally from various sources." *See also* Leon E. Trakman, "From the Medieval Law Merchant to E-Merchant Law", (2003), 53 U. Toronto L.J. 265. *See also* Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", EJIL 12 (2001), 269-307. Hall identifies three sources of international law: treaty, custom and general principles: "Only two of the three sources - treaty and custom - are clearly positive in character; i.e. they specify obligations and entitlements pursuant to acts of human will. The character of the general principles is…more ambiguous." at 284; *See also* G.-P Calliess, and M. Renner, (2009), "Between Law and Social Norms: The Evolution of Global Governance", Ratio Juris, 22: 260–280. doi: 10.1111/j.1467-9337.2009.00424.x Calliess refers to (Teubner 1997; Schiff Berman 2007). at 262. *See also* Kaarlo Tuori, "Vers Une Théorie du Droit Transnational", Revue internationale de droit économique, 2013/1 (t.XXVII), 9-36 – DOI: 10.3917/ride.256.0009. "Le droit transnational va au-delà de la division entre droit national et international, et par conséquent il est une réaction aux imperfections spatiales et temporelles du modèle de la "boite noire" mises en évidence par les changements socioculturels souvent étudiés sous la notion de *mondialisation*." at 11.

[626] Roy Goode, "Usage and Its Reception in Transnational Commercial Law", International and Comparative Law Quarterly, Vol. 46(1), 1997 at 2. See also Dictionary of law, Oxford at www.oxfordreference.com.

of international usage and its observance by the merchant community." Transnational laws have only been recognized as such after the post-war era, even though the regulation of TBN has roots in an ancient phenomenon.[627]

Due to the plurality of laws and conflict laws that may apply during dispute resolution, choice of law may be determined by private international law or public international law. The composition of transnational laws is "not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems…a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community."[628] Our scope is focused on transnational laws of a private and commercial nature, most of which parties can alter or even override by expressing their intentions in a manner that is tangible to law insofar as it does not contravene public order.

The exercise of party autonomy is evolving into the dominant source of law production under transnational laws. For example, Stephan advocates that "[t]oday the production and enforcement of international law increasingly depends on private actors, not traditional political authorities."[629] Furthermore, international arbitration defers to expressed party intention insofar as it is unambiguously agreed to between the parties and does not contravene public order.

Parallel with the exercise of party autonomy rides *lex mercatoria*; a body of customary rules that is considered implicitly accepted by the parties in the event they have not expressed otherwise.

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[627] *Supra* note 153. Oduntan turns back history: "Certain myths pervade common understanding of international business…There is an assumption that the regulation of IBT is a very modern phenomenon and one which exists solely as a result of sophisticated governmental regulation and intergovernmental diplomatic relations. The correct view is that each epoch since antiquity and even beyond has produced its own interethnic or international business transactions based upon what is traded at the period and according to various levels of sophistication." at 93.

[628] *See supra* note 153. Oduntan at 93.

[629] Paul B. Stephan, "Privatizing International Law", 97 Va. L. Rev. 1573, 2011 at 1574 and 1575. *See also* Reza Dibadj, "Panglossian Transnationalism", 44 Stan. J. Int'l L. 253, 2008. Dibadj vibrant article opens enthusiastically: "Transnationalism represents a major leap forward in our understanding of events that cross national borders. Faced with the narrow strictures of classically-defined international law which centers on nation-states, beginning in the 1952s, brilliant scholars espousing a transnational approach broadened the realism of inquiry. They emphasized not only the possible variety of actors, public and private, that engage in cross-border conduct, but also the plethora of laws that purport to regulate these activities." at 254.

Lex mercatoria is sometimes considered "uncodified, non-statutory and non-conventional".[630] But the very essence of *lex mercatoria* and the fact that customs can evolve is precisely how business parties acquired the flexibility they require for future growth in their dealings to maintain efficiency.

Law has, nevertheless, not progressed with the needs of the global market, while the search continues for better solutions to harmonize international trade. Notwithstanding its dynamic capacity to evolve, transnational laws have still not kept up with transnational business practices, despite of efforts to expand transnational laws, primarily since there is no manner to record all of the semiotic communications exercised between TBN parties in a manner that can be evidenced in a tribunal so that adjudicators can apply the expressed intentions of the parties in the same manner as they would honour a contract under *sunt pacta servanda*.

We will begin our journey with a short journey through the historical transformation of *lex mercatoria*, which is of voluntary nature, flexible and dynamic, having existed over a patterning of time by the parties themselves. Moreover, we posit that *lex mercatoria* has transformed again, maintaining its own juridical order through party autonomy, based on rich practices established through a pattern of time and acceptance.

In fact, the dynamic nature of transnational laws bridges commonalities with *lex mercatoria*, providing flexibility and methods for law to evolve to maintain efficiency for commercial dealings if only it could find a manner to record meaningful communications and obligations that TBN parties construct during the negotiations processes, currently invisible to law.

Our last section will identify how international arbitrators have supported party autonomy, and in absence of expressed stipulations by the parties, have applied general transnational principles of law as gap fillers and investigate how transnational laws can become mandatory.

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[630] *Ibid*. Goode at 2.

1. The flexibility of transnational laws

While characteristically transnational laws are flexible and dynamic to keep up with the growing needs of the global market, there are commentators who contend that this flexibility leads to uncertainty in law.[631] This position could be justified if we consider the lack of juridical tools available to record flexible but specific expressions. Other commentaries support the development of transnational principles albeit through different facets,[632] Some commentators have observed that transnational laws are entwined in other sources of law[633] under one large heading of "private transnational laws".[634] But it is the great leadership of commentators such as Thomas Carbonneau and Emmanuel Gaillard who shed brightness towards the future regulatory well-being of the global market[635] with their wisdom and thirst to conquer a new vision of law production.

Transnational laws are derived of many sources of law: domestic state laws and non-state laws, including public international law, private international laws, party autonomy and custom and usage, including merchant custom, called *lex mercatoria*, a body of merchant rules and principles developed over time by the merchants themselves that are implied in ordinary business practice.

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[631] *Supra* note 171. Mustill, J. hurls accusations of vagueness, proliferated amongst others, such as *supra* note 120. Donahue at 22; and Emily Kadens, "Order within Law, Variety within Custom: The Character of the Medieval Merchant Law", 5 Chi. J. Int'l L. 39, 2004-2005; Emily Kadens, "The Myth of the Customary Law Merchant", 90 Tex. L. Rev. 1153, 2011, 2012.

[632] *Supra* note 93. Carbonneau repels the arguments: "The opponents of lex mercatoria, armed with their skepticism of arbitral a-nationalism, found their criticism upon a rigid concept of law and a formalistic notion of state sovereignty that has become an intellectual fixation as unhealthy as any psychological counterpart." at 84. He continues the thought later in his volume by concluding: "When compared to domestic law, international law-making is plagued by the rule of force and the absolute supremacy of national sovereignty…Although sovereignty remains a factor in this setting, it is not a black hole that eats up every morsel of legal civilization." at 389; *See also* G.-P Calliess, and M. Renner, (2009), "Between Law and Social Norms: The Evolution of Global Governance", Ratio Juris, 22: 260–280. doi: 10.1111/j.1467-9337.2009.00424.x Calliess refers to (Teubner 1997; Schiff Berman 2007). at 262. *See also* Michael Joachim Bonell, "The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?", 1 Unif. L. Rev. n.s. 26, 1996; Bonell, Michael Joachim, "Soft Law and Party Autonomy: The case of the Unidroit Principles", 51 Loy. L. Rev. 229, 2005 at 229; Bonell, Michael Joachim, "The CISG, European Contract Law and the Development of a World Contract Law", 56 Am. J. Comp. L. 1 2008; Marcel Fontaine, « Vingt-cinq ans de recherches sur la pratique des contrats internationaux », in Lesguillons (Ed*.), Revue de Droit des Affaires Internationales*, International Business Law Journal, no. 3-4, 2002 ; *supra* note 176. Fontaine,/De Ly; Filip De Ly, "Law and Practice of Drafting International Contracts", in Lesguillons (Ed*.), Revue de Droit des Affaires Internationales*, International Business Law Journal, no. 3-4, 2002 ; Berger's creeping *lex mercatoria* found and updated on www.trans.lex.org/100600. On the one hand, international advocates of harmonization of trade prefer documents standards of transnational principles, supporting works such as UNIDROIT, Berger prefers an ad hoc approach due to the evolving nature of transnational trade.

[633] *Supra* note 77. Slaughter-Burley. *Supra* note 77. Koh explains the process of how transnational law becomes entwined through internalization; *See also supra* note 629. Stephan at 1589.

[634] *Supra* note 189. Oduntan. *See also supra* note 629. Stephan has documented: "Jeremy Bentham, who originated the term "international law", saw it as a project to promote general welfare, principally through "general and perpetual treaties" enacted by sovereigns...[H]e assumed that international law was exclusively about the rights and obligations of states *inter se* and not about rights and obligations of individuals" at 1574.

[635] *Supra* notes 22 and 189. Carbonneau and Gaillard.

1.1 Historical transformation of merchant custom

International commercial law embraces merchants in "a transnational community which has had a more or less continuous history, despite countless vicissitudes, for some nine centuries. It is the mercantile community that, in the first instance, generated mercantile law."[636] Merchants have exercised their trade under the umbrella of party autonomy. Customs arose out of necessity; a body of transnational customs governing "a special class of people (merchants) in special places (fairs, markets, and seaports),"[637] while regulating their business of exchange and transport[638] of goods. These customs through the medieval era were referred to as the merchant law or *lex mercatoria*: a body of informal rules that spread from the Mediterranean and through the continent to England in medieval times. Many customs were gradually integrated into the English common law.[639] They allowed parties to transcend borders by recognizing a certain set of standards and methods that all merchants practiced.[640] Trust had to be created through some vehicle as distance prevented parties to be privy of one another's personal and cultural values. These customs were practiced through semiotics, signals that were recognized and applied by the merchants themselves.

The romantic view of merchants is often portrayed as dusty fair streets filled with the hustle and bustle of peasants haggling over their wares. However, in fact, merchants of the 13th century did not fall into typical categories;[641] rather they were a class of their own and often maintained control

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[636] Harold J. Berman and Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria", Harv. Int'l. L. J. Vol. 19 (1), Winter, 1978 at 222.

[637] *Ibid* .Berman/Kaufman depicts the transnational rules characteristics: a "sense of fairness, as an overriding principle." at 235.

[638] *Ibid*. Berman/Kaufman. Necessarily, as the goods crossed national borders, they had to be transported, primarily by ship and therefore *lex mercatoria* and mercantile laws grew side by side. *See also* shipment contracts at 232.

[639] *Ibid*. Berman/Kaufman who claim that Lord Mansfield was responsible for internalization of merchant laws into the common law at 226. *See also supra* note 189. Koh (Bringing) Koh calls this "legal internalization [which] occurs when an international norm is incorporated into the domestic legal system and becomes domestics law through executive action, legislative action, judicial interpretation, or some combination of the three." at 642.

[640] *Supra* note 352. Leeson explains signaling: "Through these signals [practices, customs, and traditions] heterogeneous individuals are able to convey trustworthiness, enabling peaceful exchange despite the absence of a formal institutional structure. This practice is ancient. From tribal societies that engage in one another's religious ceremonies to international businessmen from across the globe who engage in shared methods of contract and arbitration…" at 893.

[641] Kings, nobleman and peasants.

over municipal council.[642] Merchants preferred to settle their disputes in their own private courts in order to cater to a speedy resolution and allow commerce to continue.[643] This socio-economic evolution was recognized as "customary merchant law" by the 18th century,[644] and the recognition of a statistical pattern of factors was documented.[645] The rise of 19th century Sovereign State domination of creation of law through political means offered few tools for the recognition of *lex mercatoria,*[646] in modern times sometimes referred to as an economic creation rather than a political one, not recognized in sovereign legal doctrines; labeled "uncertain" by the juridical positivist movement. The revival of merchant law and recognition of party autonomy has grown out of recognition by international arbitration during the 20th century, commonly referred to as the "New" *lex mercatoria*. In fact, she held an implicit influence even during the development of the doctrines of contracts and torts, but pluralistic tools will reveal her as "the law beyond the state."

To comprehend merchant custom, we must follow the transformation of merchant trade through three basic phases in the history of *lex mercatoria*[647]: **ancient *lex mercatoria*** through the Middle Ages;[648] **the new *lex mercatoria*** which developed in the 20th century through the practice of arbitration; and **the new, new *lex mercatoria***, as a codification of legal rules recognized by

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[642] *Supra* note 8. Aurell.; Supra note 7. Power. Daniel Power, (Ed.), New York, Oxford University Press, 2006.

[643] *Supra* note 7. Power refers tothe writings of William Mitchell on the early history of the law merchant: being the Yorke prize essay for the year 1903, Cambridge, University Press, 1904. Many scholars consider Mitchell a credible source of historical information. A scientific statistical analysis of socio-economic, political, cultural or religious factors and how they influenced law and how they were influenced by law should really be performed in order to serve as proof of historian's allegations.

[644] A search through notes and decisions of Chief Justices such as Lord Holt and Lord Mansfield, acclaimed common law reformist, along with other more informal records should be collected in order to analyze the conclusions of the 18th century.

[645] Justice Atkin, Foreword to Wyndham Anstis Bewes, *The Romance of the Law Merchant*, Sweet & Maxwell, 1923, reprint Rothman 1986 at iii.

[646] Berthold Goldman, *Lex Mercatoria*, 3 Forum Internationale 3, 3 (Nov. 1983): "Lex mercatoria is a venerable old lady who has twice disappeared from the fact of the earth and twice been resuscitated." at 3.

[647] Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, (2007) 14 Ind. J. Global Legal Stud.at 449.

[648] Bristol's Little Red Book written in the 13th century, later referred to through the writings of Holt and Lord Mansfield of the King's Bench, is the first proven 'formulation' of the origin of lex mercatoria as a legal order. Although the Little Red Book has been criticized by dealing primarily with procedure however, it is also said that substance was breathed into it through Lord Mansfield's decisions. Naturally, these decisions, along with the Little Red Book would need to be investigated further to analyze the validity of this statement.

international arbitrators' application of *lex mercatoria*, some of which has been documented both in UNIDROIT *Principles* and Berger's *creeping lex mercatoria*.[649]

1.1.1 Ancient *lex mercatoria*

Returning to the economic expansion of the 13th century, markets relaxed the rigid rules to allow persons to negotiate without a native broker, opening the scope of marketing.[650] One of the primary financial infrastructures for the merchants was the '*fair letter*', suited specifically for merchant needs, which was land marked to constitute the core of merchant law,[651] whereby a merchant could barter his wares during the market season. The fair letter served to recognize a merchant's debt to another.[652] Regulation was mostly contained within the merchants themselves clothed in 'non-legal sanctions.' For example, the enforcement of merchant law on a debtor who did not honor payment was said to be based on reputation alone.[653] The system worked effectively because it targeted not only the person owing the debt, but friends and acquaintances were also forbidden to trade at the market until the debt was paid. These informal rules based on reputation could not be recognized as legal norms until trade "usage" could be identified.[654]

There are many theories describing the origins of ancient lex mercatoria.[655] To consider its origin, we must follow the historical transformation of merchant custom until its attainment of

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[649] www.trans.lex.org/100600. Berger's documentation is intended to reflect the ever-changing values of the global market and available on internet.

[650] *Ibid* at 69 and 79.

[651] The informal negotiable promissory note ("fair letter") was later developed into the formal written, unconditional bill of exchange.

[652] *Supra* note 10. Barrow at 130.

[653] It would appear that there are other factors which require exploration, such as active interdiction to the merchant and his friends from selling and buying at fairs or of seizing the goods for the value of the debt owing. Since privacy and confidentiality surrounded this special order of people it is of little wonder that merchant laws were not written but this very fact sheds doubt on the existence of 13th century merchant law. What is mostly accepted by scholars is that merchants had specific needs which were foreign to other orders of people and relied heavily on speedy enforcement of acceptable business tactics and fairness through privacy and trust. *See also supra* note 7 at 217. Power, who conducted a societal study of the era, cautions that historical relevance is viewed by different nations by their own traditions and culture and therefore the consolidation of historical value may lead to varied and complex conclusions.

[654] Patrick Glenn, "Transnational Common Laws", 29 Fordham Int'l L. J. 457, 2005-2006. Legal scholars were also poets during this era therefore, a poet writing on the spirit of party autonomy is perhaps considered scientifically by some commentators as a myth (or a ghost) but to identify the true concept of lex mercatoria, we must interpret the art.

[655] Including the ensuing debate of the 20th century between Berthold Goldman versus Clive Schmitthoff who have differing opinions on the origin of lex mercatoria, whereby Berthold defends *lex mercatoria* as an autonomous legal system and Schmitthoff maintains that it is a composition of both State and Non-State laws. *See also supra note* 646. Goldman at 3-7. and Clive Schmitthoff, "The Unification of the Law of International Trade", 1968 J. Bus. L. 105.

normative legal order.[656] There are two fundamental requirements to evaluate when merchant custom can be recognized as legal norms:

1- That the actions reflect repeated and structured application; and
2- That there is a minimum formulation of law. [657]

The first condition is dependent on its legal creation through a pattern of human behavior[658] and conferring a legal duty.[659] Repeat human behavior is considered a normative merchant usage.[660] A pattern of compulsory human behavior leading to normative legal status is legitimized by sourcing precedence of adjudicators.[661]

The second condition is whether a minimum formulation of law exists.[662] Law is not based solely on what is tangible; rather it recognizes verbal agreements and tacit actions which may form binding obligations from one party to another.[663] Whether merchant law can be considered law depends on what is considered "law".[664]

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[656] Although it is generally accepted by most scholars that, in fact, it has attained some recognition during the Middle Ages through merchant custom, where merchants gained cognizance that civil courts were not always adequate to deal with their disputes in a timely and certain manner and the dawn of the realization that merchants could provide their own standards of legal enforcement and sanction, some scholars remain skeptical. *See also* Gerard Malynes, *Consuetudo, Vel Lex Mercatoria or The Ancient Law Merchant,* 97 (London, Adam Islip 1622) quoted in Stephen E. Sachs, *From St. Ives to Cyberspace: The modern Distortion of the Medieval 'Law Merchant'*, (2005-2006) 21 Am. U. Int'l L. Rev. 685 at 744.

[657] *Supra* note 23. Fecteau at 52.

[658] Jörg Kammerhofer, *Uncertainty in International Law, A Kelsenian perspective*, New York, Routledge 2011 at 74.

[659] The debate circulates around the question: Was merchant law simply followed out of habit or was it considered mandatory at that time? *Supra* note 117. Baker describes the dilemma: "If the law merchant was not immemorial, but merely changeable usage, then it would have been difficult to square with the notion of an immutable common law…Shifting usages can hardly be treated as common law. They can explain contracts, but cannot create obligations." at 298.

[660] Although a more thorough investigation of jurisprudence is necessary to ascertain the precedence on this factor, one answer is found in The International Court of Justice (ICJ); while being inconclusive, it formulates that the period of time may not be crucial to the establishment of merchant law:"…Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule…" in *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), Judgment of 20 February 1969, ICJ Reports (1969) 3 at 44 (para 74).

[661] This would include international arbitration awards and domestic jurisprudence.

[662] *See* 1.1 in Section 2 of Chapter 2, Part I.

[663] Trade usage relates to the intention of the parties to create, even tacitly, obligations between them: Art. 9 CISG; *See* Michael Joachim Bonell, "The Unidroit Intitiative for the Progressive Codification of International Trade", 27 ICLQ, VOl. 27, No. 2, April 1978, 413-441 at 413 and 430. *See also supra* note 51. *Bhasin* where good faith was an organizing principle acting as an implied term in the contract as the parties were in the process of negotiating when notice to cancel the contract was given.

[664] *Supra* note 658. Although Kammerhofer doubts that lex mercatoria has attained legal normativity toys with a possible justification of presupposed law: "The origins of the concept lie in theories for which customary law is merely a manifestation of pre-existing law. This does not present a particular problem, because the belief in a law that already exists is not constitutive, only declaratory." at 78. Kammerhofer proposes to take a finer look at the possibility of a manifestation through presupposition of the norm theory which could substantiate the minimum formulation required. *See also* John Skirving Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation*, Callaghan/Carswell, 1900. Skeptical scholars such as Ewart doubt the existence of customary law in the 13th century since he argues that *lex mercatoria* is considered derived from "peculiar authority and sanctity." at 374.

There are proponents who contend that *lex mercatoria* did not have its "origin" in the Middle Ages[665] and that merchant law was classified as such at a later date.[666] In reality, *lex mercatoria* underwent a dynamic transformation following the Middle Ages towards a normative legal order, only to become overshadowed through the blossoming concepts of legal positivism which could not recognize *lex mercatoria* since it was not considered promulgated from legislative sources until her recognition by Lords Mansfield and Holt, attaining legal normativity as a body of merchant laws that provided laws of procedure (generating substantive law).[667]

1.1.2 The New *lex mercatoria*

While *lex mercatoria* may have faced a dubious legal creation during the middle ages, overshadowed by emerging legal positivist theories disputing its existence as a juridical order, the metamorphosis of *lex mercatoria* nevertheless was recognized by international arbitration.[668] The growth of commercial globalization took place during the 20th century, resulting in a need to create juridical security and uniform regulation of commercial relations.

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[665] For example, *supra* note 120. Donahue at 22. A research into global interpretation of other jurisdictions view of *lex mercatoria* should also be researched; *see also supra* note 647. Michaels.

[666] Primarily with reference to Lord Mansfield's landmark decisions.

[667] Arbitrators turned to the principles of *lex mercatoria* in order to provide procedurally fair and equitable awards through the use of a discretionary tool referred to as *amiable compositeur*. The transformation may have been an indirect result of merchant usage, but it certainly attained front stage with arbitrators seeking to fill gaps in transnational contracts in order to provide a fair and equitable solution. Perhaps the merchant fair courts operated on the same, although informal, premise as arbitral tribunal in order to provide expedient and final decisions to satisfy the commercial requirements and promote the flourishing trades. A further investigation of Clive M. Schmitthoff's work may be interesting. For example in International Trade Usages, 1987, no. 71 he is said to have stated: "Substantive law is often born in the womb of procedure. In keeping with their international character, the law which these international arbitral bodies create is transnational. It is the new lex mercatoria." However, Schmitthoff argues that substantive law may result out of procedure, thereby substantiating its legal entitlement.

[668] Thomas E. Carbonneau, "The Remaking of Arbitration: Design and Destiny" in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990. Carbonneau clarifies: "These questions point to uncertainty in the evolution of the process. The private, ad hoc character of arbitration makes it difficult to formulate an informed and comprehensive evaluation. The uncertainty is nonetheless critical to the law of arbitration. It implicates the basic character of the arbitral process and will affect arbitrations' destiny as a dispute resolution mechanism. The unresolved questions as to arbitral procedure and the scope of arbitrator authority can disturb the necessary equipoise between arbitral autonomy and vital juridical interests." at 5. Merchant law in 13th century England is analogous to a caterpillar which was obliged to cocoon during the rise of Sovereignty only to metamorphosis through recognition of procedural party autonomy through arbitral mechanisms in the 20th century. Furthermore, merchant law is an economic creation and not a political one and therefore, on substantive terms, stands alone. The difficulty in researching arbitral awards is that many are not published specifically to protect the very principle that drives commercial parties towards arbitration: privacy and confidentiality of the parties.

1.1.3 The New, New *lex mercatoria*

At the end of the 19th century, *lex mercatoria* launched into a new economic meaning[669] that "no single national law governs the contract."[670] Arbitrators supported the "selective and creative process…called *lex mercatoria*"[671] *when parties have expressly referred to general principles of law*. Merchant customs today are dynamic, so commentators question how "actions reflect repeated and structured application" can offer any certainty and security in these customs. In other words, how can a dynamic quality maintain a consistent and coherent manner which reflects the legitimacy of law?[672]

> "The law merchant is still a diffuse and fragmented body of law. It will grow with the growth of uniform law, international trade customs and usages, and with the increasing number of reported awards…"[673]

Normativity is established by two primary factors: the pattern of human behavior and the predictability of regulating it. The pattern of human behavior can be tracked over time. The predictability of regulating remains the object for discussion. Law does not live in a vacuum and must encompass the reality and the perception of business parties when assessing whether the new *lex mercatoria* caters to the rising needs of predictability.[674] We posit that a bridge exists between party autonomy and customary merchant law and that the same coherence is expected of party autonomy as

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669 UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract prepared by the Commission on European Contract Law, Rome, International Institute for the Unification of Private Law (Unidroit), 2010. ISBN: 88-86449-9-4, UNIDROIT principles were originally created to offer uniformity in transnational transactions. *See also* Sylvio Normand, *Une culture en redéfinition: la culture juridique québécoise durant la second moitie du XIXe siècle*, dans Bjarne Melkevik (dir.), *Transformation de la culture juridique québécoise*, s.l., Presses de l'Université Laval, 1998, p. 221-235, Normand attests that codification can solve problems : « La codification du droit prive contribua grandement a solutionner le problème de confusion des sources du droit prive que plusieurs praticiens du droit avaient eu l'occasion d'exposer et de déplorer. » at 224. There is no hierarchy in International law, rather a horizontal pluralism between firstly, party autonomy, secondly *lex mercatoria* and thirdly, treaties and National law arbitrators resolving disputes have many tools to use to arrive at a fair and equitable decision.

670 Ole Lando, "Lex Mercatoria in International Commercial Arbitration", (1985) 34 Int'l & Comp. L.Q. 747 at 748.

671 *Ibid* at 747.

672 Michel Morin, "Le rôle du juge anglais dans l'adaptation du droit aux circonstances nouvelles et l'échec des tentatives de codification du droit pénal au XIXe siècle", dans *Le temps et le droit – Actes des Journées Internationales de la Société d'Histoire du Droit Nice 2000*, Nice, Université de Nice-Sophia Antipolis – Centre d'Histoire du Droit-Laboratoire H.E.R.M.E.S, 2002, p. 173-181. Morin interjects: "…les concepts fondamentaux du droit anglais sont depuis longtemps abandonnés au pouvoir des juges et la société anglaise a été incapable de faire consensus sur la nécessité pour le législateur de se substituer à eux." at 179. Berger maintains a flexible and continuous set of rules called "the creeping codification of the new *lex mercatoria*" can be catalogued and consulted to under his web site. www.trans-lex.org/100600.

673 *Supra* note 670. Ole Lando at 752.

674 Donald Fyson, "De la common law a la Coutume de Paris: les nouveaux habitants britanniques du Québec et le droit civil français, 1764-1775 dans Florent Garnier et Jacqueline Vendrand-Voyer (dir.), La coutume dans tous ses etats (Paris, La Memoire du Droit, à paraitre) where Fyson unravels how *lex mercatoria* was argued, unsuccessfully, by English businessmen in early Quebec, in order to argue that a dominant custom, such as *lex mercatoria*, could override the Coutume de Paris which would limit the impact of French law on their outcome. This is yet another example of *lex mercatoria* in her dormant stage. *See also* Fyson, Donald, «Les historiens du Québec face au droit », (2000) 34 R.J.T. 295-328.

any other juridical order. It is the roots of *lex mercatoria* that provide us with clues of normativity that will serve to support party autonomy as its' own juridical order in TBN. Commentators have acknowledged that international arbitration has catered to party autonomy and supports *pact sunt servanda* if the parties have expressly stipulated their agreements.

In sum, merchant law was created to form bridges to join merchants together in an organized and trustworthy fashion.[675] We have observed, during our interdisciplinary voyage, that semiotics can be tangible or intangible. Leeson depicts the semiotics:

> "Signaling through this shared practice allows heterogeneous traders to overcome the problems of uncertainty and informational asymmetries posed by their social distance."[676]

This practice of semiotics transfers communications from one party to the other to synchronize their mutual interests.[677] These communications are heterogeneous custom-based, often turning to private arbitration methods to resolve disputes that parties are unable to resolve between themselves. Modern commercial transactional parties continue to utilize international arbitration to settle their unresolved disputes.[678] For example, memberships in an international organization such as the International Chamber of Commerce ("ICC"), signals trust and credibility between transnational business partners.[679]

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[675] *Supra* note 352. Leeson at 898. Leeson further offers: "Sharing these "manners" created a "reputation" for trustworthiness that enabled intergroup exchange…*failure* to engage in common customs and practice signaled a *lack* of credibility and could destroy the possibility of exchange." at 898. Furthermore: "Individuals are unlikely to cheat after signaling credibility for two reasons. First, given that no individual can signal credibility costlessly… Second, the relative price effect of engaging in shared customs or practices for the purpose of signaling makes cooperating cheaper and cheating more expensive." at 900 and 901.

[676] *Ibid*. Leeson- Cooperation and conflict at 895.

[677] *See supra* note 48. Druzin.

[678] *See supra* note 22 at 105. Carbonneau.

[679] *Supra* note 352. Leeson: "The story of modern-day international trade is very similar to that of the medieval law merchant (Lew 1978:585). Modern international trade still makes wide use of customary practice and private arbitration…By sharing membership in such organizations heterogeneous individuals signal their credibility to one another as well." at 901.

We have followed the historical transformation of *lex mercatoria* to conclude that she is not a myth; rather we argue that there is no point in searching for the ancient *lex mercatoria* since she has historically transformed.[680]

2. Current compliance to transnational laws relating to TBN

Transnational General Principles of Law [TGPL] have been recognized by international arbitrators,[681] when parties have failed to express themselves adequately in their agreement with regard to choice of law.

Although there is no consensus on the composition of transnational laws,[682] we have divided the sphere of transnational laws, conducive to the discussion of the regulation of negotiations in international sale of goods, into two categories:

- Voluntary compliance to TGPL; and
- Mandatory principles of transnational laws.[683]

We will distinguish between TGPL that are adhered to on a voluntary basis and those transnational principles that are trending towards a mandatory recognition through decisions of international arbitrators[684] and state recognition.[685]

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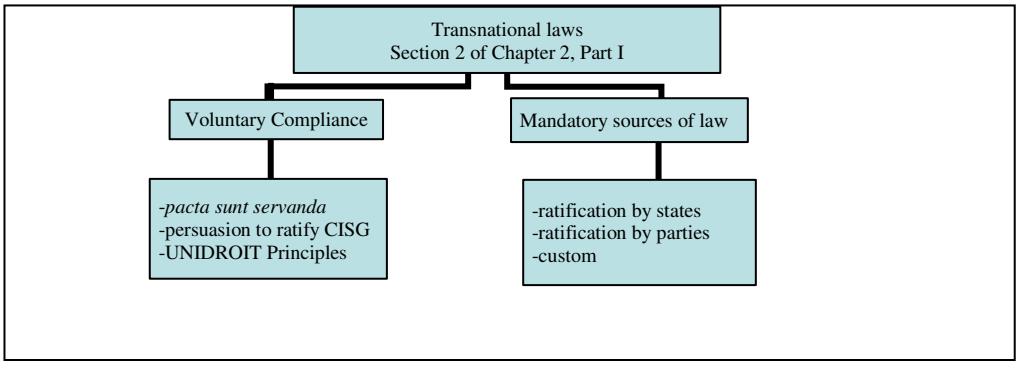
[680] *Supra* note 646. Goldman at 3 to 6.

[681] *See supra* notes 22 and 189. Carbonneau and Gaillard. *See* Emmanuel Gaillard, « La Distinction des Principes Généraux du Droit et des Usages du Commerce International », dans Études offertes à Bellet, Paris, Litec, 1991, 203 for the distinction between commercial usage and TGP in a similar matter as the principle of good faith. TGPL are implied within the scope of the exercise of party autonomy itself whereas customary usage is imposed upon the parties, based on practices within a commercial setting. http://www.shearman.com/~/media/Files/NewsInsights/Publications1991/01/La-distinction-des-principes-g%C3A9n%C3%A9raux-du-droit-e_/Files.

[682] *Supra* note 629. Dibadj at 269: Dibadj considers five sources of law: national, international, intergovernmental, supranational (which she classifies as public) and trade custom (classified as trade custom). These sources of law in function of the degree of sovereignty maintained by the state, the highest sovereignty attained on a national level and the lowest sovereignty found in trade custom.

[683] *Supra* note 625. Gaillard [Transnational Law]. In an alternative view from laissez-faire doctrine, Gaillard states: "transnational rules…are derived from various legal systems as opposed to a single one, and more generally from various sources."

[684] Arbitration award 00-04-1997 (8264) Court: ICC International Court of Arbitration, Paris. USA v. Algerian Co. (ALG) http://www.unilex.infor/case.cfm?id=658. An agreement between a US manufacturer and ALG for the supply and knowledge of operating industrial equipment was to provide information regarding any improvements. The choice of law between the parties was domestic Algerian law with authorization to use general principles of law and trade usage. ALG lost opportunities as a result of non-disclosure of information and tribunal ordered compensation under 7.4.3(2) UNIDROIT Principles. The tribunal noted: "…manque de transparence et de sincérité quant a la mise en oeuvre concrète de ses obligations…dans les contrats synallagmatiques, les prestations promises par chaque partie doivent être exécutées simultanément….Le contrat de licence l'obligeait a un comportement actif…Ce manque de transparence est contraire, lui aussi, au principe général selon lequel les obligations contractuelles doivent être exécutées de bonne foi, principe particulièrement exigeant dans un contrat international de coopération industrielle ayant pour objet la réalisation effective d'un transfert de technologie sui-une longue durée… » [our underline] 00-02-1999 (9474) Court: ICC International Court of Arbitration, Paris. BNX v Printing Co.(PRI) http://www.unilex.infor/case.cfm?id=690 and 16-10-2002 Court: Hof 'S-Hertogenbosch (Netherlands) French Co. (FRA) v. Dutch Co. (DUT) http://www.unilex.infor/case.cfm?id=960.



2.1 Voluntary compliance to transnational laws

There is no sovereign pyramid to regulate human activities internationally, so voluntary compliance is a necessary and encouraged component of the pluralistic environment of transnational laws. TBN are generally long-term relationships composed of many interconnected agreements established between the parties during the progression of the negotiating processes,[686] requiring fairness and trust. Trust is built over time in a business relationship or developed through reputation. Socially, fairness guides agreements during TBN[687] due to normative values developed in TBN which we have examined, based on efficiency, autonomy[688] and certainty.[689] To attain this certainty, the legal community has strived to harmonize laws relating to the international sale of goods in a threefold manner:

- by supporting party autonomy, an organizing TGPL, to promote *pacta sunt servanda*;
- by persuading States to embrace a unity in the ratification of a treaty that embraces "transnational laws"; and
- by tracking and documenting the elusive nature of merchant customs to entice voluntary adhesion to TGPL.[690]

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[684] *Supra* note 493. *Andersen*. Uncooperative acts in the conduct of the parties were interpreted by the Arbitrators as intentional and therefore contrary to the principles of good faith and dealing under Art. 1.7 Unidroit Principles. Who says Unidroit Principles don't have teeth: The degree of the principle was awarded on a "best effort" basis under 5.1.4(2) of 2004 Edition. For an approach between two civil law parties see supra note 493. Spanish Co (SP) v. German Co. (GER).

[685] *Supra* notes 22 and 189. Carbonneau and Gaillard; *See also* Élise Charpentier, "Un paradox de la théorie du contrat: l'opposition formalisme/consensualisme", 43 C. de D. 275, 2002.

[686] *Supra* note 632 at 254. Fontaine.

[687] *Supra* note 237. Thompson (Distributive Negotiation) Thompson clarifies the individuality of fairness: "Judgments about what is fair are driven by the nature of the relationship we have with the other party." at 54.

[688] *Supra* note 11. Hogg and Gutmann.

[689] Alec Stone Sweet, "The new *Lex Mercatoria* and transnational governance", Journal of European Policy 13:5, August 2006, 627-646. Sweet argues that the "priorities of transnational commercial activity remain autonomy, security, certainty, and efficiency."at 632.

[690] *See supra* note 632. Berger.

2.1.1 *Pacta sunt servanda*

Pacta sunt servanda was said to originate out of custom, firstly on a religious basis.[691] Under Ulpian rules of law, custom was considered the tacit consent of the populous who abided by such custom as a long-term habit or practice. Hyland identified that the Ulpian comment '*Huius edicti aequitas naturalis est. quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt seruar'* means: "it is equitable and right for agreements to be observed."[692] Therefore, the maxim is a general rule inherent to all nations,[693] standing as one of the most important TGPL. It upholds the sanctity of contract; that promises must be kept, indicative of the binding force of law that exists between contracting parties, without which there would be no international law.[694] *Pacta sunt servanda* is supported by international treaties, by domestic laws and by the parties themselves. Wehberg argues that *pacta sunt servanda* not only binds the parties themselves, but also the "international community as a whole".[695]

But, what is the scope of the application of this maxim? Is it meant only for contracting parties or can it apply to parties during negotiations? Hyland sheds some light on the debate:

> "The dispute about whether to apply the *pacta* maxim to all promises or only to those that produce agreements is only one of the interesting translation questions. For all practical purposes, in other words, it is a phenomenon peculiar to the Latin language...Since the simple present indicative is already of great power and dignity when used in the law, the *pacta* maxim cannot be translated satisfactorily without taking into account the special force of the gerundive."[696]

Translated the concept under Ulpian reports on Praetor's religious rules:

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[691] Hans Wehberg, "Pacta Sunt Servanda", AJIL 1959, 775 at 782.
[692] Richard Hyland, "Pacta Sunt Servanda: A Mediation", 34 VJIL 1994, 405 at 413.
[693] *Supra* note 691. Wehberg at 783.
[694] *Ibid* at 783.
[695] *Ibid* at 782. *See also supra* note 692 at 406. Hyland concurs with Wehberg that *pacta sunt servanda* benefits from universal acceptance; not only as a basic norm but also as a rule of ethics and a foundation of international law.
[696] *Ibid* at 409. Hyland.

> "*I will enforce agreements in the form of a pact which has been made neither maliciously nor in contravention of astatute, plebiscite, decree of the senate or edict of the emperor, nor as a fraud on any of these*. "[697]

Semantics can be argued endlessly, but what did the rule really mean?

> "Pactum is one of the oldest words in the Latin dictionary. In the nonlegal literature, the term seems to have signified any kind of agreement. It seems that some *pacta* were enforced while others were available merely as an exception: as Ulpian wrote, *Sed cum nulla subest causa, propter conuentionem hic constat nonposse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem* (But when no *causa* exists, it is settled that no obligation arises from the agreement; therefore, a naked agreement gives rise not to an obligation but to a defense). (*Digest* 2.14.7.4.) "[698]

This analogy seems strikingly familiar to the will theory and the concept of consent. How wide must an *agreement* be to encompass negotiations? We observed the proposal of two sub-categories of contracts in domestic laws, being *conventio* and *consensus*.[699] Initially, there was no general acceptance that the *consensus*, or mere pact, could form legal obligations, particularly in common law jurisdictions. The relaxation of this resistance, as law reconsidered the rigidity of this position, has not entirely solved the dilemma. If we turn to Anson's original classification of obligations, there was an assortment of agreements, some that have binding force between the parties, even though the obligation itself may seem "remote".[700] Naturally, there are also agreements that do not have binding force between the parties, being merely social obligations. The trick is to distinguish between the two. We do not deny that negotiators in transnational settings may be window shopping, but in general terms, when these negotiations continue for many months or longer, it is implausible not to narrow the divide between *consensus* and *convention* during TBN.

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[697] *Ibid* at 412. Hyland.
[698] *Ibid*.
[699] *See* 1.1 in Section 1 of Chapter 2 Part I.
[700] *See supra* note 384.

2.1.2 Persuasion to ratify the CISG

There are conventions and treaties, such as the *United Nations Convention on Contracts for the International Sale of Goods* ("CISG"), which has been widely accepted as "the backbone of international trade in all countries, irrespective of their tradition or level of economic development."[701] There are four ways in which the CISG can impact the regulation of TBN in the context of international sale of goods if the parties enter into an agreement.

The first influence is ratification by domestic states of the CISG, so that their residents are subject to a set of harmonized rules unless they specifically opt out. The second manner of persuasion is when a domestic legislation *imports* CISG rules into their own sovereign laws;[702] albeit legislative or through judicial recognition. Thirdly, the parties themselves may adopt the CISG rules by referring to them in an agreement. The last manner is affected through the application of the CISG rules by international arbitrators.

Prior to discussing matters of persuasion, we will review what the CISG *is* and its purpose as an equalizer in international trade. The CISG is considered an autonomous set of international rules resulting from commercial practice,[703] in support of party autonomy. The scope of the CISG was meant to deal with substantive rights and obligations of contracting parties; it deals with matters of formation and interpretation of contracts of sale to the exclusion of some categories of sale, including "the use of electronic communications in connection with the formation and performance of international sales contracts,"[704] but remains open-ended. Some of the decisions implementing the CISG have not offered sufficiently detailed reasons of why an issue falls within or outside the scope

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[701] Anthony Connerty, "Lex Mercatoria: Reflections from an English Lawyer", Arbit. Int. Vol. 30, No. 4, 2014 at 715.

[702] *See supra* note 189. Koh refers to this phenomenon as"*internalization*".

[703] *See* Guiditta Cordero Moss, "International contracts between common law and civil law: is non-state law to be preferred? The difficulty of interpreting legal standards such as good faith", Global Jurist 7.1 (Mar. 6, 2007) http://go-galegroup.com/ps/retrieve.do?sgHitCountType-None&sort. at 3.1.3

[704] *Supra* note 629. Bonell [CISG] at 3.

of application of the CISG.[705] However, the CISG "governs matters other than the formation of sales contracts and the rights and obligations of the seller and the buyer arising from such contracts."[706] Caselaw remains scattered,[707] and subject to interpretation. There is no consensus as to whether TBN could conceivably fall into and be subject to CISG rules in terms of relationships unless the parties specifically refer to it in an agreement.

Ratification by domestic states: The CISG features growing ratification, adding an additional twenty states since 2007. This fact is vitally important to demonstrate the persuasive movement of the CISG's uniform system of rules governing cross-border contracts for the sale of goods, and encourages ratification by states towards international cooperation and uniformity in this area of law. The more states that join, the more likely the contagion will spread.

The impact of ratification of CISG by domestic states operates by binding its residents to an international, harmonized set of rules. The CISG supports party autonomy[708] but unless the parties expressly opt out of the CISG they are subject a certain minimum standard of conduct: good faith.[709] The CISG was purposely left open-ended to accommodate situations that drafters had not foreseen at the time of its fruition, and for international arbitrations to fill in the gaps.

"Internalization" by domestic states: Cordero-Moss investigated the historical aspects of the CISG, based on what she refers to as "two previous attempts" that were not widely successful.[710] While there are countries who have not ratified the CISG, the second element of persuasion is that

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[705] Ulrich G. Schroeter, "Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation." 58 Vill. L. Rev. 553, 2013 at 555. He refers to Stefan Kroll, "Selected Problems Concerning the CISG's Scope of Application", 25 J.L. & Com. 39, 56 (2005).

[706] *Ibid*. Schroeter at 556, referring to Article 4 of the CISG. Schroeter gives examples of other areas that are governed such as the modification of sale contracts in Article 29 and obligations of contracting states in Articles 89-101. *See also* Bernard Audit, "The Vienna Sales Convention and the Lex Mercatoria" in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990.

[707] *Supra* note 508. Goderre identifies three cases that upheld the general good faith requirement to negotiating parties, however admits they were based on civil law jurisdictions, with the exception of Australian Court of Appeal: [*Renard Construction (ME) Ltd. v. Minister for Public Works* (1992) 26 N.S.W.L.R. 234, 234-83, reprinted in UNILEX at 1995]. at 276.

[708] Article 6 CISG.

[709] Article 7(1) CISG.

[710] *Supra* note 703. Cordero Moss at 3.1.3.

some countries have "down loaded" the CISG rules into their domestic policies.[711] Koh describes this "legal internalization" as an occurrence of when an international norm becomes "incorporated into the domestic legal system."[712]

This occurrence can take place legislatively or judicially. An example of judicial importation of CISG rules has been identified by commentators under Dutch law. According to Janssen, the Dutch courts have been integrating CISG rules. [713]

Ratified by party autonomy: The support of party autonomy is evidenced in Article 6 of the CISG and a principle of TGPL: *pacta sunt servanda*. However, parties must respect the underlying principle of the duty of good faith standards of conduct during the *formation* and *performance* of contracts. Parties are free, nevertheless to opt out of being subject to the rules of CISG if this option has been stipulated expressly.

Good faith is incorporated in a general fashion in Article 7(1), therefore it appears to have a "restrictive application of this principle".[714] "[T]he CISG does not contain any rule that might be used as a guideline…for a progressive doctrine of good faith within international trade law."[715] It would appear that there is no consensus on the interpretation of the CISG obligation of good faith but there is a suggestion that good faith is a norm of conduct based on cooperation.[716]

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[711] For example, in Germany it automatically applies to cross-border sales of goods - in addition to the provisions of the German Civil Code (BGB) and the German Commercial Code (HGB) – unless explicitly excluded. *See* Barbara Mayer, "The Increasing Significance of the CISG", http://www.fgvw.de/2445-1-The+Increasing+Significance+of+the+CISG.html.

[712] *Supra* note 189 at 642. Koh Bringing.

[713] *See* supra note 189. Oduntan.The reason he offers is that the Netherlands is dependent, economically, on import and export.

[714] *Supra* note 703. Cordero-Moss at 3.2. *See also* Claude Samson, « L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes», (1991) 32 Les Cahiers de Droit 1001, vol. 32 no. 4, décembre 1991, p. 1001-1026. Samson argues that a contractual relationship in international transactions spreads over a period of time and therefore necessitates cooperation and trust by the parties : « Le désir de coopérer et la volonté de compromettre ne seraient-ils pas d'ailleurs une manifestation du principe de la bonne foi ? » at 1016.

[715] *Ibid.* Cordero-Moss at 4.

[716] *Supra* note 714. Samson. *See also supra* note 508. Goderre "The drafting history indicates that there were numerous arguments both supporting and opposing a provision that would place a duty on the parties to act in good faith…Firstly that many national commercial codes contained similar good-faith obligations…instrumental in the development of trade rules; Second, [to] create uniformity in the long run…Last…the good faith provision…would serve a way to include some of the principles of the new international economic order." at 262 and 263. Goderre refers to John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 49 (1991) at 369. Goderre previously explained that: "Throughout the drafting process, delegates disputed what type of good-faith provision, if any, should exist in the document…by the final draft of the Convention, the conflicting sides managed to reach a compromise." at 260 and 261. The argument was prompted, primarily, from the division of concept between subjective and

The CISG was anticipated to contribute to harmonization of legal traditions.[717] How far can the CISG be stretched before it no longer fits the growing needs of the global market? This is yet to be seen in the e-communications and technological world which may paralyze its effect and require a fresh investigation of how transnational transactions function and how they could be better regulated. A uniform application of the rules of CISG would aid to attain some uniformity.

Applied by international arbitrators: Although the convention was left in uncertain terms to be interpreted by adjudicators to provide an openness towards future application of the convention, Gaillard delineates the role of an international arbitrator.[718] Firstly, arbitrators honour party autonomy[719] and the expressed stipulations of the parties. Parties may choose to submit to TGPL and, in absence of choice, an arbitrator may apply them. If the parties have chosen a domestic law, the arbitrator is bound to consider whether the domestic law has recognized the parties' choice.[720]

Contract interpretation under the CISG refers back to the ratification of domestic laws in absence of expressed party intention. For example, in the international arbitration award of Russian Co. (RUS) v Moldavian Co. (MOL)[721] RUS negotiated an agreement to supply natural gas to MOL who was to deliver to a third-party recipient under the contract. However, RUS delivered the goods directly to the recipient thereby risking non-payment to MOL, since the recipient was not part of the negotiation process. Since both parties were from CISG member states, the arbitrator applied

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objective grounds which we have familiarized ourselves with on our discussion of intent in Section 1.1 of Chapter 2 of Part I. Goderre concedes that there are convincing arguments against the recognition of good faith negotiations based on the fear of creating uncertainty and the manner to impose sanctions for non compliance. The result is that the impact of Article 7 of the CISG remains preliminary but subject to interpretation.

[717] *Supra* note 42. Lake/Draetta reference Honnould, Uniform Law for International Sales (1982). The Vienna Convention has "reconciled many major differences between common law and civil law traditions." at 28. Lake also refers to Gabor, "Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law", 7 NW. J. Int'l L. & Bus. 796, 797 (1986).

[718] Emmanuel Gaillard, « La Distinction des Principes Généraux du Droit et Des Usages du Commerce International », http://www.shearman.com/~/media/Files/NewsInsights/Publications1991/01/La-distinction-des-principes-g%C3A9n%C3%A9raux-du-droit-e_/Files. *See also* Emmanuel Gaillard, « Trente ans de lex mercatoria. Pour une application sélective de la méthode des principes généraux du droit », (1995) J.D.I. 5, 24. See also Andreas F. Lowenfeld, "Lex Mercatoria: An arbitrator's View", in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990.

[719] *Ibid.* Gaillard at 210.

[720] *Ibid.* Gaillard at 212.

[721] 2008 (18/2007) Court: International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation In the international arbitration award of Russian Co. (RUS) v Moldavian Co. (MOL) http://www.unilex.infor/case.cfm?id=1478

UNIDROIT Principles to interpret the matter and decided that RUS failed to act in the implied good faith under Art. 1.7 UNIDROIT Principles and Arts. 7 and 8 of the CISG. "International practice considers good faith and fair dealing as implied obligations (Article 5.1.2 of the UNIDROIT Principles)."[722] The application of the CISG rules by international arbitrators, interpreted through UNIDROIT Principles, is a persuasive factor that supports the harmonization intended by the CISG.

2.1.3 UNIDROIT Principles

Documentation of TGPL has been commented upon extensively. While commentators continue to debate whether TGPL equate *lex mercatoria* or customary usage[723] a special working group was appointed under the United Nations, representing many nations to ponder international trade.[724]

UNIDROIT Principles are considered to be a non-binding set of principles whereby enforcement depends on persuasion rather than an *imposed* standard.[725] The scope of the UNIDROIT Principles is intended to "provide an increasingly "global" legal environment for cross-border commercial transactions, including negotiations as well as contracts.[726] Since they are non-binding, parties are not meant to be affected by the UNIDROIT Principles unless they "opt in". However,

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[722] *Supra* note 705 at 554. Schroeter refers to Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001).The CISG has been known to "trump" even the American UCC. Parties who are member states of the CISG may exclude the application of the CISG as long as it is done in expressed terms.

[723] Hugh Collins, "Cosmopolitanism and Transnational Private Law" European Review of Contract Law, 2012, Vol.8(3), 311-325 at 313. Collins: "…transnational commercial law…is also called sometimes the new lex mercatoria." "For many centuries businesses have managed trade by their own procedures, rule-books, and dispute resolution mechanisms. This is true of both national markets in particular commodities and of international markets." at 321. *See also* supra note 703. Cordero-Moss introduces transnational as "non-authoritative sources that can broadly be defined as *lex mercatoria* or trans-national law, and consisting primarily of generally acknowledged principles of international trade, international contract practice, trade usages, as well as private codifications of contract terms, standard terms of contract or code of conducts, such as those issued by the International Chamber of Commerce or by various branch associations." at 1.

[724] Joshua D. H. Karton, "Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?", UNB L. J. 2009, Vol. 60, 32. Karton enunciates that: "The second type of international contract law instrument – the compilations of principles - are usually drafted by representatives of states but are not convention to be ratified [such as *UNIDROIT Principles of International Commercial Contracts*]." at 37. *See also supra* note 629. Bonell describes the CISG: "Both the merits and the shortcomings of the CISG prompted the International Institute for the Unification of Private Law (UNIDROIT) to embark upon a project as ambitious as the preparation of the UNIDROIT Principles." at 16. Bonell relays that the drafting of the UNIDROIT Principles was created on a "non-binding restatement of law" rather than as a binding instrument like the CISG at 16.

[725] *Supra* note 508. Goderre identifies the customary impact of UNIDROIT Principles: "Indeed, the UNIDROIT Principles are unlike any other legal text previously utilized on an international level [they have no binding force and are intended only to be relied upon for their persuasive value." at 271.

[726] *Supra* note 632 at 18 and 26. Bonell.

where parties are silent, the UNIDROIT Principles have been used as gap-fillers[727] in international arbitration, representing international standards that are considered accepted generally.[728] In other words, where TGPL are referred to in the parties' agreement, adjudicators have applied the UNIDROIT Principles.[729]

Merchant law has developed to maintain community practices within its own regulatory system[730] maintained as their own institutions.[731] There are commentators who refer to UNIDROIT Principles as the "New *Lex Mercatoria*".[732] Other commentators distinguish between these three sources of transnational law.[733]

TGPL are dynamic and flexible in their nature, developed by compliance to certain norms of practice that have developed over time. Most commentators consider these general principles to be part of the development and transformation of *lex mercatoria*, a guide for global trade.

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[727] Alejandro M. Garro, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG", (1995) 69 Tul L. Rev. 1149. at 1151. *See also* discussion in Gesa Baron, "Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?", Arb. Int'l, Vol. 15, no. 2, 1999.

[728] *Supra* note 632. Bonell at 24.

[729] *Ibid*. Bonell refers to U.S. federal court: United States District Court, S.D. California, Dec. 7, 1998 (Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defence Systems, Inc.; ICC Award NO. 12111 of Jan. 6, 2003.

[730] *Supra* note 686. Sweet describes "[t]he *Lex Mercatoria* – also called 'the Merchant Law' -is a multi-faceted term which serves both to draw boundaries around a community and its practices, and to denote a legal system. It describes the totality of actors, usages, organizational techniques, and guiding principles that animate private, transnational trading relations, and it refers to the body of substantive law and dispute resolution procedures that govern these relations." at 629.

[731] *Ibid*. Sweet argues that actors generate their own legal institutions: "In the past three decades, transnational commercial actors have generated their own institutions. Institution building has proceeded on two linked fronts. The first is the intensive effort to 'unify' or standardize the general principles of a stable 'a-national' contract law; and various standardized, model contracts are in fact increasingly used. Second, a robust system of private, competing transnational arbitration houses has evolved, providing traders with a range of alternatives to litigating transnational contract disputes in state courts. In consequence, national courts and legislators have adapted, most notably, by reducing the scope of their authority to regulate both contracting and arbitration." at 633. Sweet continues the thought by adding: "The centrality of the Lex Mercatoria as a mode of governance is partly enabled by the 'creeping codification' (Berger 1999; Ferrari 1998) of this law. The more traders and dispute resolvers actually use this law, of course, the more its autonomy – from national sources of law – is enhanced." at 633.

[732] Anne-Marie Trahan, "Les Principes d'UNIDROIT relatifs aux contrats du commerce international", 36 R.J.T., n.s. 623, 2002 at 631. *See also* Michael Joachim Bonell, "The Unidroit Principles and Transnational Law", (2000) Rev. dr. unif. 199. L.R.Q., c C-67-01.Trahan argues that the purpose of UNIDROIT is to aid in the interpretation of the CISG. The lines between UNIDROIT, TGPL and custom are blurred. Some commentators blend the three concepts into one at 632.

[733] *Supra* note 77. Zumbansen (Piercing) expounds: "Thus, the law of the lex mercatoria could be understood as law of the economy organised in decentralised fashion, where this 'economy' cannot appropriately be described by national economic policy positions 'here' and the regulatory claims expressed in the transactions 'there'…Thus, instead of imploring the birth of a new, qualitatively different law, one ought rather to think of observing the manifold manifestations of transnational actors and their regulations from the viewpoint of a continually learning, proceduralised law, able to respond to the development of autonomy by forming standards for sub-areas and appropriately sensitive contextual regulations." And then Zumbansen refers to R. Cooter, 'Decentralized Law for a Complex Economy, The Structural Approach to Adjudicating the New Law Merchant', (1996) 144 University of Pennsylvania Law Review, 1643-1696. "From this viewpoint the focus would no longer be on a sharp distinction between lex mercatoria and national law but, instead on a better communication between transnational economic law and the materialized standards developed within the nation State;" footnote at 417. *See also* Robert D. Cooter, "Structural Adjudication and the New Law Merchant: A Model of Decentralized Law", 1994, available at http://works.bepress.com/robert-cooter/40.

Party autonomy is protected under Article 1.1 "Article 1.1 (*Freedom of contract*) The parties are free to enter into a contract and to determine its content." UNIDROIT comments explain the philosophy behind supporting party autonomy:

> "The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to offer their goods or services and to whom they wish to supply, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order."[734]

Negotiations are considered under party autonomy in the UNIDROIT 2010 comment:

> "As a rule, parties are not only free to decide when and with whom to enter into negotiations with a view to concluding a contract, but also if, how and for how long to proceed with their efforts to reach an agreement. This follows from the basic principle of freedom of contract enunciated in Article 1.1, and is essential in order to guarantee healthy competition among business people engaged in international trade."[735]

We must not forget the reason that UNIDROIT was set up in the first place: to unify private law[736] and to support party autonomy.[737] At the same time, public order and good faith come into play to accompany party autonomy. The relationship between the two is rather intriguing. Rather than addressing negotiations under a duty of good faith, planners clothed expectations in negotiating conduct in a negative sense; that parties cannot negotiate in "bad faith" under Article 2.1.15. The most likely reason for this was to appease common law jurisdictions who did not embrace the principle of good faith. With a growing acceptance of a duty of good faith in common law contracts with precedence like *Yam Seng* and *Bhasin*, it may be time to reconsider a review of the drafting of 2.1.15 and its application to negotiations. There is really no such legal principle as "bad faith" since

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[734] *Ibid*. UNIDROIT comments 2010 at 8.

[735] *Ibid*. UNIDROIT comments at 59.

[736] Paul-André Crépeau, "Les principes d'UNIDROIT et le Code civil du Québec: valeurs partagées?", Scarborough, Carswell, 1998, 200. *See also* Dominique Lizotte's commentary on Paul-André Crépeau, "Les principes d'UNIDROIT et le Code civil du Québec: valeurs partagées?", Scarborough, Carswell, 1998, 200 in 40 C. de D. 486, 1999 at 486.

[737] *Ibid*. Lizotte at 487.

the intention is to sanction the breach of good faith.[738] Further attention to what constitutes a duty of good faith and when it should be recognized by law deserves expansion, taking care not to impede on party autonomy.

The matter of a standard of conduct, such as good faith and fairness, is reaching mandatory heights in TGPL. Are transnational laws able to supersede party autonomy?

2.2 Mandatory principles of transnational law

Transnational mandatory rules are projected but not set in stone and there are doctrinal disagreements as well as conflicts between doctrine and law in action to determine what is considered mandatory and whether international mandatory rules can supersede party autonomy.[739]

A debate in the international arbitration quarters revolves around which laws should apply to parties of a dispute. Preponderants of party autonomy argue that if the parties have clearly expressed themselves on a choice of law, arbitrators should apply the parties' choice for the sake of certainty and stability.[740] Other commentators posit that the closest connection to the context of the case is a fairer manner in which to resolve disputes.[741] Yet, a third angle posits that arbitrators must apply what they

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[738] *See supra* note 518. Harrison identifies the nuances of the concept : "The legal opposite of good faith is not bad faith: it is a breach of good faith, or a lack of good faith. "Bad faith" normally means a deliberate misrepresentation or a deliberate misuse of a power; which is not at all the territory of good faith…Commonly, it is used by people who may have been in breach of their duty of good faith: the person using it feels he ought to escape blame…At all events it should never be taken to mean, "I observed the good faith rules". at vii.

[739] *Supra* note 189. (*Aspects* philosophique) Gaillard explains: « Une norme légitime mais non effective ni encore légale n'est qu'une valeur susceptible d'inspirer le législateur ou le juge ; une norme légale mais sans effectivité ni légitimité est une norme appelée à la désuétude ; une norme effective qui n'est ni légal ni légitime peut être celle d'un autorité d'occupation ; une norme légitime et effective correspond a la notion traditionnelle de droit naturel… Dans cette grille d'analyse, qui retient une conception essentiellement variable de la juridicité, celle de la lex mercatoria ne fait aucun doute.» at 67 and 68 ; Paul B. Stephan, "Privatizing International Law", 97 Va. L. Rev. 1573, 2011. Stephan advocates that "[t]oday the production and enforcement of international law increasingly depends on private actors, not traditional political authorities." at 1574 and 1575. *See also* Reza Dibadj, "Panglossian Transnationalism", 44 Stan. J. Int'l L. 253, 2008. Dibadj vibrant article opens enthusiastically: "Transnationalism represents a major leap forward in our understanding of events that cross national borders. Faced with the narrow strictures of classically-defined international law which centers on nation-states, beginning in the 1952s, brilliant scholars espousing a transnational approach broadened the realism of inquiry. They emphasized not only the possible variety of actors, public and private, that engage in cross-border conduct, but also the plethora of laws that purport to regulate these activities." at 254.Charles H. Brower II, "Arbitration and Antitrust: Navigating the Contours of Mandatory Law", 59 Buff. L. Rev. 1127, 2011 at 1132 and 1133. On private matters, Brower refers, amongst other commentators to Audley Sheppard, "Mandatory Rules in International Commercial Arbitration: An English Law Perspective" in Mandatory Rules in International Arbitration, George A. Bermann & Loukas A. Mistelis eds., 2011) versus Hannah L. Buxbaum, Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization, in ibid Mandatory Rules in International Arbitration who argues "deference to party autonomy signals greater confidence in priate ordering as the key to managing "the complexities of global transactions." at 47.

[740] *Supra* note 668. Carbonneau explains: "[When agreement is to submit to international arbitration] The process provides for commercially adapted results. It is a by-product of transnationalization and an anticipated feature of informal and expedient commercial justice. Arbitration has none of the fine trappings of the masked ball, nor is it the ribald antics of the carnival. Formalistic facades are not necessary to achieve the sensible results dictated by a commercial ethic." at 13.

[741] *Supra* note 739 at 1130. Brower II.

"consider fair and reasonable" in accordance with international trade usages "which are so sufficiently established that parties consider themselves to be bound by them."[742]

While certain TGPL may be approaching mandatory recognition; rules that supersede party autonomy, there is resistance from preponderants who uphold party autonomy. We must strive to reconcile this strain that sponsors uncertainty and instability in transnational private transactions. TBN remain intangible to law, as we are unable to follow the negotiation steps, positions and stages in absence of juridical tools. Negotiations remain chameleonic; like "ghosts that are seen in the law but that are elusive to the grasp."[743] Yet, on a normative basis TBN parties in the processes of negotiation exercise their autonomy within a circle of responsibility regarding conduct to protect trust and cooperation.

One example of an evolving mandatory rule is the presumption that parties are expected to negotiate in good faith, but the scope and intensity of such a presumption has not been determined. What is customary between TBN parties during the functioning of negotiations?

Custom is not easily identified,[744] but in practice legal obligations have been recognized and applied by adjudicators.[745] Customary standards of conduct reflect what is expected within a certain trade. Although skeptical commentators remain unconvinced of the juridical power of custom,[746] Carbonneau deflects the negative attacks on transnational order[747] and refocuses the lens on an

[742] *Supra* note 701 at 717. Connerty.

[743] *Supra* note 739 at 1134. Brower II.

[744] *Supra* note 629. Stephan explains *how* CIL are derived: "CIL includes rules that important actors believe to exist, even though they have not been formalized…Its precise definition remains elusive." at 1602.

[745] *See supra* note 47. *Yam Seng* norms at para.[125].

[746] *Supra* note 23. Fecteau defines a pattern of human behavior recognized by a source of law.

[747] *Supra* note 22. Carbonneau 2011. Carbonneau repels the arguments: "The opponents of lex mercatoria, armed with their skepticism of arbitral a-nationalism, found their criticism upon a rigid concept of law and a formalistic notion of state sovereignty that has become an intellectual fixation as unhealthy as any psychological counterpart." at 84. He continues the thought later in his volume by concluding: "When compared to domestic law, international law-making is plagued by the rule of force and the absolute supremacy of national sovereignty…Although sovereignty remains a factor in this setting, it is not a black hole that eats up every morsel of legal civilization." at 389.

essential mitigating factor: Who do business parties trust when they are unable to resolve their disputes?[748]

Although the answer is steeped in history and has suffered the battle of controversy, it has not been defeated thanks to Lord Holt and Lord Mansfield, and to the rise of international arbitration whose transformation offers support of both party autonomy and TGPL. These principles have mutated through the historical transformations to support party autonomy. In other words, party autonomy is the front line and only when party autonomy fails to resolve a dispute between the parties will third party adjudication serve as a safety net. Even during a dispute, parties are free to choose alternative adjudication from domestic courts, such as binding arbitration or mediation to aid the parties back into party autonomy so that they can design the remedy themselves. Therefore, if the parties do not overstep the boundaries of what is considered minimally fair, the parties have always been supported in the exercise of their autonomy. What is minimally fair is yet to be determined and defined.

How does a transnational general principle of law become mandatory? A mandatory principle of transnational law, per say, does not exist. Gaillard refers to transnational public laws that include, "les principes fondamentaux du droit qui s'imposent sans égard aux liens du litige avec un pays déterminé".[749] This exists when this public order reflects universal values that are recognized by domestic laws.[750]

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[748] *Ibid*. Carbonneau.

[749] *Supra* note 189. Gaillard at 116.

[750] Daniel Hochstrasser, "Public and Mandatory Law in International Arbitration" in Emmanuel Gaillard, Ed., Towards a Uniform International Arbitration Law?", New York, JurisNet, 2005. Hochstrasser explains: "Mandatory rules of law…are defined as imperative provisions of law which must be applied to an international relationship irrespective of the law that governs that relationship; they are a matter of public policy…and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not relevant by application of the conflicts of law rule.at 17.

Gaillard has provided strong arguments that certain TGPL are moving forward towards recognition as mandatory principles through state recognition;[751] meaning that the parties cannot contract out of them. This occurs through state recognition of TGPL or by ratification of the parties themselves, either because they have specifically referred to them or because they have remained silent. The question is what does this standard of conduct comprise? Does it include honesty, loyalty or/and cooperation? Is it applicable during negotiations? We will investigate these questions in the first chapter of Part II.

Domestic ratification: Some commentators have claimed that transnational laws are "beyond" or even "without" the nation-state"[752] (everything but domestic laws). Others consider transnational laws hybrid between international and domestic laws.[753] Domestic laws provide enforcement measures of transnational laws. This may take place as a result of an internalization process, by integration into the domestic system[754] or ratification of a treaty by the State.

Domestic laws remain an important part of transnational laws.[755] While juridical positivists avowal the sovereign legislative authority, prior to the rise of sovereignty law was pluralistically *relational*:

> "Historically, [prior to the rise of sovereignty] the English notion of common law was…*relational* law, law which defined itself and its application in terms of its constant

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[751] *Supra* note 189. Gaillard.

[752] Gralf-Peter Calliess, "The Making of Transnational Contract Law", Indiana Journal of Global Legal Studies, July 2007, Vol 14(2), 469-483; Gralf-Peter Calliess and M. Renner, (2009), "Between Law and Social Norms: The Evolution of Global Governance", Ratio Juris, 22: 260–280. doi: 10.1111/j.1467-9337.2009.00424.x. Calliess/Renner refer to (Teubner 1997; Schiff Berman 2007). at 262. S*ee contra supra* note 621. Duval (Lex Sportiva): "Globalisation does not necessarily entail, however, that the nation states are disappearing, evaporating. The new transnational space is a complex 'assemblage' of levels, structures and organisations…The transnational space is a playground for social interactions rooted in very different loci or process, and escapes any simplification of these interactions along the pure lines of the Westphalian international order. This evolving space is not deprived of power relationships. But political power expresses itself in a more diffused way than the one we are familiar with from the nation state. Many *loci* of power cohabit and compete in the transnational space." at 823.

[753] *Supra* note 77. Slaughter Burley and supra note 189. Koh.

[754] *Supra* note 189. Koh (Bringing) explains "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-deciding for a, then internalized into a nation's domestic legal system." at 625 and 626. *See also supra* note 629. Dibadj refers to William J. Aceves, "Liberalism and International Law Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation", 41 Harv. Int'l L.J. 129 (2000): "Simply put, "the domestication of international law addresses the enforcement problem that has long plagued the international system." at 139.

[755] *Supra* note 629. Dibadj remarks: "Despite the assumptions about the role played by international law and institutions in mediating cross-border transactions, the great irony is that national law still has a far more significant role." at 272. This, according to Dibadj, includes the enforcement of foreign courts or arbitral tribunal decisions.

> and ongoing relations with other laws applicable within the same territory. The notions of binding law and stare decisis were creations of the mid-nineteenth century. "[756]

There may be a change is in the air,[757] and a growing need to take an alternative view. We posit that harmonization of transnational laws is not a fantasy if we take an alternative view on the basis of *cooperation* rather than unification. Unification is improbable due to the divergent nations, languages and cultures. To attain cooperation, domestic courts and international arbitration must learn from each other[758] and respect one another. Domestic laws are not alone in this inter-connection with transnational sources of law since transnational laws include a plurality of private actors, and party autonomy is greatly appreciated in international arbitration.[759] Mandatory transnational laws are considered dependent on domestic ratification. But they are also susceptible to ratification through party autonomy.[760]

Ratification through party autonomy *pacta sunt servanda*: The enigma of transnational law has attracted commentators from all over the world. "What do we mean by transnational commercial law? Is it the same as the lex mercatoria or something broader?"[761]

> "After some 35 years of legal debate and countless applications of transnational rules by international arbitrators…it may seem surprising that general principles of law – also frequently referred to as transnational rules or lex mercatoria – remains such a divisive issue."[762]

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[756] *Supra* note 654. Glenn at 462 and 463.

[757] *Supra* note 624. Duval "Under such pressures [global challenges] the internal structure of the state itself is mutating." at 824. *See also supra* note 77. Zumbansen: "…instead of insight into the border-crossing societal differentiations of social functions in the direction of a 'world society', a clinging to old (neo-) liberal conceptions of a State-based framework for a market thought of as healthy and capable of comprehensive self-regulation is what threatens." at 415. *See also* Paul G. Mahoney and Chris W. Sanchirico, "Competing Norms and Social Evolution: Is the Fittest Norm Efficient?", 149 U. Pa. L. Rev. 2027, 2000-2001.

[758] *Supra* note 724. Karton encourages collaboration: "…national courts should not be afraid to apply general principles of international private law…Arbitrators also have something to learn from national choice of law regimes…" at 53.

[759] *Supra* note 629. Stephan at 1596.

[760] Specifically expressed, unambiguous contracts are recognized by all sources of law. Is there an implied organizing principle in party autonomy that is also susceptible to ratify transnational laws? *See supra* note 9. Swan CCL at 175. Swan contributes to the philosophy of *pacta sunt servanda*: "**§2.13** A society probably cannot exist without some kind of shared expectation that some promises will usually be enforced by agents of the state while others will not be, and there is no reason to believe that all societies will at all times agree on what promises will or should be kept. What is important to note is that the drawing of any line between the promise that will be enforced and the one that will not, can only be made in the context of a functioning society that has certain objective characteristics. A society that is largely based on a market economy will have a very different pattern of both promise-making and enforcement than will a society that is based on radically different economic or organizational ideas. An example of such a radically different idea is, of course, the family, where the distribution of goods and the allocation of duties will not usually be based on exchanges." at 175.

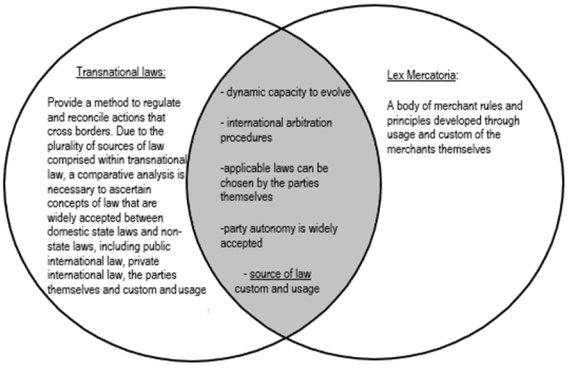
[761] *Supra* note 626. Goode at 1.

[762] *Supra* note 189. Gaillard at 59.

Transnational law's spherical characteristics are due to its capacity to embody a plurality of legal systems. This collection has often been seen as producing a set of general principles of law "which transcend the law of any nation-state or regional or international organization."[763]

We posit that TGPL are broader than *lex mercatoria*. TBPL are an umbrella that shelters customs that have been generally accepted and documented to which parties are expected to voluntarily adhere to, not all of which has been recorded,[764] as well as state and non-state laws. If party autonomy fails, then international arbitrators may turn to TGPL to fill in the gaps of the parties' agreements. When transnational principles that have become mandatory through state recognition they can supersede party autonomy[765] if not expressly opted out.

Commonalities between Transnational Laws and Lex mercatoria



While there are commonalities between transnational laws and lex mercatoria, the legal concepts differ. Whereas transnational laws are composed of a plurality of sources of law, state and non-state laws including lex mercatoria, *lex mercatoria* is a specialized body of principles developed through custom over time and accepted widely by the merchants themselves. However, the dynamic capacity for law to evolve and the extent of support of party autonomy is what joins these two concepts of law together.

[763] *Supra* note 654. Glenn at 458. Glenn further describes: "It [transnational law] is law which is not formal in character, not formally endorsed by a state prior to its application within the state, not systemic or positive in character. It represents a major theoretical and highly practical challenge to concepts of law that have prevailed for the last two centuries."

[764] *See supra* notes 72 and 73. Hall and Hofstede.

[765] *See* the discussion on good faith in *supra* note 685. Charpentier at 361.

Party autonomy has played a significant role in transnational law. In fact, it is the cornerstone to the foundation and future development of transnational law. Where it is necessary to further distinguish its role, is to identify the relationship between party autonomy and standards of good faith.

TGPL includes *pacta sunt servanda* as well as a concept of good faith and cooperation.[766] Both UNIDROIT Principles and the CISG have embraced the concept of good faith to standardize transnational commercial trade and promote trust. At first glance, transnational laws appear to limit the principle of good faith to contracts. We argue that TGPL include good faith in negotiations. Although general UNIDROIT Principles support the concept of good faith, when dealing specifically with negotiations Article 2.1.15 of the UNIDROIT Principles emphasizes bad faith. The CISG is the larger challenge as many commentators refute any application to negotiations.[767] Thus, the boundaries of party autonomy must be explored in terms of what can supersede party autonomy and, if good faith is a factor, whether it overrides or enhances party autonomy.[768]

Conclusion: Transnational settings recognize that contracting parties should regulate their own affairs.[769] TBN parties require support to encourage them to document agreements together during negotiations.[770] It is understood that the shared understandings of merchants are better served

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[766] Marie-Claude Rigaud and Guy Lefebvre, « Les usages du Commerce International: Où en sommes-nous? Où en sont-ils?» , (2011) 89 *R. du B. can*., 643-693 at 682 and 685.; Article 1.7 UNIDROIT Principles.

[767] *Supra* note 700. Cordero-Moss at 19. *See also*, Lisa Spagnolo, "Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG", 21 Temp. Int'l & Comp. L.J. 261, 2007. Spagnolo outlines the arguments between the confinement of CISG of precontractual issues versus expansionists advocating for greater fairness and flexibility at 289.

[768] *Supra* note 629. Stephan at 1606: "Privatization of this power [to produce rules of international law] involves giving private persons freedom to choose how to vindicate the international law interest, not the power directly to enforce international law." at 1606.

[769] *Supra* note 22. Carbonneau defends party autonomy:"What contracting parties provide in their agreement generally becomes the law controlling law. Courts can interpose their authority in arbitrations. They could assert their power by policing the formation and the content of arbitration agreements. But, from a practical standpoint, if courts were to become more active in the supervision of arbitration, they would more than likely focus their attention upon awards rather than agreements. Agreements have a symbolic standing: they represent a gateway to private adjudication and they codify the parties' intent regarding dispute resolution. Blocking their enforcement would signify opposition to the fundamental consensus surrounding arbitration rather than the implementation of a narrower strategy for the periodic defense of national interests though the vacatur of awards." at 421. [our underline]

[770] *Ibid.* Carbonneau reflects: "Merchants will not conduct business across national boundaries if there is no guarantee of either basic contractual accountability or the provision of remedies for material breach of contract. Arbitration may not be able to right the geo-political and socio-economic disparities in the world community, but it can provide a workable form of world adjudicatory and transactional justice. It makes the risks of transborder commerce palatable." at 423. Carbonneau defends why international arbitration is of importance: "In transborder commercial matters, choosing to arbitrate goes almost without saying, because international arbitration is instrumental to neutrality, the provision of the necessary expertise, effective dispute resolution, and the enforcement of awards. Finality and enforceability are central to any dispute resolution process. Functionality—in terms of economy, efficiency, and effectiveness—is another highly prized objective. Additionally, parties may want to provide for greater rights protection or may seek to preserve their business relationship no matter how difficult a particular transaction may become. Different or adapted remedies can achieve these ends." at 435.

within their own arenas to remain autonomous.[771] Agreements under transnational legal regulation do not fall into the same depth of uncertainty as domestic laws.

Party autonomy has been significantly supported by transnational laws, particularly when disputes are regulated by international arbitration. In fact, one of the TGPL is *pacta sunt servanda*; that promises exchanged between parties must be kept, recognizing the binding force of law that exists between contracting parties. Although *pacta sunt servanda* grants to TBN parties freedoms of contract, they are accompanied by a standard of good faith expected between negotiating parties, the need to reconcile the relationship between party autonomy and expectations of standard of conduct, such as good faith, remains to be more fully elaborated.

A growing uneasiness regarding the regulation of international sale of goods, presumed to be harmonized through standard form contracts, is suffering from a poverty of legal tools. In a sophisticated, e-commerce environment, updating antiquated treaties to provide for growing technological concerns and a manner to view the transformation of TBN from ancient merchant customs to its own juridical order should be reconsidered.

[771] *See See also* Harold J. Berman and Felix J. Dasser, The "New" Law Merchant and the "Old: Sources, Content, and Legitimacy" in Carbonneau, Thomas E., (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, Inc., 1990. Berman/ Dasser. *See also supra* note 668. Carbonneau: "The law merchant has been for centuries and continues to be today an international body of law, founded on the shared legal understanding of an international community composed principally of commercial, shipping, insurance, and banking enterprises of all countries. These shared legal understandings are reflected in the contract practices of those enterprises, and they continually find their way into judicial and arbitral decisions and also into national and international legislation. We believe that the shared legal understandings of the international mercantile community should be seen as an autonomous body of law, binding in appropriate cases upon national courts." at 21.

Section 3: Should Party Autonomy be Recognized as its Own Juridical Order in the Context of TBN?

To continue the setting of our legal ballroom, we will study party autonomy in the broad sense of the word to establish what it really *is* in the context of TBN. We have examined the roles of domestic and transnational sources of regulation and ascertained that, in principle, they support party autonomy, but they lack the tools to properly characterize what TBN parties are arranging during TBN and to what degree they have bound themselves to a standard of conduct. While transnational laws provide guidelines to party autonomy, domestic laws will impose certain limitations and override party consent even when voluntary consent is exercised (if it constitutes an illicit or wrongful act or contravening public order).

We will first peel the layers of the anatomy (a term we borrowed from Martin Hogg) of party autonomy to inquire how it manifests in nature to ponder how party autonomy *fits* in law. We will consider the *will theory* and its impact on party autonomy. We will compare the workings of merchant custom adopted by party autonomy in self-regulated industries. In small heterogeneous groups, social sanctions function satisfactorily due to small community values; but these sanctions may not be suitable to govern the magnitude of the global market. We will widen the analysis to include whether party autonomy could be considered its own juridical order and, if so, how it functions as a regulatory source of law. We will conclude with inherent internal limitations which have been adopted widely, including a standard of conduct, and whether this stand could be the elusive concept of good faith, to promote trust in business relationships.

1. The nature of party autonomy during TBN

Party autonomy, in the context of TBN, focuses on the ability of business parties to regulate their own dealings. Lehmann defines party autonomy as "…nothing more than that people can take

care of their own affairs."[772] Business parties prefer to be self-governed,[773] and for the most part, both domestic and transnational laws have endeavored to respect this autonomy.[774] Many scholars have defined party autonomy as purely procedural where parties are free to choose the law applicable to a dispute;[775] referring often, but not exclusively, to the "choice of law".[776] The binding force of contract has been considered a procedural aspect to party autonomy that influences the reinforcement of substantive express provisions.[777]

We have discovered that the procedural aspects are merely the outer layer of party autonomy.[778] Peeling back anatomical layers, below the surface on a substantive level, party autonomy is the *voluntary* creation of the parties' own rules to regulate business negotiations, in which the parties' intentions may be expressed or implied, often referred to as "institutionalized" in terms of juridical instruments under the freedoms of contract.[779] This norm is aimed to promote economic relations between parties by providing business parties tools to regulate their own transactions without

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[772] Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws", Vanderbilt Journal of Transnational Law, Vol 41, 381 at 414.

[773] It is well established that the majority of business parties prefer to settle their own disputes. Furthermore, many business parties exercise a more precarious party autonomy to agree later. *See* Omri Ben-Sharar, "Freedom from Contract" in Omri Ben-Shahar and Ariel Porat, (Eds.) *Fault in American Contract Law*, New York, Cambridge University Press, 2010 at 200; For business *see supra* note 64. Roxenhall/ Ghauri. Roxenhall emphasizes that business parties believe contracts are only necessary under exceptional circumstances at 261 and 262. *See also* Stefan Grundmann, "Information, Party Autonomy and Economic Agents in European Contract Law", Common Market Law Review 39: 269-293, 2002. Grundmann underlines that "contract law is the core area not only for private law, but also of the internal market process…[this fundamental freedom is] designed to extend party autonomy across borders." at 270.

[774] *Supra* note 204. Meng, see also *supra* note 207. Zhang.

[775] *Supra* note 772. Lehmann at 387. *See also* Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure", Journal of International Arbitration, June, 2007, Vol.24(3), 327-339. However, this freedom is not without limitations. In particular, "the parties themselves cannot unilaterally change the terms of the arbitration agreement without the consent of the arbitral tribunal." at 331.

[776] *Supra* note 207. Zhang describes "choice of law as a doctrine …introduced in the sixteenth century…" at 511 and continues, "…said to originate from the writings of Charles Dumoulin (1500-1566) a French scholar of the sixteenth century who was acclaimed as "the father of party autonomy…It was Dumoulin's belief that with respect to contracts, "the will of the parties is sovereign." at 516. Furthermore, "[Dumoulin] articulated that under party autonomy, in the absence of express choice, he law was to be sought in accordance with the tacit and probable intentions of the parties…sought in the surrounding circumstances." at 517.

[777] *Supra* note 204. Meng at 214.

[778] *Supra* note 81. Muir-Watt reflects: "[party autonomy is] unaffected by the transformation of the nature and function of private law, the profound change induced by globalization in the structure of the international legal order, and more generally the tectonic upheavals within the theory of law and sovereignty and the reality of cross-border trade and investment." at 9.

[779] *Supra* note 207. Zhang distinguishes how various jurisdictions interpret "freedom of contract". She has identified that in English law, for example, which is synonymous with English Canadian law "freedom of contract" is wider than "private autonomy" whereas French law categorizes freedom of contract "as a sub-species of party autonomy [and] in the Italian experience the two terms have been used interchangeably…In German thinking, party autonomy is the general category which covers the acts of private persons, whilst freedom of contract, which derives its origin from that, is divided into all its sub-species." at 135.

outside interference.[780] We have considered substantive aspects of the exercise of party autonomy in the eyes of juridical positivists in Section 1 of Chapter 2, Part I only to realize that there are many variations within *freedoms of contract*, whereby negotiation communications are not recognized unless a valid contract has been formed.[781] If we consider freedoms of contract under a pluralistic lens, they can be seen as simple composites under the umbrella of communications expressed by party autonomy during negotiations. We posit that there could be other tools that could be used to express this autonomy.[782]

Michaels calls for a "legal theory of party autonomy with a foundation," rising above its current attribution as a myth or legal fiction. Michaels comments on the "poverty of theoretical discussions."[783] He suggests that a legal theory of party autonomy does not exist. "Instead, we have two paradigms – an internationalist one, and a substantive law one – and no basis on which to choose between the two."[784] In his article entitled "Party Autonomy – A New Paradigm without a Foundation?"[785] Michaels describes the substantive paradigm as the freedom of the parties to deselect laws that are mandatory through procedures, such as choice of law.[786] He considers that a theory of party autonomy need not explain freedom of contract at large. Instead, it needs to explain "a theory of rules that are mandatory domestically but can be deselected through a choice of law clause."[787] On an internationalist paradigm, party autonomy is "a quasi-connecting factor" which is "an accident of

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[780] *Ibid.* Zhang becomes pragmatic: "...party autonomy is especially favored by many practitioners in international business transactions. They believe that allowing the contractual parties to determine the law that applies to the disposal of their rights and obligations will help achieve efficiency, certainty, predictability, and protection of the parties' expectations." at 512. *See* also Jean Kellerhals, Marianne Modak, Jean-François Perrin and Massimo Sardi, *L'Éthique du Contrat (Du rapport entre l'intégration sociale et la morale juridique populaire*, *L'Année sociologique*, 1993, 43, 125.

[781] For example, agreements to agree later sometimes fall short of traditional contract validity and freedom from contract may not be considered a contract at all.

[782] We will return to this discussion in Section 3 of Chapter 1, Part II regarding edge pieces of a normative legal theory of negotiations with a foundation.

[783] *Supra* note 80. Michaels at 3.

[784] *Ibid*.

[785] *Ibid*.

[786] *Ibid* at 5.

[787] *Ibid* at 14.

history"[788] and a "mere extension of contractual freedom."[789] In other words, this extension of party autonomy is the ability of the parties to adopt express agreements and make choices beyond the state.[790] A "transnationalist paradigm" calls for an underlying theory of party autonomy in transnational law which "cannot be static but must be dynamic.[791] The paradigm is comprised of polar opposites: how contract is viewed by law whereby "contract is clearly subordinate to the law," versus an international level, where "party autonomy reverses this order."[792]

Party autonomy has also been explained in terms of a legal fiction, (similar to the legal fiction that supports implied contracts), and its foundation in current legal theories is based on the procedural expansion of free choice of law and forum recognized by international arbitrators.[793] On a pluralistic basis the effect of law may be dependent on the reception by the transnational community. Party autonomy is "essentially utilitarian, linked to the needs of international trade."[794] But there is no foundation since "we have no justifying theory for party autonomy [but that] party autonomy has become so important that we must deal with it anyway."[795] In absence of a legal theory, we dub the concept with a legal fiction or call it a myth. In the past, myths have entered the battlefield of critical commentaries that are blinded by the great importance the concept may have. Both *lex mercatoria* and party autonomy have suffered this strife.[796] We posit that the concept must be re-examined in a new light to question how party autonomy fits into the scheme of law since party autonomy is a matter of context.

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[788] *Ibid*.
[789] *Ibid* at 6.
[790] *Ibid*. Because if its' international character, Michaels argues that the scope of this paradigm of party autonomy should be "detached from states." This would be accomplished through a "deselection" choice of law clause between the parties at 14.
[791] *Ibid* at 15.
[792] *Ibid* at 7.
[793] *Supra* note 81 at 5 and 6. Muir-Watt.
[794] *Supra* note 80. Michaels at 7.
[795] *Ibid* at 3.
[796] *See supra* note 171. Mustill; *Supra* note 656. Sachs; See also Georges R. Delaume, "The Myth of the Lex Mercatoria and State Contracts", in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990; Heith Highet, "The Enigma of the Lex Mercatoria", in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990.

"[E]ven in the world of legal fictions, coherence may count;"[797] that these structures must maintain accessibility,[798] stability,[799] and foreseeability[800] which are the three primary factors of juridical security.[801] These factors must be honoured to preserve the legitimacy, efficiency and provision of certainty to legal regulation as it applies to the regulation of business negotiations. Lehmann argues that "[an] important feature of party autonomy is that within its realm, it trumps all other conflict rules."[802] Various theoretical arguments of conflict of laws begin with the older positions of Joseph H. Beale and Kahn-Freund's who scorned party autonomy as "permission to do a legislative act."[803] This position of party autonomy causes "theoretical headaches to any serious positivist."[804] Transformation from a negative position into a neutral one where complete freedom is neither recognized nor denied, but progressive legal theories[805] support the protection of "reasonable

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[797] *Supra* note 81 at 23. Muir-Watt. *See also supra* note 11. Piazzon cites Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, Sirey, 2e éd., 1951, no. 38, p. 334 who points out some of the multiple causes of juridical insecurity: inflation, legislative instability, réduction in the quality of norms, retroactivity of rules of law. [our underline].

[798] *Ibid*. Piazzon. Piazzon relates the importance of accessibility in law: « …l'accessibilité matérielle et intellectuelle de la règle, tout comme la sécurité juridique entendue comme la fiabilité du droit, n'est qu'un moyen au service de la liberté et de la justice qui résultent d'un meilleur accès au droit. » at 18.

[799] *Ibid*. Piazzon divided stability into objective and subjective factors, objective law being : « concerne les sources du droit, c'est-à-dire principalement la loi et la jurisprudence. » and the subjective law :« Prescription et non-rétroactivité sont deux sources majeures de stabilité des droits et situation individuels des sujets de droit. » at 28.

[800] *Ibid*. Piazzon becomes philosophical when describing foreseeability in law, referring to *La philosophie du droit*, PUF, coll, *Que sais je* ?, 10e éd., 1997, at 103: « La prévisibilité des conséquences juridiques des actes et comportements constitue donc l'essence de la sécurité juridique pour les sujets de droit. « La sécurité, écrit Batiffol, ne se confond pas avec la simple protection de l'individu et de sa liberté. Elle exprime plus précisément l'aspiration à un system de règles certaine, parce qu'une telle certitude répond au *besoin décisif de prévisibilité* : il faut qu'un chacun puisse prévoir les conséquences de ses actes, et déterminer par suite ce qu'il peu ou doit faire ou ne pas faire ; il faut qu'un chacun puisse aussi prévoir ce qu'autrui a le droit de faire ou ne pas faire pour régler ses attitudes en conséquence ». at 49.

[801] *Ibid*. Piazzon once again refers to Roubier: «Comme d'autres types de règles, par exemple morales ou religieuses, le droit intéresse l'organisation de la vie en société, il est un « phénomène de régulation » nécessaire…Au delà de cette généralité, le droit organise la conduite des Hommes en fonction de finalités qui sont l'expression de valeurs essentielles: il est donc une science normative qui poursuit des finalités. » at 11.[our underline]

[802] *Supra* note 772. Lehmann at 289.

[803] *Ibid* Lehmann at 390. In fact, Lehmann points out that "…the word "autonomy" in Greek translates to the phrase "to give oneself a law."

[804] *Ibid* Lehmann at 383. *See also* Dori Kimel, "Fault and Harm in Breach of Contract" in *From Promise to Contract – towards a liberal theory of contract*, Oregon, Hart Publishing, 2005 at 287. Private autonomy other than that enforced by the powers of the state travels contrary to a juridical positivist point of view, as noted by Dori Kimel: "The facilitative nature of this legal domain – the fact that, here, the law furnishes prospective parties with the power to make legally binding transactions, thus also availing them, in the context of such transactions, of the adjudicating as well as enforcing agencies of the state." Kimel differentiates between contract and promise: "On the voluntariness side, apparent tensions between contract and promise are bound up with the idea that if contract, like promise, were based on the recognition of the value of voluntarily assumed, self-imposed obligations then contract law would look different: it would impose far fewer limitations and far fewer conditions on parties' ability to have their expressed wishes – and nothing other than their expressed wishes – enforced by law. Contract law doctrines such as consideration and implied terms, the relative rarity of actual enforcement (as opposed to the award of monetary compensation for breach), and much besides to do with the numerous ways in which the freedom of contract is encroached upon in contemporary jurisdictions, have been adduced as evidence in this context." at 272. *See also* Duncan Kennedy, " From the Will Theory to the Principle of Private Autonomy : Lon Fuller's "Consideration and Form", Colum. L. Rev., Vol. 100(1), 2000, 94; Eric Posner and Alan O. Sykes, "Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues", 110 Mich. L. Rev. 243, 2011-2012; Richard A. Posner, "Let Us Never Blame a Contract Breaker" in Ben-Shahar, Omri and Ariel Porat, (Eds.) *Fault in American Contract Law*, New York, Cambridge University Press, 2010.

[805] *Ibid*. Lehmann describes various possible hypothetical theories that could allow party autonomy to challenge domestic law hierarchy, one of which rides on the "reasonable expectations of the parties at 392.

expectations of the parties"[806] and conflict of laws open their scope to yet "another field of conflict of law…the field of individual liberty.[807]

2. Party autonomy and the will theory

"Strength does not come from physical capacity. It comes from an indomitable will."
the words of Mohandas Karamchand Gandhi

Remaining on the substantive anatomic level, we will now investigate the relationship between the will theory and party autonomy. The purpose for this inquiry is to reveal that once we peel the outer shell of procedural aspects of party autonomy, there are substantive decisions that also rely on the parties' ability to self-regulate.[808] This may seem obvious in many jurisdictions, particularly in civil law systems, but there is still a certain resistance to the idea under the common law.[809]

The normative foundation of the doctrine of contract is the voluntary willingness to be bound to a legally recognized obligation. Derived from an era of "*laissez-faire*", a chicken and egg scenario arises as to whether the state recognizes that private parties may exercise their will *freely* (the will theory) and whether the force of the state is behind the undertaken obligation or whether this freedom arises from the Utopian, Roman law of autonomy and equality.[810] In either case, there lies a certain lack of comfort to adjudicators who have only a few tools to measure the free will exercised by the parties.

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[806] *Ibid* at 827. Lehmann argues that. "The justification of party autonomy has to start by recalibrating the problem of conflicts...the origin of the conflicts problem is not a battle between states, but lies instead in the private sphere" at 413. *See also supra* note 47. *Yam Seng* was later referred to by our own Supreme Court of Canada, recognizing good faith as an organizing principle in the common law. *See also supra* note 51. *Bhasin*.

[807] *Ibid*. Lehmann at 434.

[808] *Supra* note 540. Rakoff posits that freedom of contract "cannot be defined juridically" rather that it is a voluntary, lawful and enforceable (or not) support of the "will theory." at 490 and 477.

[809] *Supra* note 84. Atiyah claims that under common law, the will theory is accepted in a different manner from civilian laws. Rather than a subjective "meeting of the minds" the common law only considers that which is expressed or what can be objectively deduced. Atiyah refers to Hume to demonstrate the resistance to establishing intention subjectively: "There *is* no such act of the mind as *willing* something, and if there were, it is not the will alone which creates an obligation, but the expression of that will. Moreover, the expression of the will is sufficient for the creation of the obligation even though the promisor has a secret intention to deceive us. The reality, of course, is far simpler. Promises are binding for reasons of human convenience."at 53.

[810] *Supra* note 204. Meng.

According to Atiyah, it was Rousseau's influence that infused the will theory into English common law.[811] Rousseau's brilliant mathematically designed theory of the "general will" differentiated the right for individuals to exercise their will on private matters (versus the democratic societal will).[812] A flurry of debates arose during the modern era. Fuller, himself, struggled against acceptance of the will theory only to reconsider its defense in later years, albeit in a diminished role.[813] Hogg amalgamates the essence of contract theory in a manner acceptable to both common law and civil law jurisdictions, incorporating the will theory of choice: "The twin pillars of agreement and intention to be bound...such [manifestation] being conduct beyond mere "desire" or "resolution" - provided a theory of contract which has proved both uncontroversial and stabilizing."[814]

One suggestion is that party autonomy is composed of the "will theory".[815] The role of the will theory is understood when party intention is expressed or implied through contractual vehicles.[816] The will theory accompanies the intention to be bound and hovers over whether this basic freedom is all about choice of the parties.[817]

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[811] *Supra* note 84. Atiyah refers to Rousseau: "He is famous in particular for…the idea of a 'general will'. This concept of the 'general will' seems to be not unrelated to those continental juristic ideas about contract in the late eighteenth and early nineteenth century, which have come to be known as 'will theory', and which eventually…filtered into English law."

[812] Radu Dobrescu, « La distinction rousseauiste entre volonté de tous et volonté générale : une reconstruction mathématique et ses implications pour la théorie démocratique », Canadian Journal of Political Science, 2009, Vol 42(2), 467.

[813] In other words, the social good was still considered greater than the protection of individual rights.

[814] *Supra* note 11. Hogg at 15.

[815] *Supra* note 204. Meng at 214.

[816] *Supra* note 84. Atiyah. "the paradigm of legal obligation came to be seen as that which was created by the deliberate and conscious choice of a man who made a promise; and by 1770 this was already beginning to lead to the conclusion that *all* legal obligations arose from free choice-which, if it was not expressed, must then be implied." at 57. See also Richard Craswell, "When is Willful Breach "Willful"? The Line Between Definitions and Damages", in Ben-Shahar, Omri and Ariel Porat, (Eds.) *Fault in American Contract Law*, New York, Cambridge University Press, 2010.

[817] *Ibid*. According to Atiyah, the voice of Hume: "….distinguish[es] between the act of agreeing or of making mutual promises on the one hand, and an 'agreement' which consists of merely doing something with a common purpose, and involving reciprocal obligations. This distinction is of central importance to...for it recognizes that *common action*, involving reciprocal obligations, though it may be called an agreement, nevertheless differs from *the making of an agreement* by an exchange of promises. It differs in two important but related ways: first in that the reciprocal obligations in the first case arise out of the *common action*, that is, out of what is *done*, even though it is done in concert, while in the second case, the obligations arise out of what is *said*, that is, out of the expressed intentions, or promises, of the parties. And in the second place, it differs in that common action, although involving some measure of consent or agreement, does not rest entirely upon an act of consent or agreement in the way that promissory liability may rest." at 56. *See* Arthur Linton Corbin, "Quasi-Contractual Obligations", The Yale Law Journal, Vol. 21, No. 7 (May, 1912), 533-554. Corbin defies intention is easily conclusive: "…it is seldom possible to determine conclusively whether there was an agreement in intention or not; A may be lying…" at 534.

Existing more recently in the debates of legal scholars are arguments of whether the "will theory" is based on *choice* by the parties or *power* of one party over the other.[818] The reason for this interest is based on whether the will theory should exist at all or whether it should be replaced with an interest theory, based on benefit.[819] For those commentators who advocate that the will theory is based on *power*, the interest theory is superior and they recommend discarding the will theory.[820] Party autonomy regulates *choice* based TBN.

Regardless of the arguments over choice or power, there is no undoing the will theory. It is a fundamental basis for autonomous relations. Fuller toiled with the concept of the choice-based will theory with additional obstacles that the common law had to overcome, namely, the rejection that the intention of the parties could be determined subjectivity. The main objection lies in the lack of subjective evidence, since the common law relies on an objective test where no expressed provision has been made between the parties. It is considered that there is more certainty in what a reasonable man would have done in like circumstances. This secondary consideration creates a further barrier to the will theory, directly attacking the freedom of contract since it renders what the parties *actually* intended impotent unless clearly expressed.[821]

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[818] Paul Graham, "The Will Theory of Rights: A Defence", *Law and Philosophy*, Vol. 15(3), 1996, 257 at 260.

[819] The interest theory was really developed on a moral or political philosophy inspired by Joseph Raz, and qualified by Roscoe Pound as a balance between public and private interests. *See* Terry di Filippo, "Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound", Indiana University Press, *Transactions of the Charles S. Peirce Society*, Vol 24. No. 4 (Fall, 1988), 487-508. di Fillippo asserts that, under this philosophy, "individual interests can be given effect however only to the extent to which they coincide with social interests." at 488. However, *see supra* note 147 regarding legal philosophy version described by Kramer describes the relationship between the debtor, to whom the legal duty is owed and the creditor. To disclaim the will theory he uses criminal as the first proponent, followed by the nature of the will theory based on powers of enforcement or waiver at 249 and 250. He neglects to view party autonomy as the exception, as he considers party autonomy based on choice rather than power.

[820] *Supra* note 147. Kramer.

[821] *Supra* note 804. Kennedy at 108.The will theory is based on individual freedom and has been successfully integrated into civil law jurisdictions upholding voluntary consent to substantive matters. It reflects what is commonly understood in a business handshake or nod: symbolic of the respect returned when acquiescing to another's will whereby a promise made by one party is upheld to another (or compensated). The "meeting of the minds" is a subjective context based on the intention to consent, as opposed to the common law objective test of "manifestation of mutual assent".This approach is different from the objective standards in the CCL. *See supra* note 9 (footnote 11 at 449) Swan who refers to "*Walton v. Landstock Investments Ltd.* (1976), 13 O.R. (2d) 693, at 696, 72 D.L.R. (3d) 195, at 198, [1976] O.J. No. 2275, at para. 9 (Ont. C.A.), leave to appeal refused [1976] 2 S.C.R. ix (S.C.C.), where Houlden J.A. said: "Mutual assent is not required for the formation of a contract, only a manifestation of mutual assent ... Whether or not there is a manifestation of mutual assent is to be determined from the overt acts of the parties." *See also Bogue v. Bogue* (1999), 46 O.R. (3d) 1, [1999] O.J. No. 4310 (Ont. C.A.)." *See* Siegfried van Duffel, "In Defence of the Will Theory of Rights", Res Publica (2012) 18, 321 versus Nicholas Vrousalis, "Between Insensitivity and Incompleteness: Against the Will Theory of Rights", Res Publica (2010), 16, 415.

We argue that the will theory is innate to negotiations in both procedural and substantive layers; that it inherently lives within the semiotic communications exchanged between negotiating parties. In fact, we propose that we could create a system whereby objective and subjective distinctions are obsolete by introducing BONs that follow step-by-step what the parties consent to at any given time; specific and unambiguous exchanges, discarding the need for an objective test.

3. Does party autonomy operate "outside" the law in self-regulated industries?

The fundamental answer to whether self-regulated industries operate outside the law or whether they have created their own juridical order depends on the juridical lens approaching the matter. On a purely juridical positivist note, it is considered that parties operating in self-regulated industries have made a deliberate choice not to be bound by the law within the scope of these industries to self-regulate using non-legal sanctions such as reputation and ex-communication of membership. This is assuming that the law must be authorized by a sovereign source. If we view the matter with another lens, we can see a plurality of sources of law.[822] Merchant custom has been recognized to have the elements of its own juridical order.[823] Self-regulated industries have also been recognized as their own juridical order.[824]

There are similarities between merchant custom and self-regulated industries. Both systems operate under a normativity that is derived from party autonomy and cooperation.[825] This foundation functions on the expression of the will theory which enables the parties themselves to self-regulate

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[822] *Supra* note 175. Macdonald Illuminating at 1118. To illuminate the methodology to be used to comprehend human discernment, Macdonald breaks down this perception into four procedural steps: 1) "Perceiving"; (creating a human awareness); 2) "Naming"; (identifying the name and character), 3) "categorizing"; (providing a class or group for better identification) and 4) "understanding. (insight to allow good judgment).

[823] *See supra* note 23. Fecteau specifies: a patterning of widely accepted human behavior and a minimum formation of law.

[824] Guy Rocher, "Pour une sociologie des ordres juridiques", 29 C. de D. 91, 1988 at 119.

[825] Roderick A.Macdonald, "Custom Made-For a Non-chirographic Critical Legal Pluralism", 26 Can. J.L. & Soc. 301, 2011. Macdonald advocates: "As agents, legal subjects understand the normativity of law as originating in their own actions and interactions; that is, they learn about law, first and foremost, from themselves…A *critical* legal pluralism requires human beings to appreciate their own norm-constituting potential, that is, to accept that interaction is fundamental to all normativity – however formalized, however explicit, however informal, however implicit. The meaning of the *word* is to be understood in actions and interactions. It is to be understood not just in the institutional rites of dogmatic interpreters but in the continuing interpretive communion of the congregation. In such a perspective the *word* is only one of the many symbols through which a congregation becomes a community…expressing their aspirations, holding each other to account, and sometimes even oppressing each other: art, music dance, rite, gesture, and action ground the word in everyday life." at 311.

through their own arrangements[826] insofar as their intentions are specifically expressed, and community standards are assumed to exist within the parties' relationships.

What is seemingly a subtle difference appears to be a great divide on a juridical level since merchant custom is considered to be operating with the use of legal norms. We have seen that the juridical positivist claim is that merchants function through party autonomy that is exercised through freedoms of contract, considered by juridical positivists as a reward granted by sovereign sources of law. On the other hand, self-regulated industries allegedly operate using social norms and non-legal sanctions. We recall that for a social norm to become a legal norm it must be a widely accepted standard due to actions that reflect a repeated and structured patterning of human behavior and it must have a minimum formation of law.[827] If we take a closer look at the development of self-regulated industries we can understand why Rocher has considered self-regulated industries, as a juridically sociological fact, to have created their own juridical order, having all the components of a juridical order identified by Rocher.[828]

Self-regulated industries have developed as a result of commercial members within these groups having accepted to exclude outside legal regulation.[829] Richman claims that "ineffectiveness of

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[826] *Supra* note 11. Hogg's twin pillars at 15.

[827] For more discussion see 1.1 in Section 2 of Chapter 2 Part I. It is undisputed that merchant custom and self-regulated industries both have the first component. *See supra* note 23 where Fecteau refers to *North Sea* regarding the minimum formation of law: it is not the amount of time that determines a minimum formation of law rather the adhesion to the rule, recognized by the community itself. *See also supra* note 194. Donaldson at 252.

[828] *See supra* note 824. Rocher at 119. The fact that these industries have organized themselves in a systematic manner of functioning, they have qualified as juridical orders unto themselves, outside the state. The definition of a juridical order identified by Rocher are: 1-"un ensemble de règles, de norms acceptées comme au moins théoriquement contraignantes par les membres d'une unité social particulière, qu'il s'agisse d'une nation, d'une société, d'une organization, d'un groupe, etc"; 2-des agents ou des appareils sont reconnus dans l'unité sociale comme étant specialisés pour: -élaborer de nouvelles règles ou modifier celles qui existent; -interpreter les règles existantes; - les appliquer et les faire respecter; 3-l'intervention des appareils ou agents est fondée sur une légitimité…justifiée…cela signifie que les membres de l'unité sociale on une *conscience* des rapports entre les règles et les appareils ou agents; 4-les trios functions enumerées en 2- peuvent être remplies par des agents ou des appareils différents, ou par les mêmes; - 5-les règles et les agents ou appareils doivent faire prevue de stabilité dans le temps, d'une relative permanence. Ces règles ne doivent pas sans cesse varier et les agents être constamment relayés. 1- Repeated interactions and acceptance of norms are satisfied by Schultz at 895. 2- In an institutionalized setting, such as self-regulated industries, agents are appointed by the community to elaborate new rules, interprete existing rules and apply a sanction (expulsion) if the rules have not been respected. 3-Members are bound by rules of arbitration. *See supra* note 28. Schultz at 932: It is the members themselves that maintain the legitimacy of the system through instituionalized communities that invoke sanctions against non-compliance. 4- This is not applicable since the agents are the same in all three components. 5- Evidence that these rules and agents have a stabilty over time must take into consideration the *North Sea* interpretation: it is the adhesion of the rule by the community rather than the amount of time that determines a minimum formation of law.

[829] *Supra* note 28. Bernstein.

state-sponsored courts" breeds extra-legal enforcement.[830] Schultz agrees that regulation of sustainability certificates in the forest industry was "to regulate where government failed to do so"[831] coming out of an economic necessity in the form of "institutional environment".[832]

The diamond industry may be the most renowned of self-regulated businesses,[833] setting mechanisms of communication in place, standardizing how the stones are valued and purchased.[834] If a party fails to comply with industry standards, including the warranty of the quality of the stones, sanctions include the posting of reputation bonds;[835] a powerful and efficient deterrent in the diamond trade, and not unlike the treatment during the early days of the fair letter where merchants who did not honour payment were excluded, (along with their friends), from trading.[836] In the event of a dispute, club membership agreements preclude court actions, referring all disputes to binding arbitration.[837]

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[830] *Supra* note 28. Richman at 32.

[831] *Supra* note 28. Bradshaw Schulz at 2545.

[832] *Ibid* at 2549. Shultz admits that this is a new approach and therefore will require more empirical work in the future (see p. 2519) but Shultz argues it is on the increase at 2522.

[833] *Supra* note 28. Richman warns of the results of self-government: "Because diamonds are easily portable, universally valuable and virtually untraceable, state courts are incapable of enforcing executory contracts for diamond sales. In other words, the diamond industry has never enjoyed legal certainty." at 31.

[834] *Supra* note 28. Bernstein summarizes that the transaction is effected by means of an "open cachet, symbolic gestures to signify offer and acceptance, without the necessity of consideration to regulate a binding effect to an offer, using a sample stone sealed in an envelope. The buyer's signature on the outside of the envelope signifies he accepts the offer and the seller must acknowledge this acceptance within a designated period. The seller's acceptance is relayed to the buyer by "mazel and broche," a symbol recognized as acceptance in the industry. If he can't contact the buyer within the designated period nevertheless he may accept by marking the envelope, certified by the witness of industry members. at 122. Bernstein explains the industry role: Bernstein posits that, "Although the cachet is formally an agreement between a buyer and a seller, its most important function in the market is to regulate the relationship between a seller and his broker… [cannot dishonestly state a lower price and] pocket the difference." at 123.

[835] *Ibid* at 138. These bonds are imposed on club members which have "pre-existing or gradually evolving social relationships" at 140; (As opposed to "one-shot" deals where parties do not expect to do business with each other again) *Supra* note 9 CCII. Swan argues that there are "pockets of the law" where bad behaviour in the negotiating relation will also be controlled (She refers to *Walton v. Landstock*). We posit that his could open the scope to adopting an organizing principle of good faith in negotiations. She argues that the transformation achieved by *Bhasin* where the separate pockets or instances are brought together in a new organizing principle and that the same pattern of pockets or instances exists under negotiations. Paragraph [63] in the *Bhasin* decision lays down the steps taken to recognize an organizing principle of good faith towards a contractual performance direction but both paragraphs [33] and [64] offers and extension to other situations and be applied to negotiations. Negotiations are known to have "scumbaguous behavior", particularly when choosing to exercise competitive strategies and tactics. Although based on marketing research, negotiations are generally a mixture between competitive and collaborative strategies and tactics throughout the continuum, as the relationship develops. Puffing and bluffing, and some forms of lying and cheating (more prevalent during the earlier part of the relationship) have been tolerated for the most part by law and marketing as long as another party could not have reasonably relied on the information, particularly when law cannot see either a written agreement or an equivalent agreement demonstrated by the conduct of the parties. If party autonomy is its own juridical order, then it must have organizing principles as well, which should include levels of good faith. There is a baseline that parties cannot choose to go below, however, that both domestic law mandatory laws and transnational public order prohibit. *See also* Gerald B. Wetlaufer, "The Ethics of Lying in Negotiations", 75 Iowa L. Rev. 1219, 1989-90; Michael H. Rubin, "The Ethics of Negotiations: Are There Any?", 56 La. L. Rev. (1996) at 454.

[836] *See* 1.1 in Section 2 of Chapter 2, Part I. See in particular *supra* note 7. Power.

[837] *Supra* note 28. Bernstein interjects, "The DDC Board of Arbitrators does not supply the New York Law of contract and damages, rather it resolves disputes on the basis of trade customs and usages." at 124.

Bernstein advocates that diamond merchants "opted out" of domestic regulation, along with members of the cotton industry,[838] as these industries were able to self-regulate using social norms and reputation. There is new change upcoming since the rise of Indian stone cutters competing with the traditional monopoly of the DeBeer diamond legacy, the size of the global market in the diamond industry has altered the manner in which the diamond industry will be exploited and regulated in the future.[839] Furthermore, diamonds represent "forever", a theme that is not conducive to the conflicts resulting from "blood diamonds".[840] Consumers are not willing to purchase "blood diamonds" and therefore the certainty of the quality and origin of the diamonds must now be protected through certain trademarks.[841] The development of a certification process known as *The Kimberley Process Certification Scheme* (KPCS) was realized in 2003 to protect legitimacy in the diamond trade and abolish blood diamonds from the international community.[842] Therefore, authenticity of the diamonds from legitimate sources now requires protection:[843]

> "Diamond sellers now need global private governance to assure consumers, and instruments of regulatory certainty replace the unsupported anonymous transaction. In short, the general lawlessness of globalization has meant the end to lawlessness in the diamond industry."[844]

Non-legal sanctions have functioned very well in small communities where community values can be enforced by a recognized hierarchy who is either a highly-regarded person of status or a

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[838] *Ibid*. Bernstein.

[839] *Supra* note 28. Richman argues: "If the diamond market continues to expand, the relational constraints of diamond networks might fail to match the growth, and diamond merchants might have to find alternative systems to organise distribution." at 39.

[840] Gretchen Vetter, "The Forgotten Million: Assessing International Human Rights Abuses in the Artisanal Diamond Mining Industry", 16 Transnat'l L. & Contemp. Probs. 733, 2006-2007 at 736: "Conflict diamonds are currently defined as "diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the [United Nations] Security Council"." But Vetter calls for an expansion of this definition: "to include "all those gems that come from areas where mining is based on the systematic violation of human rights..at 737.

[841] *Ibid* at 44. Richman.

[842] *Ibid*. Vetter at 744. Vetter argues that this "is an enormous step in the right direction" but that there are further shortcomings that must be addressed at 745,746.

[843] *Ibid*. Vetter defines blood diamonds at 736, extends the definition at 737 and then calls for a new definition at 766.

[844] *Supra* note 28 at 42. Richman.

membership board (institutionalized) set up to administrate the group and who has the power to enforce sanctions:

> "(1) the existence of rich, well-developed norms among a merchant group…(2) a resource-type that is conducive to user generation and enforcement of rules; and (3) a robust competition for private regulatory control over industry activity."[845]

Within these small industries, three norms must be present in order for self-regulation to be successful, including "repeated interactions", that the parties know "a great deal of information about each other"; and that the membership is limited to "a small number of group members."[846] Under self-regulated regimes, the members themselves maintain the legitimacy of the system through institutionalized committees:

> "It enables them [dominant group members] to invoke sanctions against those who do not comply. Their status is therefore not incidental to their role as dispute resolvers. From this position of power, these members are able to control the group's norms in a way that maintains the status quo."[847]

Comparatively, merchant custom has developed into a recognized juridical order due to widely accepted standards of conduct and a minimum formation of law. Similar to self-regulated industries, prior to the transformation of *lex mercatoria*, we recall that ancient merchant custom used social sanctions to control their markets through expulsion of a merchant, and his friends, who had not

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[845] *Supra* note 28 at 2518. Bradshaw Schulz argues that: "Growing dissatisfaction with market-mechanisms is leading to increasing contemplation of private regulation as a mechanism to address global environmental concerns…"Norms literature critiques legal centralism in which government is the primary creator and enforcer of rules." Within close-knit groups, extralegal, norm-based dispute resolution processes may be more efficient than formal legal structures. Norms literature illustrates that industry actors define their own rules, and that the success of transactions depend upon trust, which reliance upon formal legal dispute resolution systems may undermine." at 2522 and 2523. Bradshaw Schulz explains where these industries are best served: "Sustainability certifications are active in fishing, chemical companies, conflict-free diamonds, fair trade coffee, tea, cocoa and cotton….Certification programs are lauded as promoting transparency, accountability, and public participation relative to traditional regulatory regimes. They "encourage proactive industry, reduce transactions costs and accelerate achievement of environmental targets due to less legal action and conflict." at 2527. Using the forestry example, Bradshaw Schulz expounds on how the private regulatory regime "operates against the backdrop of existing state and federal laws. They are voluntary systems of rules developed, monitored, and enforced by non-state actors (largely industry groups or environmental non-governmental organizations)." at 2548. *See also* Robert Ellickson, "Order without Law: How Neighbors Settle Disputes" Cambridge, Massachusetts: Harvard University Press, 1991 at ix and 302; *supra* note 28. Richman, concurs: "These commercial networks resort to self-enforcement because state contractual enforcement is not a reliable option." at 36.

[846] *Ibid* at 2540. Bradshaw Schulz.

[847] *Supra* note 623. Sagy at 932. Moreover, the parties must have a bonding relationship with "a spirit of cooperation and well-established norms." *See also supra* note 28. Referring to the forestry industry, Bradshaw Schulz identifies three necessary norms: "(1) cooperation for the sake of relationship preservation…(2) industry protection – acting in solidarity against perceived threats of regulation or boycott, and (3) participation – that established land managers participate in maintaining and promoting the forest industry through participation in licensing boards, industry organizations, alumni organizations, agency appointments, and conference." at 2540.

fulfilled his obligations under a fair letter, tarnishing the reputation of the merchant.[848] Merchant custom was effectively developed in order to bridge this lack of comradery as it was considered that those who respected merchant customs could be trusted; it signaled a certain credibility amongst merchants who were travelling from different geographical jurisdictions.[849]

What is different between self-regulated industries and merchant custom is that merchants knew very little about each other whereas self-regulated industries are contained in groups that know a lot about each other.[850] Both merchant customs and the norms used by self-regulated industries operate with "well-established norms".[851]

When do TBN parties step out of social norms and enter legally enforceable norms? Juridical positivism would require that the State recognize the legal enforceability of the agreement for a norm to become a legal one. On a juridical positivist level, we have identified two tests that determine whether norms are legal norms or social norms:

- transparency: clear and voluntary expressions of party intention to be legally bound (or not);[852] and
- the parties' commitment must pass the test of indefiniteness.[853]

Under a juridical pluralistic lens, other sources of legitimate regulation permit the parties themselves to self-regulate.[854] The fine line between rules of recognition and stability in social norms versus legal norms differs with the lens it is viewed from and how much our minds are willing to distinguish between "the quality of light we perceive."[855] Epistemologically, norms are assessed by

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[848] *See supra* note 10. Barrow.

[849] *See supra* note 352. Leeson.

[850] *Supra* note 28. Bradshaw Schulz for self-regulated industries and *supra* note 352. Leeson for merchant custom.

[851] *Ibid*. Bradshaw Schulz at 2540.

[852] *Supra* note 11. Hogg's twin pillars. *Contra see* Gulati, Bhawna, "'Intention to Create Legal Relations': A Contractual Necessity or an Illusory Concept.", Beijing Law Review, 2011, 2, 127-133, published online September 2011.(http://www.SciRP.org/journal/blr).

[853] *Supra* note 540. Rakoff. *See* popular normative status under vertical sources of regulation.

[854] *Supra* note 207. Zhang.

[855] *Supra* note 175. With the use of metaphor, Macdonald cleverly compares law with light and points out that not only is there not just one source of light (i.e. the sun) but "that boundaries between light and dark are often difficult to trace." at 1117. *See also* Martha-Marie Kleinhans and Roderick A. Macdonald, "What is a Critical Legal Pluralism?" 12 Can. J.L. & Soc. 25, 1997. The opening paragraph summarizes: "Neither law nor society self-

how they are received by the perceiver. Ontologically we must question "what types of human interaction are to count as law."[856] Macdonald coaches:

> "all social systems, including legal, must negotiate between states of fact and states of law and between formal legal concepts and legal fiction...However formal or informal a legal order, however formal or informal a norm, human action will mold the institutional practices and the prescriptions into a complex normative environment." [857]

Rules of human interaction that generally prescribe recognized procedures and provide "consequences of future occurrences" can be recognized on two levels: [858]

> "In sum, law production involves both deliberate choices to create legal rules and actions and statements that may lead to legal rules (such as CIL) but may not…Some rule production occurs in advance of concrete controversies (upstream production) but much takes place in the context of adjudicating disputes (downstream production). States do not have a monopoly on either stage of the production process." [859]

Self-regulated industries do not operate "outside" the law, rather they function as their own juridical order since the state does not have the monopoly on the legal production process. Therefore, it is unconceivable that party autonomy not be considered as its own juridical order in the context of TBN if the functioning of TBN were institutionalized.[860]

4. Party Autonomy: towards a juridical order in TBN? Releasing the monarch from the cocoon

What constitutes party autonomy is contingent on context. In the context of the regulation of TBN, we argue that party autonomy in TBN is moving towards recognition as its own juridical order;

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identifies. Neither norm nor social practice is self-evident in any particular context. Indeed, neither belief nor behaviour exists apart from believers and behaviours." at 27.

[856] *Ibid*. Kelinhans/Macdonald at 27.

[857] *Supra* note 825 at 321. Macdonald (Custom) refers to J.-G Belley, "Le contrat entre droit, économie et société (Cowansville: Yvon Blais, 1998), R. Reisman, Law in Brief Encounters (New Haven, CT: Yale University Press, 1999) M. Lessons of Everyday Law (Montreal: McGill-Queen's University Press 2003) Daniel Jutras Law in Small Spaces" Canadian Journal of Law and Society 16 (2002), at 45 to defend his argument.

[858] *Supra* note 629. Stephan states: "Some aspects of law production are fairly straightforward. A legislative body that enjoys widespread recognition as legitimate and authoritative adopts a statute. [as well as s]everal states, following procedures generally recognized as appropriate enter into a treaty [or a] trade group publishes a set of uniform terms that private persons can agree to include in contracts. Each of these instances generates a set of rules that provides some information about the consequences of possible future occurrences." Stephan depicts: "…traditional division of state functions into legislating, executing, and adjudicating ignores at least two complications: bodies other than legislatures legislate, and adjudication also entails law production." at 1584 and 1585.

[859] *Ibid*. Stephan at 1588 and 1589.

[860] *See supra* note 28. Richman at 36.

being a source of law running side by side in a parallel universe with domestic laws and transnational law. We will defend our position by reviewing the foundational roots of party autonomy in TBN.

Firstly, the historical roots of party autonomy were identified long before the rise of sovereignty, as parties themselves, who traveled from various jurisdictions, monitored their own transactions on fair tables. At the time that merchant custom was in the process of developing, the spirit of domestic states was one of *laissez fair*. We have examined the transformation from medieval *lex mercatoria* to its transformation and eventual acceptance as its own juridical order. We will recall that this acceptance was first recognized during the years that Mansfield presided in the English High Court and was further developed by international arbitration.

International arbitration also supports party autonomy, naturally, as *pacta sunt servanda* is a fundamental principle of TGPL, the principle that promises must be kept, backed with the binding force of law to protect agreements between contracting parties.[861] The query is whether the scope of *pacta sunt servanda* can apply to negotiation communications? Is this principle dependent on what law considers a legally binding agreement?

We examined the development of the classical doctrine of contract, and identified that there was a proposition of two sub-categories of contracts for discussion, being *conventio* and *consensus*. While, initially, a *consensus*, or mere pact, could not form legal obligations, particularly in common law jurisdictions, the law came to realize that this position was too rigid, thus opening the scope of what constituted an agreement. We will also recollect that during our discussion of freedoms of contract,[862] the foundation of contract is based on what the parties have expressly stipulated to be legal intentions, whether in written form or verbal, insofar as there is evidence that the parties considered that they were legally bound.

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[861] *Supra* note 691. Wehberg at 783.
[862] Section 1 of Chapter 2, Part I.

Short-sighted, antiquated juridical tools preclude law from recognizing commitments made between TBN parties, often intangible by law. Nevertheless, we have learned through the works of behavioral scientists that party autonomy is operating between TBN parties, that the parties themselves have developed a way they communicate obligations to one another, and generally respect those obligations. Effectively, TBN parties have, more often than not, operated "outside" the law, relying on merchant custom as a prescriptive guide.[863] Can we properly identify that party autonomy exercised during TBN has the legitimacy of a juridical order?

The purpose of legal regulation is to provide certainty, predictability and stability to human activities.[864] In order for party autonomy to operate with this same certainty, it must be regulated through legally enforceable norms. The legal "authority" must regulate in a permanent manner having the authority to enforce an obligatory rule (as opposed to a moral rule).[865] Whether a system of rules has the juridical status of a legal regime depends on *what* we consider law. What we consider law depends on the lens of methodology used to determine whether it is juristic.[866]

In a transnational setting, law cannot serve a political master. It must cater to a plurality of interests in the global market in promoting proper conduct of TBN parties. The purpose of law is to "prohibit and provide remedy for improper behavior in the performance and enforcement of contracts."[867] So the law must set up traffic lights and supervise "rules" of the game following social norms of acceptance of a standard of behavior. Negotiating parties are given latitude to play the game if they do not contravene legal mandatory rules.[868] Party autonomy in TBN is not simply a creation of

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[863] *See* supra note 23. Fecteau.

[864] *Supra* note 11. Piazzon.

[865] *See supra* note 804. Kimel identifies the tension between moral and legal promises.

[866] *Supra* note 92. Van Hoecke at 209. Van Hoecke argues that human interaction and communication is the centre of the law rather than legal systems.

[867] Daniel C. Peterson, "All the King's Horses and All the King's Men: Are Oregon Courts Putting the Good Faith Obligation Back Together Again?", 84 Or. L. Rev. 97, 2005 at 908.

[868] *See* Jack M. Graves, "Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C.§ 1-301 and a Proposal for Broader Reform", 36 Seton Hall L. Rev. 59, 2005-2006. Graves clarifies mandatory rules and party autonomy:"…a law is not mandatory, nor a public policy fundamental, simply because it would lead to a different result than the law chosen by the parties." at 86.

social order that law must supervise. It has rules of its own, fashioned on normative, super-imposed standards recognized in a global merchant custom. Party autonomy has been supported by domestic and transnational laws, but has yet to be noticed as its own juridical order.

To ponder whether party autonomy is moving towards recognition of a juridical order, it must have certain elements to determine whether a juridical order exists. If it does not, we must discover what is missing. We will take a closer look by reviewing Rocher's criteria of how a juridical order "outside" the state can be recognized as a juridical order.

Rocher's five criteria to establish a juridical order

Rocher has identified necessary five prerequisites before a non-state juridical order can be considered,[869] humbly translated as follows:

1- a collection of rules; norms generally accepted by members of a particular social unit;
2- agents that can be recognized as authorities to elaborate new laws, interpret the existing laws and apply the law;
3- the intervention of the agents must be based on legitimacy;
4- the three functions of agents enumerated in component "2-" must exist in order to have the juridical order recognized, though it is not necessary that one agent be responsible for all three functions; and
5- there must be a certain stability; a relative permanence.

Breaking down Rocher's criteria is necessary to ascertain our goal:

I The **first criterion** relates to the '**necessity of an ensemble of rules and norms generally accepted by members of a social unit'**. A juridical positivist would argue that the sovereign state recognizes party autonomy, sanctions the reinforcement of parties' agreements and provides the rules necessary to accomplish this enforcement. This criterion, under juridical positivism, is recognized as the "sovereign" power that enforces agreements. A juridical positivist makes a distinction between

[869] *Supra* note 824. Rocher defines a juridical order identified by Rocher are: 1-"un ensemble de règles, de norms acceptées comme au moins théoriquement contraignantes par les membres d'une unité social particulière, qu'il s'agisse d'une nation, d'une société, d'une organization, d'un groupe, etc"; 2-des agents ou des appareils sont reconnus dans l'unité sociale comme étant specialisés pour: -élaborer de nouvelles règles ou modifier celles qui existent; -interpreter les règles existantes; - les appliquer et les faire respecter; 3-l'intervention des appareils ou agents est fondée sur une légitimité…justifiée…cela signifie que les membres de l'unité sociale on une *conscience* des rapports entre les règles et les appareils ou agents; 4-les trios functions enumerées en 2- peuvent être remplies par des agents ou des appareils différents, ou par les mêmes; - 5-les règles et les agents ou appareils doivent faire prevue de stabilité dans le temps, d'une relative permanence. Ces règles ne doivent pas sans cesse varier et les agents être constamment relayés.

real law and ideal law (values) and imposes on a jurist to apply real law; in other words, to seek sources of law and that constitute law in a particular jurisdiction. The agent, if party autonomy is the parties themselves, is considered appointed by the "sovereign" to create their own ensemble of rules and norms generally accepted by merchants.

Pluralistically, party autonomy developed through merchant custom providing an ensemble of rules accepted and heterogeneous to merchants. A short journey into the legal history of merchant customs evidences the fact that merchants, as a social unit, adopted a certain set of rules that applied between them, beginning with the use of the 'fair letter'.[870] This practical device was used to ascertain the value of the trades during the term and had to be settled upon termination of the fair season. These rules ran parallel but without the necessity of sovereign intervention; accepted by the members as rules of trade to promote trust and credibility amongst merchants that did not know each other. The examination of the transformation of merchant custom demonstrates that both requirements to attain this legal normativity have been present throughout the transformation of merchant custom: a pattern

[870] *Supra* note 10. Barrow. The enforcement of merchant law of a debtor who has not honored payment has been said to be based on reputation alone but it would appear that there are other factors which require exploration, such as active interdiction to the merchant and his friends from selling and buying at fairs or of seizing the debtor's goods to the value of the debt owing. Since privacy and confidentiality surrounded this special order of people it is of little wonder that merchant laws were not written but this very fact sheds doubt on the existence of 13th century merchant law. Perhaps much the same reason as why the Church prolonged the writing of canonic laws, as Barrow described: "it was only relatively late that the papacy developed an interest in the compilation of canon law. Compilations of canon law were strictly a private matter until nearing the end of the twelfth century." at 130.

of human behavior[871] and a minimum formulation of law.[872] This insemination of party autonomy therefore satisfies Rocher's first criterion.[873]

II The **second criterion** calls for '**agents that can be recognized as authorities to elaborate new laws, interpret the existing laws and apply the law'**. To dissect this factor entails segregation of three aspects:

1) **Authorities recognized to elaborate new laws**

There is a general consensus that parties can elaborate new laws between them by expressly stipulating legally binding agreements. Although a juridical positivists' conjecture would contend that it is the State that allows parties to elaborate new laws, by enforcing expressly valid contracts, pluralistic transnationalists claim that this elaboration can be created by the parties themselves and that the scope of party autonomy should be "detached from states".[874] Muir-Watt argues that the parties are in a procedural position to "change the nature of law"[875] by choosing a forum which will recognize an agreement even though it could be "otherwise held to be unenforceable at the place of its conclusion may well be considered valid and enforceable elsewhere."[876] MacDonald offers a juridical pluralistic light shining law as a normative phenomenon when it is recognized by citizens

[871] *Supra* note 23. Fecteau. *See also supra* note 658. Kammerhofer states: "The peculiarity of this mode of creating law is that it partially depends for its creation upon behaviour which can be seen both as application and as creation of law; its norms are created in part by acts which are also an application of the resultant norm. It is the very idea of customary law that factual behaviour patterns of the subjects of law (customs) count as building blocks for law-making, irrespective of their legality." at 74. *See also* qualifications to time: "…Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule…" in *supra* note 660 *North Sea Continental Shelf* at 44 (para 74).

[872] *See supra* note 804. Kennedey summarizes L.L. Fuller's impression of lawat 103: The expression of eight essential normative functions is required in order to consider the existence of a legal order. These factors fit within the scope of juridical security, namely accessibility, stability and foreseeability in accordance with standards enumerated in Piazzon, *supra* note 11 at 17 and 62. *See also supra* note 664. Skeptics such as Ewart doubt the existence of customary law in the 13th century. He argues that *lex mercatoria* is considered derived from "peculiar authority and sanctity." at 374. For c*ontra* arguments, *see supra* note 171. Mustill; *supra* note 631. Kadens; *supra* note 656 Sachs at 744. *See also supra* note 631. Kadens; *Supra* note 120. Donahue; The debate circulates around the question: Was merchant law simply followed out of habit or was it considered mandatory at that time? *Supra* note 117. Baker describes the dilemma: "If the law merchant was not immemorial, but merely changeable usage, then it would have been difficult to square with the notion of an immutable common law…Shifting usages can hardly be treated as common law. They can explain contracts, but cannot create obligations." at 298. For atypical authority *see supra* note 658. Kammerhofer bases his arguments on a "presupposed norm". For c*ontra* arguments, *see supra* note 171. Mustill etc.

[873] However, what constitutes this ensemble of rules and norms is based on *pacta sunt servanda* on the one hand and internal limitations imposed by industry standards that prohibit certain behavior on the other hand. In other words, the parties must follow the patterns of the dance.

[874] *Supra* note 80. Michaels at 6.

[875] *Supra* note 81. Muir-Wattat 16. On a juridical positivist level, *see also supra* note 624. Hall comments: "commands of persons who are not political superiors of those to whom the commands are addressed can also be regarded as laws property (but not so strictly) so called if they are imperative commands of a general character set by a determinate source armed with sanctions." at 280.

[876] *Ibid*. Muir-Watt at 22.

themselves.[877] Under the will theory, Stephan emphasizes that law production need not be legislative: "States do not have a monopoly on either stage of the production process."[878] Therefore, pluralistically, party autonomy rises to this criterion.

ii) **Authorities recognized to interpret the law**

Once again, juridical positivism would claim tenancy of this action to interpret the law by the State through judicial discourse. But pluralistically, authorities recognized to interpret the law need not be adjudicators or third-party mediators, rather they can be the parties themselves. Parties are free to insert interpretation clauses in their agreements, for example.

On a transnational, pluralistic basis, "reasonable expectations of the parties," are supported by the concept of individual liberty.[879] Although merchant "courts" were set up in a similar fashion to informal arbitration in earlier days to interpret merchant custom and impose non-legal sanctions,[880] international arbitration has served a continuous function to support the parties' interpretation of their own autonomous dealings.[881] Muir Watt argues that the "1958 New York Convention for the recognition and enforcement of international arbitration awards…excludes any intrusion in the merits of the dispute under the applicable law and is largely restricted to issues of public policy."[882] Consequently, the authority of international arbitrators not only supports party autonomy but also reinforces it through the ability to render a decision that cannot be appealed.[883] Arbitrators not only

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[877] *See* Roderick A. Macdonald, « L'hypothèse du Pluralisme Juridique dans les Sociétés Démocratiques Avancées », (2002-03) 33 R.D.U.S. at 135. He continues the thought: "Depuis quarante ans, les anthropologues...ont constaté que le droit étatique n'avait presque aucun effet normatif pour la plupart des populations étudiées. Il existait d'autres ordres juridique non téatiques beaucoup pluis puissants....Selon l'hypothese pluraliste, tout ordre juridique est constitué par les pratiques et les croyances des sujets. Le droit trouve sa source non pas dans la coercition qu'impose le pouvoir politique mais plûtot dans les interactions humaines." at 140.

[878] *Supra* note 629. Stephan at 1589.

[879] *Supra* note 772. Lehmann at 435.

[880] *Supra* note 10. Barrow.

[881] *Supra* note 724. Karton argues that arbitrators value party autonomy; in fact that "[t]he discussions have not been philosophical but rather practical: how best to promote party autonomy and expand its scope." at 32. He extends this support even further by identifying party autonomy as the *motus operendus* of international arbitration: "Party autonomy is the legal and ideological core of international arbitration." at 41.

[882] *Supra* note 81 at 22. Muir-Watt continues the thought as a legal fiction: "party autonomy…ensure[s] that, as private, de-localised, acts, such awards are free from any state supervisory control." at 23.

[883] *Supra* note 22. Carbonneau 2007.

recognize party autonomy, but they will not deter from an express agreement unless it contravenes mandatory rules:

> "private methods of dispute resolution, and the norms that are applied within them, serve to reinforce the power structures that produced them...private orders...work to preserve the power of dominant group members by placing them in the roles of norm makers and adjudicators."[884]

iii) **Authorities recognized to enforce the law**

The first two elements of Rocher's second criterion are more easily satisfied than the third element. It can be said that both domestic adjudicators and international arbitration have traditionally upheld and enforced expressed valid contracts and that parties have the freedom to express the interpretation within the scope of the agreement itself. But the caveat lies in whether parties can *enforce* their own contracts?

Parties can and do abide, to the most extent, by the terms of the agreement between them and request enforcement from each other.[885] But when the parties are unable to enforce the contract due to unresolved disputes, we concede that they must turn to some kind of mediation or arbitration to aid in the settlement of the dispute.[886] Since merchant custom is considered its own juridical order, enforced by international arbitration, could it be argued that international arbitration also enforces party autonomy at party choice? If an argument cannot be sustained to have satisfied Rocher's third aspect, there is another manner to satisfy the criterion by operating TBN in its own institutionalized system,[887] expanded in Chapter 2, Part II.

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[884] *Supra* note 623. Sagy at 932.

[885] *Supra* note 84. Atiyah argues: "In an executory situation, to hold a man bound is to compel him to carry through some performance, or at least to hold him liable for the consequences of not doing so." at 755.

[886] *Supra* note 9. Swan explains:"§4.176 It is clear that parties can conduct their negotiations so that there is no deal, no concluded contract, until a final, signed writing has been executed, and there is no justification for suggesting that the law should blur the bright line that the parties have relied on. There are, however, many situations where the parties' negotiations are messy; where it is not clear what their expectations were at each stage and where, if no relief is given, one party will be caught by unfair surprise. There are also cases where the parties have expected that, as their negotiations progressed, they would gradually lose the right to back out without incurring some risk of legal liability." at 532.

[887] *Supra* note 77. Zumbansen (Piercing) Zumbansen refers to Teubner, Globale Bukowina in German…"The third function of contracts, externalisation, ultimately comes about through the fixing and confirmation in the contract of the very institution that will, if necessary, monitor its implementation. The arbitral tribunal invoked here is first of all authorised by the contract. This self-reflexivity leads to a divergence of an 'official' and a 'non-official' version of global law, since the arbitral, official control makes the law laid down in private autonomy unofficial." "A lasting contractual relationship develops, out of its execution and realisation, quasi-social qualities, thereby opening up a more or less flexible framework for adapting and shaping the

III The intervention of the agents must be based on legitimacy. This third criterion points to legitimacy in law, based on traditional legitimating which is linear, imposing, authoritative, and in general,[888] strives to lead to certainty. In juridical positivist terms, general rules are imposed by the authority of the legislature, empowered by higher norms. A judge must preserve the appearance of a constitutionally or legislatively respectable procedure and if he does, even though the result may be different, he maintains the legitimacy of law.[889] Whether a judge truly considers facts and laws step by step or whether a more pragmatic approach is taken,[890] the procedure of judging requires reference to a legitimate process even though the role of the judge may fluctuate according to whether the case is a "simple" one or a "hard" case. The validity of these norms is justified by a linear concept, ending with a basic norm or rule of recognition. The legitimacy is attained when courts refer to these general rules as authoritative, making the legitimization circular and convincing and therefore, in theory, concrete.[891] Legitimization involves setting certain standards.[892] Justice Morrissette retracts from legal positivism:

> "Mais tout système juridique qui valorise le pluralisme (une sorte d'entorse à la neutralité axiologique…doit tolérer une marge d'indétermination normative…tant au plan cognitif qu'institutionnel."[893]

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contract *through time*…Looking at private, contractual law-making, it would seem as if global contractual law almost naturally constitutes and *constitutionalises* itself." at 426. *Supra* note 8. ('Proud to be merchants'). Aurell clarifies the merchant distinction: "Merchants may have been excluded from the concept of the three orders but they were certainly not excluded from society. Medievalists no longer accept the traditional view that the Church or even the whole of society rejected merchants…So Western thought was disposed to recognize the existence of a category of people whose fortune and prestige were due to their mercantile activities alone…In the Mediterranean, they sometimes belonged to the old nobility." at 43 and 44. Merchants during that time were required to travel over long distances to trade at great risk which became such an economic concern that it eventually set the wheels to the creation of negotiable instruments. In the interim, merchants faced the economic 'birth of commercial capitalism' and where the King's interest was taxation; a means to provide funds required for military expenditures of the Royal purse.

[888] *Supra* note 92 at 150. van Hoecke.

[889] Barak Richman, *The Judge in a Democracy*, Princeton, Princeton University Press, 2006, refers to Posner who describes the law as a tool: "The means of realizing the judicial role must be legitimate." at 113.

[890] Richard A. Posner, *How Judges Think*, Cambridge, Mass., Harvard University Press, 2008. Posner explains there are two ways for a Judge to determine a case: "The first is to examine the extension of the rule…its meaning…and then to determine whether the facts of the case at hand correspond to one of those instances. The second method, which is the pragmatic, is to determine the purpose of the rule…and then pick the outcome that will accomplish that purpose." at 245.

[891] *Supra* note 92. van Hoecke explains: "A communicative legimisation is circular, in that there is a dialogue with the social problems to which the rule or decision is meant to be applied."

[892] *Ibid*. "Standards permit …a judge or jury to use information of which the judges or legislators who promulgated the standard could not have been aware."

[893] *Commission de Transport de la Communauté Urbaine de Montréal* v. *Syndicat du Transport de Montréal* (C.S.N.) [1977] C.A. 476-490. Mélanges P.-A. Cote, Éditions Themis, 2011, le juge Yves-Marie Morissette de la Cour d'appel du Québec.Morrisette comments that normative pluralism includes indeterminate norms which aid a judge to consider the case step-by-step to attain a desired solution: "…diversité, la technicité et la densité normative…" at 2. *See also* Mark van Hoecke, *Law as Communication*, Oxford, Hart Publishing, 2002 at 205-215, where he uses argumentation theory to describe the

With party autonomy, legitimacy is not found in courts or legislative sources and legal certainty is not defined by how the rule is applied rather how it is *perceived* and interpreted by the parties themselves. Legitimacy is based on the parties' adherence to norms that have been set by what is generally understood as the "rules of the game". Business parties perceive that they operate independently from law during their negotiations.[894] Expectations during TBN are based on trust and interdependence.[895] These social norms can become legal norms when there is a structured patterning of human behavior that is widely accepted and a minimum formation of law. Business commentators, and behavioral scientists alike, have confirmed that there is a structured patterning of human behavior. To evidence law, there must be a willingness to be bound by it, a minimum formation of law. Although this aspect is difficult to calculate since, currently, there are no tools to prove when business commitments during TBN are intended to be binding in law. But if there were a manner to record these intentions, this minimum formation of law could be detected and therefore the third criterion would be fulfilled.

IV The fourth criterion is that: '**It is not necessary that one agent be responsible for all three functions required in criteria two**'. In other words, the functions can be broken between different agents. If we consider that the agents creating and interpreting the law are the parties themselves, but we surrender that the parties themselves cannot ultimately *enforce* their own contracts, unless they were in an institutionalized setting, where the agent could be the administrator

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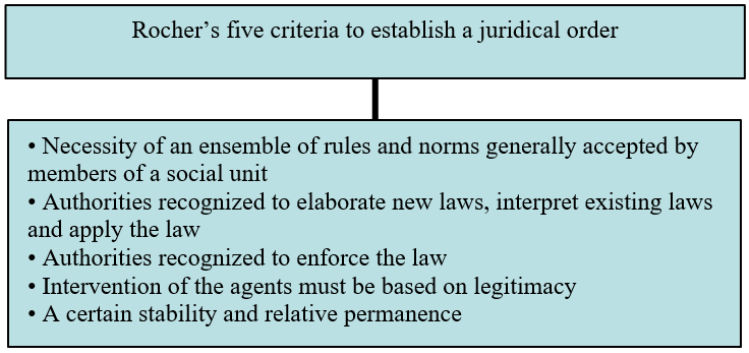
necessity for the Legislature or Judge to preserve the legitimacy of law : "When enacting law as a public body, deciding a case as a judge…by definition it is…always a communicative action, aimed at convincing other of the *truth* of one's statement and/or its underlying reasons, of the *normative correctness* of the rule, decision…Hence…*grounds* have to be given to convince the others of those underlying claims of truth, correctness and sincerity." at 207..

[894] *Supra* note 15. Ghauri at 22.

[895] *Ibid*. Ghauri at 33. *See also supra* note 49 at 521. Usunier. *See also supra* note 59. Lewicki.

of a centre that monitors the creation and interpretation of the law, appointed by TBN parties themselves,[896] at the parties' specifically expressed request.

V The debates have ensued regarding the historical value of merchant laws, *lex mercatoria*, as some commentators argue that it has no **'certain stability' and 'relative permanence'**, which is Rocher's **fifth criterion**. While the majority of theorists are preponderants of *lex mercatoria*, there still remain commentators who do not consider the existence of a permanent set of merchant rules, considered a pure myth.[897] The real challenge lies in the balance between stability and flexibility. The wider vision supported by authors such as Carbonneau and Gaillard disintegrates this mythical argumentation.[898]



Simplistically, we have observed that party autonomy in TBN is, in fact, moving towards the recognition as its own juridical order where social norms could be turned into legal norms through

[896] *See also supra* note 189. Gaillard explains: « Une norme légitime mais non effective ni encore légale n'est qu'une valeur susceptible d'inspirer le législateur ou le juge ; une norme légale mais sans effectivité ni légitimité est une norme appelée à la désuétude ; une norme effective qui n'est ni légal ni légitime peut être celle d'un autorité d'occupation ; une norme légitime et effective correspond a la notion traditionnelle de droit naturel… Dans cette grille d'analyse, qui retient une conception essentiellement variable de la juridicité, celle de la lex mercatoria ne fait aucun doute.» at 67 and 68. Gaillard towards a transnational public order at 116.

[897] *See also supra* note 171. Mustill; *See also supra* notes 631. Kadens and 656. Sachs. However, a concerted effort to document these rules into a recognizable order has been proposed through the Principles of UNIDROIT and Berger's *Creeping Lex Mercatoria*, even though these rules are considered voluntary.

[898] *Supra* note 179. Lowenthal addresses the normative aspects of negotiation: "Therefore, the accepted conventions of negotiation operate as informal external rules, placing limits on the extent to which a negotiator may successfully employ competitive or collaborative tactics, and giving each party entering negotiation a fair sense of the rules by which another party will be playing. "In other contexts, formal societal rules limit the extent to which negotiators may use competitive bargaining tactics." at 99. Although a more thorough investigation of jurisprudence is necessary to ascertain the precedence on this factor, one answer is found in The International Court of Justice (ICJ); while being inconclusive, it formulates that the period of time may not be crucial to the establishment of merchant law: "…Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule…" in supra note 657. *North Sea* at 44 (para 74).

acceptance of a certain set of rules that are observed by them[899] if a minimum formation of law can be evidenced. Rocher recognized that self-regulated industries have established a juridical order for themselves out of necessity. The largest challenge for party autonomy in TBN to be recognized as its own juridical order lies in the legitimacy of the enforcement of laws by the parties themselves. Generally, parties resolve their own differences. However, when party autonomy fails so the parties are unable to resolve their disputes and the parties are forced to turn to third party assistance, an institutionalized arbitration system could arguably take on this role.

5. Internal limitations within party autonomy

Any juridical order must be accompanied by organized and enforceable standards of behavior. The basis of party autonomy is self-government which can be accomplished within this legal order through the choice of the parties exercised through freedoms of contract. There is no reason why *pacta sunt servanda*, could not be applied to TBN if the parties are exchanging tangible promises and agreements that law can recognize, but this contractual freedom also demands respect for opposing parties' freedoms.

Furthermore, community standards are understood as an ensemble of customary rules that the parties cannot contravene, such as "good faith…co-operation, solidarity and the safeguard of fundamental rights."[900]

Customs of one kind or another have been recognized by all regulatory sources of law, in which party autonomy is no exception. For example, evidenced in the *Coutume de Paris*, was a medieval customary law serving Paris and its outskirts. This custom was adopted in New France during Canadian colonization, eventually to become incorporated legislatively into the *Code Civil de*

[899] *Supra* note 97. Cumyn refers to Santi Romano who maintains that the parties have the opportunity to make the choice: "Romano démontre en effet que le droits ne saurait être réduit à un ensemble de normes. Il met en lumière le rôle crucial des acteurs du système juridique, ceux qui font et qui appliquent le droit." at 358.

[900] Guido Alpa, "Party Autonomy and Freedom of Contract Today", [2010] EBLR, 119-141at 134. On a positivist level, it is argued that the State provides rules relating to the validity of juridical instruments entered into between the parties and enforcement of sanctions in the event of non-performance at 120.

Bas Canada. Custom was the basis that justified the application of good faith practices into commercial transactions.[901]

Customs also exist when party autonomy is exercised during TBN in the norms of behavior:

> "Thus far, efforts to improve bargaining ethics have been an empty vessel…[but] If left unattended, the danger is that they and the countless others who use negotiation will perpetuate not only the process but also its unethical practices."[902]

Mr. Justice Leggatt in the *Yam Seng* decision recognized the source of the background behavior of contracts:

> "…the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behavior". Mr. Justice Leggatt then breaks down these norms into three categories: 1) "norms that command general social acceptance"; 2) norms that are "specific to a particular trade or commercial activity; and 3) norms "arising from features of the particular contractual relationship."[903]

All three of these norms logically apply during the processes of negotiations as TBN parties exchange promises and agreements and build a business relationship together. But law is not yet able to see the intangible, but meaningful, exchanges that take place. If law could envision these promises and agreements, and understand the development of the business relationship, it would be in a better position to regulate.

Acknowledging that there is a standard of conduct reflected by these norms of behavior is not enough; the nature and measurement of such a standard is a further blockade. Firstly, law would need to acknowledge a duty of good faith in TBN dealings. Secondly, law would need a manner to measure the nature and scope of the duty of good faith during TBN that can be reconciled under the various sources of law in a cooperative fashion.

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[901] *See supra* note 47. *Yam Seng. Supra* note 665. Carbonneau refers to excerpts of ICC International Arbitration decisions: ICC Award nos. 5835, Clunet 1996, 9117, Clunet 1998, and 12698, Clunet 2004 to name a few http://www.unilex.info/cases.cfm?pid=2&id=arbitral.

[902] *Supra* note 1. Holmes Norton at 577.

[903] *Supra* note 47 at para.[134]. Mr. Justice Leggatt refers to *HIH Casualty* v. *Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61 to support that "commerce takes place against a background expectation of honesty" at para. [136].

Mr. Justice Leggatt identified that the "general norm which underlies almost all contractual relationships is an expectation of honesty" which necessitates evaluating case by case in the common law.[904] But how is honesty evaluated?

Honesty has been described in Yam Seng to include honesty, loyalty and cooperation but the Supreme Court of Canada has not recognized good faith as more than honesty during the *performance* of a contract.[905] Business and behavioral science disciplines have uncovered that self-interest and opportunism interplay during negotiation communications. To overcome this disability the parties must keep their eyes on the prize. Business studies have shown that successful negotiations include honesty and cooperation to build trust and focusing the parties' attention to the mutual goal in sight.[906]

Conclusion: The role of party autonomy is based on norms that can be legally recognized. Contract doctrine allows the parties to freely elaborate their own laws, insofar as they are voluntary, specifically and unambiguously expressed. The difficulty arises when party autonomy fails as a regulatory source; in other words, when TBN parties must turn to outside adjudication or mediation, and evidence of the full spectrum of the negotiation processes is unavailable due to certain promises and agreements being tacit, implied or intangible.

Recognition of party autonomy as its own juridical order in the functioning of TBN requires an institutional setting to guide the parties to create, interpret and enforce bilateral promises and agreements. If parties fail to enforce their own agreements, legitimacy of law requires, within such an institutional setting, there be a means to have disputes arbitrated. Private ordering is supported by both domestic and transnational sources of law, but there exist limitations imposed by the plurality of tri-

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[904] *Ibid* at para [147].

[905] *Supra* note 51. *Bhasin*.

[906] *See* interdisciplinary commentaires at *supra* note 59. Lewicki and Cova. *See also supra* note 1. Holmes Norton expresses the concept on an ethical level:: "…the bargaining process does produce a minimal ethic…At the same time, it is the minimalism of the ethic of the market process that impels the search for a higher ethic." and "No process can be self-sufficient in creating its own ethic. Truthfulness and fairness are values that derive their meaning from human experience and ideals." at 577.

dimensional sources of law, both internal to party autonomy as its own juridical order as a normative expectation and by imposition of domestic laws and transnational laws.

CONCLUSION OF PART I

Law has not fathomed the intricacies of the basic processes of negotiations, let alone the meaningful communications exchanged between TBN and what successful negotiations really mean to business parties. Law is unable to distinguish when TBN parties step from the social world into the legal world, instigating surprise results during adjudication of TBN disputes. Law has not sensitized itself to the cultural exchanges that take place in the global market. Law has, thus, been unable to illuminate the communications that are exchanged between TBN parties; the meaningful promises and agreements and the development of the business relationship itself during TBN transactions. There is no manner to record these meaningful communications between TBN that are so vital to the business world to preserve trust and proceed in the functioning of negotiations towards a successful purpose of negotiations. Therefore, the contribution law is currently making when resolving disputes between TBN parties is jaded, leading to uncertainty and destruction.

TBN parties require efficiency, autonomy and certainty to ensure the proper functioning and success during the negotiation processes. Unfortunately, TBN are impoverished by the inadequacy of law to regulate behavior of TBN parties without encroaching on the parties' *autonomy*. Although law attempts to support expressed party autonomy by offering juridical tools of freedom *to* contract and freedom *from* contract, there is no guarantee to TBN parties who prefer to mini agreements based on *freedom to agree later* in terms that have been accepted while leaving other terms open, leaving their agreements subject to absence of legal protection.

Law has not provided the *certainty* that TBN parties require, as it has so few juridical tools to rise to the challenge of regulating disputes between negotiating parties. Negotiations do not "fit" into

a distinct category of domestic legal obligations, forcing adjudicators to seek remedies through legal fiction or other sources of legal obligations when negotiating parties have failed to conclude a valid contract. Lack of *certainty* and encroachment on *autonomy* do not defend the *efficiency* required to transact globally.

Fragmentation of substantive norms within each sector of legal regulation and splintered determination of authority over regulation lead to uncertainty in TBN. It is time to reconsider alternative tools to regulate private commercial transactions in the global market, promoting party autonomy as its own juridical order in an authentic institutional setting having its own procedural and substantive law to avoid the legal uncertainty in dispute resolution and offer an efficient manner that TBN parties can pursue the processes of negotiations.

Domestic laws are misinterpreting the meaningful exchanges taking place between TBN parties. Transnational laws support party autonomy, but are inhibited if the parties have not stipulated their terms expressly and unambiguously and, in many instances, there is no means to record this autonomy. The CISG has reached "the maximum that could be achieved at the legislative level"[907] and its binding nature does not permit the flexibility that soft laws can provide. UNIDROIT Principles, may be "incorporated" by the parties into their own agreements but UNIDROIT Principles may also be applied even in absence of party choice.[908]

Arbitration tribunals have been known to apply UNIDROIT Principles if the parties have not stipulated a choice of law[909] and even where parties have chosen a particular domestic source of law, UNIDROIT Principles may apply as a matter of "relevant rules of private international law",

[907] Anna Veneziano, "The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of Unidroit's Experience", 58 Vill. L. Rev. 421, 2013. Veneziano refers to Michael Joachim Bonell, "Towards a Legislative Codification of the UNIDROIT Principles?" 12 Unif. L. Rev 233-34 (2007) at 524.
[908] *Ibid.* Veneziano at 142 and 143.
[909] *Ibid* at 144.

particularly where the domestic law is not suitable to "cope with the numerous problems that may arise relating to the formation, validity and performance/non-performance of this type of contract.[910]

While it is well established that transnational laws purport to support party autonomy, the largest impact on TBN, that some consider also "interfere" with party autonomy,[911] is an "expectation" of a standard of conduct while exercising rights under party autonomy.[912] To dissect this seeming dichotomy, party autonomy must be analyzed under a pluralistic lens to discuss how a standard of conduct, such as good faith, impacts this autonomy.

It is widely recognized and accepted that an excellent legal source of recognition of party autonomy lies in international arbitral recognition.[913] The general consensus is that international arbitration supports party autonomy *when the parties' intentions are transparently expressed.*[914] Carbonneau underlines that party autonomy should prevail:[915]

The importance of giving business parties the freedom to regulate their own affairs:

> "They [entrepreneurs] required the freedom to do as they pleased in the context of their enterprises, to take the risk of realizing their full potential, and to be creative in their pursuit of wealth. Averseness to external regulation was present at the very inception of

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[910] *Ibid* at 144 and 145.

[911] Louise Rolland, « Les Principes d'UNIDROIT et le *Code civil du Québec* : variations et mutations», (2002) 36 R.J.T. 583.

[912] *Supra* note 47. *Yam Seng*: Mr. Justice Leggatt considered that contracting parties would not want to behave in a manner that is not honest at para. [136].Within the anatomical foundation of regulation, lying outside the parties' mutual relationship, even transnational laws join to promote a standard of conduct and prohibit a party from acting in "bad faith". Article 2.1.15 of UNIDROIT Principles.The definition of bad faith is found in 2.1.15 (3).In fact, the concept of bad faith is imprecise in law. To ward more precision, bad faith should be addressed as the breach of good faith. *See supra* note 517. *See also supra* note 12. Yee expounds: "'A world saturated with bad faith is very costly.' Comparatively, a good faith model allows parties to optimize their economics interests. First, the existence of a good faith principle gives parties greater security and flexibility in structuring dealings with aspects not easily translated into legal rights and liabilities. Second, adversarial attitudes are not conducive to an efficient economy. For example, a company 'published' into arrangements, yielding insufficient profit, may ultimately be insolvent. This results in transaction costs for the other party that has to look for another contractor. Third, in a good faith regime, transaction costsin the form of unnecessary 'defensive expenditures' are reduced." at 199.

[913] *Supra* note 724. Karton remarks on the support of party autonomy through international arbitration: "…the expansion of legal support for party autonomy is an unambiguous victory for arbitration…We seldom see such cheerleading for party autonomy from national court judges or legislatures…In the eyes of many arbitrators, the evolution of national and international laws toward greater party autonomy is a function of the "recognition" by national adjudicators and legislators that the interests of international commerce are served by a robust doctrine of party autonomy." at 42.

[914] *Supra* note 689. Sweet displays: "After all, through contracts, parties create their own law; the Lex Mercatoria is meant to provide an independent foundation for this law, not to replace it." at 634. Sweet further gives reasons for merchant laws: "to resuscitate the contractual agreement and to cajole the parties to get on with their business, using norms of 'fairness,' as between the parties. The effectiveness of the MLM depended critically on reputation effects, and the fear of being ostracized from the trading community." at 630.

[915] *Supra* note 22 at 105 and 106. Carbonneau further interjects: "Freedom of contract, therefore, is at the very core of how the law regulates arbitration." at 419.

mercantile activity. Individual liberty was not a political ideal, but a remarkable boon of business necessity."[916]

There is a need for parties "create their own law",[917] based on free and voluntary actions of the parties:[918]

> "Merchants will not conduct business across national boundaries if there is no guarantee of either basic contractual accountability or the provision of remedies for material breach of contract. Arbitration may not be able to right the geo-political and socio-economic disparities in the world community, but it can provide a workable form of world adjudicatory and transactional justice. It makes the risks of transborder commerce palatable."[919]

Meanwhile, custom developed a set of game rules, some of which have been documented as TGPL, some which are found in UNIDROIT. TGPL were developed for signaling purposes to preserve trust.[920]

Standards of conduct may appear to interfere with party autonomy,[921] and perhaps sometimes they do when TGPL are used by arbitrators to fill the gaps in absence of expressed party or ambiguous

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[916] *Ibid*. Carbonneau at 103. [our underline]. Marc Henry, "The Contribution of Arbitral Case Law and National Laws" in Emmanuel Gaillard, Ed., *Towards a Uniform International Arbitration Law?*, New York, JurisNet, 2005."An award rendered in 1996 summarized the state of transnational law in these terms: the applicable rules of Lex Mercatoria should include principles such as: contracting must prima facie be performed in accordance with their provisions (pacta sunt servanda); contracts must be performed in good faith. Amongst the transnational rules applied to international trade, the binding power of contracts, and its equivalent in Latin "pacta sunt servanda," constitutes without a doubt the fundamental principle. See 1996 award in ICC case No. 8365, 124 J.D.I 1078, 1079—80 (1997)." at 45.

[917] *Supra* note 686. Sweet displays: "After all, through contracts, parties create their own law; the Lex Mercatoria is meant to provide an independent foundation for this law, not to replace it." at 634.

[918] *Ibid*. Sweet emphasizes: "The MLM [*Medieval Lex Mercatoria*] regime was 'voluntarily produced, voluntarily adjudicated, and voluntarily enforced' (Benson 1992: 15–19). The regime embodied certain constitutive principles, including: good faith (promises made must be kept); reciprocity, non-discrimination between 'foreigners' and 'locals' at the site of exchange; third-party dispute settlement; and conflict resolution favoring equity settlements. In practice, the MLM required traders to use contracts, which were gradually standardized, and to settle their disputes in courts staffed by other merchants (experts, not generalists)." at 629. *See especially supra* note 22. Carbonneau defends party autonomy:"What contracting parties provide in their agreement generally becomes the law controlling law. Courts can interpose their authority in arbitrations. They could assert their power by policing the formation and the content of arbitration agreements. But, from a practical standpoint, if courts were to become more active in the supervision of arbitration, they would more than likely focus their attention upon awards rather than agreements. Agreements have a symbolic standing: they represent a gateway to private adjudication and they codify the parties' intent regarding dispute resolution. Blocking their enforcement would signify opposition to the fundamental consensus surrounding arbitration rather than the implementation of a narrower strategy for the periodic defense of national interests though the vacatur of awards." at 421.[our underline]

[919] *Supra* note 22. Carbonneau at 423.

[920] *Supra* note 352. Leeson articulates: "Through these signals [practices, customs, and traditions] heterogeneous individuals are able to convey trustworthiness, enabling peaceful exchange despite the absence of a formal institutional structure. This practice is ancient. From tribal societies that engage in one another's religious ceremonies to international businessmen from across the globe who engage in shared methods of contract and arbitration…" at 893. Leeson further offers: "Sharing these "manners" created a "reputation" for trustworthiness that enabled intergroup exchange…*failure* to engage in common customs and practice signaled a *lack* of credibility and could destroy the possibility of exchange." at 898. Furthermore: "Individuals are unlikely to cheat after signaling credibility for two reasons. First, given that no individual can signal credibility costlessly… Second, the relative price effect of engaging in shared customs or practices for the purpose of signaling makes cooperating cheaper and cheating more expensive." at 900 and 901. Furthermore: "The story of modern-day international trade is very similar to that of the medieval law merchant (Lew 1978:585). Modern international trade still makes wide use of customary practice and private arbitration…By sharing membership in such organizations heterogeneous individuals signal their credibility to one another as well." at 901.

stipulations.[922] International arbitration is a neutral and trusted environment to business parties around the globe and is, consequently, an ideal forum to consolidate party autonomy and good faith. Merchant laws were never intended to gratify the winner or chastise the loser, rather to maintain norms of fairness *within* the structure of the parties' voluntary regulation,[923] including a "sense of fairness, as an overriding principle",[924] thereby offering a solution for the dichotomy between supporting party autonomy and maintaining a standard of good faith is found in international arbitration:

http://www.rockhurstgroup.com/culture/roundtable.htm

> "In transborder commercial matters, choosing to arbitrate goes almost without saying, because international arbitration is instrumental to neutrality, the provision of the necessary expertise, effective dispute resolution, and the enforcement of awards. Finality and enforceability are central to any dispute resolution process. Functionality—in terms of economy, efficiency, and effectiveness—is another highly prized objective. Additionally, parties may want to provide for greater rights protection or may seek to preserve their business relationship no matter how difficult a particular transaction may become. Different or adapted remedies can achieve these ends."[925]

Within the diversity of cross border trade, a solution has been found in international arbitration that respects party autonomy and the relational theories of interdependence, cooperation and

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[921] *Supra* note 911. Rolland at 588 and 590. Rolland considers that good faith constitutes a limitation to party autonomy.

[922] *Supra* note 189. Gaillard argues that TGPL are moving towards a transnational public order that can supersede party autonomy. at 116. Gaillard explains: « Une norme légitime mais non effective ni encore légale n'est qu'une valeur susceptible d'inspirer le législateur ou le juge; une norme légale mais sans effectivité ni légitimité est une norme appelée à la désuétude ; une norme effective qui n'est ni légal ni légitime peut être celle d'un autorité d'occupation ; une norme légitime et effective correspond a la notion traditionnelle de droit naturel… Dans cette grille d'analyse, qui retient une conception essentiellement variable de la juridicité, celle de la lex mercatoria ne fait aucun doute.» at 67 and 68.

[923] *Supra* note 686. Sweet explains that the reasons for merchant laws were: "to resuscitate the contractual agreement and to cajole the parties to get on with their business, using norms of 'fairness,' as between the parties. The effectiveness of the MLM depended critically on reputation effects, and the fear of being ostracized from the trading community." at 630.

[924] *Supra* note 663 at 235. Berman/Kaufman depict the transnational rules characteristics, including a "sense of fairness, as an overriding principle." at 235. *See alsosupra* note 771. Berman/Dasser reflect: "The law merchant has been for centuries and continues to be today an international body of law, founded on the shared legal understanding of an international community composed principally of commercial, shipping, insurance, and banking enterprises of all countries. These shared legal understandings are reflected in the contract practices of those enterprises, and they continually find their way into judicial and arbitral decisions and also into national and international legislation. We believe that the shared legal understandings of the international mercantile community should be seen as an autonomous body of law, binding in appropriate cases upon national courts." at 21.Sweet displays: "After all, through contracts, parties create their own law; the Lex Mercatoria is meant to provide an independent foundation for this law, not to replace it." at 634.

[925] *Supra* note 22. Carbonneau at 435.

solidarity[926] that business perceptions aspire[927] while maintaining standards of conduct that are shared in commercial circles. Our goal is to provide more concrete evidence to adjudicators during the resolution of TBN disputes.

It is a challenge for some sources of law, particularly on a domestic setting, to recognize party autonomy in TBN as its own juridical order unless the niggling element of legitimacy of enforcement is resolved. The modus operandi of TBN is one of private ordering that includes the necessity to establish clear rules to "play the game"; a standard of conduct;[928] a duty of good faith to preserve trust and the proper functioning during the processes of negotiations.[929]

Party autonomy is sequential, assumingly forming the regulatory front line, evidenced by the consistent recognition of party autonomy by domestic and transnational sources of law. But can party autonomy conceivably "trump" other regulatory sources?[930] We will now consider the relationship between party autonomy and the concept of good faith through a comparative analysis of the sources of law.

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[926] *Supra* note 911. Rolland at 596.

[927] *See* supra note 59. Lewicki and Cova.

[928] Robert E. Scott, "A Theory of Self-enforcing Indefinite Agreements", 103 Colum., L. Rev. 1641, 2003. *See also* Alan Schwartz and Robert E. Scott, "Market Damages, Efficient Contracting, and The Economic Waste Fallacy", 108 Colum. L. Rev. 1610, 2008. *See also* Daniel D. Barnhizer, "Inequality of Bargaining Power", 76 U. Colo. L. Rev. 139, 2005; Spencer Nathan Thal, "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness", 8 Oxford J. Legal Stud. 17, 1988; Viktorija Budreckiené, "Transformations in the Notion of Contractual Equilibrium Between Parties with Equal Bargaining Position", Social Transformations in Contemporary Society, 2013 (1), ISSN 2345-0126; Alan Schwartz, "Seller Unequal Bargaining Power and the Judicial Process", 49 Ind. L.J. 367, 1973-1974.

[929] *Supra* note 49. Usunier illustrates: "Trust is built step by step, with a view towards the future." at 130. *See also supra* note 15. Ghauri concurs: "This process which requires trust and security for each party, is critical to successful interdependent relationships. This trust can be developed by including the other party in the negotiation process and ensuring that her needs are met as well as your own. Following a fair process will contribute to feelings of satisfaction and success to both parties." at 33.

[930] *Supra* note 772. Lehmann at 289.

PART II HOW A JURIDICAL *GYROSCOPIC* ORIENTATION COULD IMPROVE THE LEGAL REGULATION OF TBN

TBN are dynamic, free and voluntary communications between private business parties transacting from different jurisdictional boundaries. Characteristically, they are long-term relationships impacted by language and cultural barriers as parties exchange information, promises and agreements building business relationships that assume mutually satisfactory goals. During these exchanges, a certain standard of behavior is expected between negotiation parties, but no actual measurement of scope and intensity has been detected by law.

Nevertheless, law *is* regulating these negotiations, but not consistently and therefore with trepidation due to the inadequacy of juridical tools in this area of law. To justify why law should regulate, law must take a fresh look at the normative framework of negotiations, how negotiating parties communicate with one another and when the negotiation dance begins. Then, law can visualize how rights and obligations may be formed, to achieve a better understanding of how law could better regulate.

While parties are performing the negotiation dance, they may freely and voluntary delineate the content and intensity of their rights and obligations to one another,[931] but law has failed to channel business parties' semiotic exchanges that are not tantamount to a contract. There is no current manner for law to consistently recognize meaningful semiotic communications that fall short of a contract, nor is there a way to measure the content and intensity of an agreement, so parties are subject to conjecture.

[931] That is, within super-imposed foundations of industry norms, law and custom. *See* Juliet P. Kostritsky, "Contract Interpretation: Judicial Role Not Parties' Choice", in Larry A. DiMatteo, Qi Zhou and Severine Saintier, *Commercial Contract Law: Transatlantic Perspective*, CUP, 2013. Kostritsky elaborates: "Thus, contracts, promises, and the world of exchange and promising are not just creations of the free will of the parties, but are social institutions created and collectively maintained by the law. Contract law exists not just to enforce individual will, but to support what Durkheim called the "noncontractual foundations of contract law" that are not worked out individually but that subsist in the background as evolving conventions and norms that form the infrastructure to support promises." at 845.

CHAPTER 1: A CALL FOR A NORMATIVE CO-OPERATIVE LEGAL THEORY OF TBN

"*Our ability to reach unity in diversity*
will be the beauty and the test of our civilization."

We begin this chapter with a comparative analysis to exhibit whether the quantum of autonomy required by TBN parties is sufficiently supported by law. In tandem, we will investigate the relationship between party autonomy and good faith. Does a duty of good faith unduly interfere with party autonomy? We are searching for a fundamental manner to reconcile the tri-dimensional sources of law and posit that the solution lies in institutionalizing standards of communications and conduct that offer party choice in the context of TBN, assuring that acceptable legal minimum standards of law are maintained.

A discussion on the duty of good faith during negotiations will lead to a call for a legal negotiation theory [LNT] of TBN, based on a distillation of Hogg's co-operative will theory of contracts that illuminates the meaningful promises and agreements and the development of the business relationship during TBN. This LNT of TBN should take into consideration the normative patterning gathered outside of law; the perceptions of business commentators and behavioral scientists and lead to a practical application of the proposed theory.

Section 1: A Comparative Analysis to Illuminate the Relationship Between Party Autonomy and a Duty of Good Faith in TBN

We recall that a comparative analysis is beneficial to discover the root of a socio-economic uniformity. To explore the interconnections and observations, our comparative law analysis will break down three sections:

1) Function and normative values: how law regulates;
2) Transplant test and legal culture: identifying similarities and differences; and
3) Institutional settings: reconciling sources of law in a new institutional setting.

We will demonstrate the legal function and normative values through a hypothetical moot decision. The critique of the moot decision will use transplant tests and legal culture to expose similarities and differences between the regulating sources of law. A discussion on TBN in institutional settings will lead to the conclusion of our comparative analysis that proposes a new theory and institutional setting that can be recognized by all sources of law.

Function and normative values: Since the purpose of law is to regulate human activity, its **function** lies in *how* the law regulates. We will examine how the tri-dimensional sources of law are regulating TBN, making use of the factors that we have gathered and exposed in our moot decision.

The function of law depends on what is considered *law*. Domestically, it is the state that has the authority to administer justice. Therefore, even though a community may have developed customary standards of behavior, a juridical positivist approach would not acknowledge these standards as *law* unless they could be recognized by the state. Transnational laws do not have a sovereign source, so juridical positivism would require that transnational laws be ratified by the state to be recognized as *law*. However, we have observed that, pluralistically, the parties themselves may also ratify transnational laws and that this form of *law* is recognized by domestic sources of law and international arbitration.[932]

Juridical positivists only consider party autonomy as its own juridical order if it is recognized by the state. Nevertheless, we have discerned that parties of a particular community can create their own juridical order and self-regulate.[933] Therefore, it is conceivable that party autonomy could operate its own juridical order and be recognized by all regulatory sources of law if a proper institutional

[932] *See* Section 2 of Chapter 2, Part I.

[933] *Supra* note 824. Rocher at 119. *See* self-regulated industries in 3. of Section 3 of Chapter 2, Part I.

setting could be organized that fulfills the criteria to have a stable collection of rules and legitimate agents that are recognized as authorities to create, interpret and enforce *law*.[934]

The theory of juridical norms is based on normative prescriptions that guide human behavior.[935] Normativity is established by two primary factors: the pattern of human behavior and the predictability of regulating it.[936] To compare norms entails categorizing them.[937] We identified three underlying norms that justify judicial enforcement of TBN obligations: the protection of *efficiency*, *autonomy* and *certainty*.[938] All sources of law must consider these norms so vital to TBN, but there is no consensus on how. There are tensions within the structure of contracts,[939] differences between common law and civil law jurisdictions and a polarized common law debate regarding contractual doctrine quarrelling whether contract should be based upon promise or upon agreement.[940]

Normatively, both civil law and common law systems support party autonomy, which in turn supports the underlying norm of efficiency and promotes economic relations.[941] The function of law is similar in both common law and civil law systems: to support party autonomy insofar it does not interfere with mandatory rules, contravene societal values, frustrate third party rights, promote opportunism or unfair trade, or threaten the economic efficiency of the state.

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[934] *Ibid*. Rocher's five criteria.

[935] *See* 3. in Section 1 of Chapter 1, Part I.

[936] *Supra* note 11. Piazzon demonstrates the factors that fit within the scope of juridical security, namely accessibility, stability and foreseeabilityin accordance with certain standards at 17 and 62. *See also supra*note 111. Kramer at 103 in the expression of eight essential normative functions is required in order to consider the existence of a legal order.

[937] *Supra* note 3. Riles states: "How can we compare if we cannot even identify stable units of comparison?" at 252.

[938] *Supra* note 11. Piazzon.

[939] Luigi Russi, "Can Good Faith Performance be Unfair? An Economic Framework for Understanding the Problem", 29 Whittier L. Rev. 565, 2007-2008. *See* in particular pages 579-588. Russi identifies that commentators are divided between two normative tensions: behavioral standards proposed by Robert S. Summers, "Good Faith" in General Contact Law and the Sales Provisions of the Uniform Commercial Code", 54 Va. L. Re. 195, 1968 and Thomas A. Diamond and Howard Foss, "Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing has been Violated: A Framework for Resolving the Mystery", 47 Hastings L.J. 585, 1995-1996 at 586 versus versus economic standards directed towards a certain economic activity advanced by Steven J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", 94 Harv. L. Rev. 369, 1980-1981 and Mark P. Gergen, "A Defense of Judicial Reconstruction of Contracts", 71 Ind. L. J. 45, 1995-1996.

[940] We will discuss how HCWT ceases the oscillation of these concepts between morality and good faith versus strict liability in Section 3 of this chapter. *See* Alan Miller and Romen Perry, "Good Faith Performance", 98 Iowa L. Rev. 689 2012-2013 and Eric G. Anderson, "Good Faith in the Enforcement of Contracts", 73 Iowa L. Rev. 299, 1987-1988. *Supra* note 150. Scott (Strict Liability) at 20.

[941] *Supra* note 11. Hogg.

These norms are recognized and respected on a broad level under transnational laws through the principle of *pacta sunt servanda*; a fundamental recognized principle of transnational law[942] that harbors a presumption that good faith prevails.[943] Both these broad TGPL support party autonomy in TBN, implicitly as a juridical order having its own organizing principle[944] while international arbitrators strain to unveil party intention.

Though legal sources of law approach regulating negotiations in dissimilar fashions, the reasons for imposing obligations are similar: they all attempt to support party autonomy while furnishing a fair playing field during TBN. Where negotiations have not formed a formal agreement, nevertheless legal families have found methods to impose obligations.[945] Unfortunately, no source of law has found a proper remedy to regulate TBN without unduly interfering with it and blindly imposing remedies that may not be suitable to TBN disputes.

1. A moot decision

Identifying a duty of good faith during TBN is cluttered with a plurality of regulatory sources of law. Welcome to our moot decision which is intended to demonstrate the relationship between party autonomy and good faith for better comprehension and enjoyment.

1.1 In the matter of *Good Faith v. Party Autonomy*

"All Rise…"

[942] *See* Section 2.1.1 of Chapter 2, Part I.
[943] *See* Section 2.2. of Chapter 2, Part I.
[944] International arbitration turns to expressed party consent before applying any other rules of law: *See* supra note 721. Karton. *See also* our discussion on determining a juridical order in 3. in Section 3 of Chapter 2, Part I.
[945] *See* 2. in section 3 of Chapter 1, Part I. For example, CCL may make use of other remedies such as promissory estoppel or restitution whereas QCLmay refer to breach of good faith or equity.

IN THE MATTER OF THE ARRANGEMENT OF:

GOOD FAITH [GF]
Petitioner
and

PARTY AUTONOMY [PA]
Respondent

DOMESTIC LAWS: [CCL] and [QCL]
TRANSNATIONAL LAWS [TL]
PARTY AUTONOMY AS A JURIDICAL ORDER [PAJ]
Monitors

MOOT DECISION ON WHETHER AN AGREEMENT TOOK PLACE BETWEEN PARTY AUTONOMY AND GOOD FAITH THAT IS SUBJECT TO HOMOLOGATION

INTRODUCTION:

[1] Petitioner makes a motion to homologate an oral agreement entered into with Respondent that obliges Respondent to negotiate in good faith during transnational business negotiations [TBN].

CONTEXT:

[2] On or around the First day of January 2017, Party Autonomy [PA] and Good Faith [GF] allegedly entered into an oral agreement including terms to restrict PA when she exercises her rights to negotiate under freedoms of contract; that she is subject to a duty to negotiate in good faith.

[3] The parties do not share the same version of the facts. Whereas GF maintains that an oral agreement was entered into with PA establishing that TBN would be subject to a duty of good faith, PA argues that no such agreement exists between the parties.

[4] GF also argues that, regardless of whether or not an agreement is recognized by law, that because of the nature of their relationship, a duty of good faith is *implied between the parties*.

[5] GF further contends that by *operation of law* an imperative standard of good faith must apply when PA is exercising her civil rights even if a duty of good faith cannot be implied by virtue of their relationship.

[6] Petitioner refers to the English Supreme Court in *Yam Seng Pte Limited* v. *International Trade Corporation Limited*[946] that recognizes that a party is bound to exercise freedoms of contract subject to a duty of good faith in the *performance* of a contract *implied by the parties*.[947]

[7] Petitioner further submits that the decision in *Yam Seng* was referred to in the Supreme Court of Canada in *Bhasin* v. *Hrynew*,[948] whereby a duty of good faith is recognized as an organizing principle by *operation of law* during the *performance* of a contract.

POSITION OF THE PARTIES

Good Faith

[8] Petitioner argues that Respondent and Petitioner negotiated an oral agreement that establishes that PA cannot exercise her rights under freedoms of contract without honouring a duty of good faith.

[9] GF further defends that she never intended to harm Respondent by expecting that a standard of good faith must necessarily accompany freedom of contract and that she has not interfered in PA's economic activities.

Party Autonomy

[10] Respondent qualifies that the cited court decisions do not apply to business negotiations in the context of transnational business negotiations since Respondent was merely negotiating during the *formation* of a contract and no contract was entered into. PA contends that she has always exercised freedoms of contract *freely* when entertaining business negotiations across various geographic borders and denies that there is any determined legal obligation of good faith in negotiations.

[11] Furthermore, PA argues that her autonomy has been regularly supported by domestic laws [DM], transnational laws [TL] and by virtue of party autonomy itself [PAJ].

[12] PA accuses Petitioner of unjustly interfering in her economic activities and natural laws of competition. Her fear is that an obligation of good faith would permit courts to interfere with the express terms of any agreement[949] and that the essence of negotiation would "hobble the marketplace"[950] and therefore, the principle of good faith has always been applied under CCL very exceptionally.[951]

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[946] [2013] EWHC 111 (QB).

[947] *Ibid*. *Yam Seng* at para. [149].

[948] *Bhasin v. Hrynew*, 2014 SCC 71; [2014] S.C.R. 494.

[949] *Transamerica Life* v. *ING Canada* (2003) 68 OR 457 (C.A.).

[950] *Martel Building Ltd*. v. *Canada* (2000) S.C.C. 60.

[951] *Gateway Realty* v. *Arton Holdings*, (1991) 105 N.S.R. (2d) 180. There were two competing shopping centres whereby Zellers was an anchor tenant of Gateway. Arton convinced Zellers to relocate to its own Centre while it had 17 years remaining on a lease with Gateway. It uses its assignment of lease clause to assign the lease to Arton and Arton leaves the premises vacant. The court held that contracting parties are subject to standards of honesty, reasonableness or fairness.

Monitors

[13] Monitors unanimously support that PA is entitled to exercise her rights to freely negotiate her business dealings,[952] insofar as PA has not breached law and public order.

[14] Domestic Laws CCL [CCL] recognizes that if PA and GF were in a contractual relationship, that an overriding duty of good faith during the *performance* of contractual obligations should be imposed by law.[953] It is the view of CCL that this good faith standard does not apply to negotiations.[954]

[15] CCL does not recognize that an agreement exists between PA and GF since there is no clear evidence that the parties intended to create a binding agreement;[955] that there is no proof that an offer and acceptance were ever entered into, nor does any objective sign to evidence such an agreement exist. Furthermore, oral presentations are inadmissible under the parole evidence rule.[956]

[16] Additionally, CCL argues that she does not habitually recognize an agreement to negotiate in good faith[957] and would certainly not recognize an overall duty of good faith during negotiations.

[17] Domestic Laws QCL [QCL] comes to the same conclusion regarding whether the parties have entered into an agreement, but for different reasons. QCL considers that there was no

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[952] For CCL *see supra* note 9. Swan CCII, Ch. 3 at 5; *supra* note 379. Waddams at 191; *supra* note 42 Lake/Draetta at 37. For QCL *see* Article 1388 C.c.Q.; *supra* note 38 Baudouin/Jobin at 142 and 143; *supra* note 402. Tancelin at 56. For TC *see* Articles 1.3 and 4.3 of the UNIDROIT Principles; in particular interpretation of contracts that considers preliminary negotiations, established practices the parties have created between themselves, conduct of the parties, the nature and purpose of the agreement and meaningful expressions that are accepted within a certain trade and usage. TL is represented by transnational general principles of law comprising the maxim of *pacta sunt servanda*. Naturally, party autonomy concurs as it is the basis as its own juridical order.

[953] *Bhasin v. Hrynew*, 2014 SCC 71; [2014] S.C.R. 494.

[954] *See supra* note 951. *Gateway*. Kelly, J. relates the general rule: "…courts properly tread with great care and interfere with reluctance in this type of exercise [regarding imposition of "moral" principles on legal transactions] Therefore, court-imposed "moral standards are rarely imposed in a manner that would override express contractual provisions." at para. [63].

[955] *Hawrish* v. *Bank of Montreal* [1969] S.C.R. 515, 2 D.L.R. (3d) 600, [1969] No. 17 (S.C.C.) at 605-606. A lawyer was reassured that the company debt would no longer be enforced against him personally once the co-directors of the company were bound. The Trial judge admitted the evidence. The Court of Appeal found the oral evidence inadmissible. The Supreme Court of Canada was not convinced that the evidence "indicates clearly the existence of such intention…the collateral agreement allowing the discharge of the appellant cannot stand as it clearly contradicts the terms of the guarantee bond which state that it is a continuing guarantee." Judson, J. at 520 S.C.R., 605-606. *See also Bauer* v. *Bank of Montreal* [1980] 2 S.C.R., 102, at 112-113, 110 D.L.R. (3d) 424, at 431-432, [1980] S.C.J. No. 46 (S.C.C.) . The decision concurred with *Hawrish* v. *Bank of Montreal* as the Court found there was insufficient evidence to admit a collateral agreement and that such evidence would be inadmissible under the parole evidence rule. *B & B Constructions* v. *Brian A. Cheesman*, (1994), 35 N.S.W.L.R. 227 (C.A.). Kirby, J. specified that the parole evidence rule was meant to bar the "exploration of the unfathomable depth of subjective intentions. It is to add certainty by adherence to the effect of the clearly expressed written word." at 234. *See supra* note 9. Swan CCL, Chapter 8 for detailed explanation of the limits of the parole evidence rule, which is basically limited to admitting evidence that there is no valid agreement in law, to evidnece other sources of obligations that the parties have undertaken together and evidence to illuminate disparities in the written contract. *See* in particular **§8.44** regarding an unexhaustive list of possible allegations in *Gallen v. Allstate Grain Co. Ltd.*, (1984), 9 D.L.R. (4th) 496, at 506, 53 B.C.L.R. 38, at 50, [1984] B.C.J. No. 1621(B.C.C.A.).

[956] *Supra* note 9. Swan: "Though the actual treatment of the problems that arise in negotiating relations is complex, the general attitude of the law is that, especially through the operation of the rules of offer and acceptance, negotiations are legally irrelevant and a contract only comes into existence on the acceptance of the final offer." at 146. *Supra* note 379. Waddams at 266 to 268; *supra* note 413. *Stilke* v. *Myrick*.

[957] *Supra* note 91. *Walford v. Miles*, is the leading precedent demonstrating how the court did not regard an agreement to negotiate as enforceable by law for lack of certainty. However, change is on the horizon. *See supra* note 440. Péloquin.For alternative view, *see supra* note 205.Trakman/ Sharma. Where parties have established an objective manner in which the agreement can be determinable, even English law has interpreted the agreement and enforced obligations: *See Petromec v. Petroleo* [2006] 1 Lloyd's Rep. 121) and *Barbudev v. Eurocom Cable Management Bulgaria* [2011] EWHC.

subjective evidence of a meeting of the minds between PA and GF.[958] Furthermore, that the essential material facts to evidence an agreement are missing on an objective level.[959]

[18] Nevertheless, QCL disagrees with CCL regarding whether TBN are subject to a duty of good faith. Since the C.c.Q. provides an imperative, overriding principle of good faith when a party exercises her civil rights, QCL argues that this duty of good faith also applies to negotiations.[960]

[19] Although QCL notes an overriding principle of good faith under Article 6 of the C.c.Q. QCL qualifies that the circumstances and context of this case may not merit application of a general principle of good faith to negotiations since the courts have only identified a general duty to negotiate in good faith under certain circumstances, such as unequal bargaining power, breach of confidentiality, non-disclosure or misrepresentation, or breach of good faith severing negotiations prematurely.[961] Those identified circumstances cannot be applied to the present case.

[20] Transnational Laws [TL] support PA but they also sustain GF. One doesn't exist without the other since both *pacta sunt servanda* and the duty of good faith and fair dealings are equally considered transnational general principles of law [TGPL]. TL concedes that the scope and nature of the duty of good faith has been left open-ended.[962]

[21] TL submits that PA has full power to freely enter into binding agreements (*pacta sunt servanda*) but it must be evidenced by unambiguous, expressed party stipulations.[963] In this matter, TL submits that there is little evidence to support a binding agreement.

[22] TL also submits that whether there is a binding agreement or not, a duty of good faith applies.

[23] TL contends that, in absence of an agreement, TBN parties must not enter into negotiations in bad faith in accordance with Article 2.1.15 and 2.1.16 of the UNIDROIT Principles.[964]

[24] Although currently, the TL has identified certain circumstances that fall into the context mentioned in paragraph [23] this matter may not be sanctionable under the said paragraph.[965]

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[958] *See supra* note 431. *Denzell Merchandizing Inc. (Twice as Fun Inc.) v. Calego International Inc.*, 2006 QCCS 2814 at para. [30].; *Michael Publishing Company Inc.* v. *Companies Warnaco du Canada* 2003 CanLII 37910 (QCCQ). *See supra* note 38. Baudouin/Jobin for the constitution of a meeting of the minds; *Tradezone Securities Inc.* v. *Industrial Alliance Securities Inc*. 2010 QCCS 336; *Multipix Communications Inc.* v. *Midland Walwin Captial Inc*., 2013 QCCA 2058.

[959] *See supra* note 608. *Michael Publishing*. *See also supra* note 38. Baudouin/Jobin attest that when the subjective intention is not available, QCL uses an objective test.

[960] Article 6 C.c.Q.; *See Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989) 2 R.C.S. 574. Article 1375 C.c.Q. provides that "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished."

[961] Quebec courts have recognized a duty to negotiate in good faith under special circumstances. *See ibid. Lac Minerals; Joginder Singh* v. *Daljit Kohli Trio Properties Ltd*., 2015 QCCA 1135 at para. [106]; *Ahmed Soulieman and 9285-8869 Quebec Inc.* v. *124128 Canada Inc*., 2015 QCCQ 10861 at para. [65]; *Syndicat de Copropriété Le Versailles v. Heywood Buildings Inc*., 2014 QCCS 5634.

[962] *Supra* note 724. Karton at 42; *supra* note 22. Carbonneau at 421; *supra* note 771 Berman/Dasser.

[963] *See* TGPL represented by Articles 1.3 and 4.3 of the UNIDROIT Principles.

[964] *See also* Article 7 CISG that promotes "observance of good faith in international trade".

[965] PA has not breached Articles 2.1.15 which stipulates that a party cannot break off negotiations in bad faith without liability and that a party cannot perform negotiations if there is no intention to reach an agreement and 2.1.16 which sanctions disclosure of confidential information.

Nevertheless, TL would argue that the TGPL could provide for a minimum standard of good faith during negotiations to preserve commercial fairness, but no unfairness is evident in this case.

[25] Party Autonomy as its own juridical order in the context of TBN [PAJ] interjects that to sustain a juridical order, it must have organizing principles, in which good faith cannot be ignored.[966]

[26] PAJ considers that, while there is no agreement between PA and GF, both parties must come to terms with determining a minimum standard of good faith that is acceptable to all sources of law and that within that structure, the parties are free to choose the nature and scope that they require while negotiating in a transnational business context.[967]

ISSUES

[27] 1. Is there an agreement between PA and GF that is enforceable by law?

2. Is there a duty of good faith between PA and GF during the negotiation processes in absence of an agreement?

3. If PA is bound by a duty of good faith, how is that duty measured in nature and scope?

LEGAL ANALYSIS

1. Is there an agreement between PA and GF that is enforceable by law?

[28] PA and GF were in the process of negotiating the extent that GF can influence the exercise of freedoms of contract by PA in the context of negotiations, in particular TBN, but there is no consensus that they have entered into an agreement.

[29] There is a consensus between the Monitors that if the parties had entered into a valid contract with expressed, unambiguously stipulated terms and conditions, that all sources of law would recognize and support such an agreement on condition there is valid consideration or cause and that it is not illicit or against public order,[968] since the parties have a relationship.

[30] There is no evidence or record to show that the parties have entered into an agreement with expressly, unambiguously stipulated terms.

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[966] *See* 3. in Section 3 of Chapter 2, Part I (self-regulated industries). *See also supra* note 352. Leeson explains the importance during the development of merchant laws to ecognize trust and credibility. For a business perspective, see supra note 15. Ghauri.

[967] Since it is permitted in all sources of law that parties specify the nature and scope of the duty of good faith, this is a resource for a manner in which law can provide tools to guide TBN parties.

[968] For CCL: *see supra* note 379. Waddams at 173; *supra* note 9. Swan CCL, Chapter 8 at 929. Swan refers to Cardozo J. who notes with regard to interpretation of contracts that: "Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable." *Jacob & Youngs Inc. v. Kent* 129 N.E. 889, 230 N.Y. 239 (C.A.N.Y. 1921) at 891 N.E.4 ; For QCL *see supra* note 38. Baudouin/Jobin, Article 1385 C.c.Q. *See also supra* note 431. Denzell. For TL *see supra* note 689 at 406. Hyland concurs with Wehberg that *pacta sunt servanda* benefits from universal acceptance; not only as a basic norm but also as a rule of ethics and a foundation of international law.

2. Is there a duty of good faith between PA and GF during the negotiation processes in absence of an agreement?

[31] There is a consensus that, in the presence of an agreement, all sources of law recognize a duty of good faith during the *performance* of a contract. The majority of the sources of law consider that GF can, under certain circumstances, impose a duty of good faith on PA during the *formation* of a contract in absence of PA's consent.[969]

[32] There appears to be a consensus between the Monitors that if an agreement were recognized by law that the parties would be subject to the duty of good faith during the *performance* of contractual obligations.[970]

[33] There appears to be no consensus between the Monitors as to whether a duty of good faith during *negotiations*.[971] In this matter, there is no evidence of breach of good faith as the facts do not reveal the precedential circumstances that would entitle GF to expect a duty of good faith during negotiations, including unequal bargaining,[972] breach of confidentiality,[973] misrepresentation,[974] non-disclosure or abusive actions.[975]

3. If PA is bound by a duty of good faith, how is that duty measured in nature and scope?

[34] There is a consensus between the Monitors that if the parties had stipulated the nature and scope of a duty of good faith within the terms of a *contract* that all sources of law would recognize such a duty and sanction any breach of such duty.[976]

[35] However, there is no consensus between the Monitors that para. [34] applies to negotiations.[977]

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[969] For CCL: *see supra* note 51. *Bhasin*. Although the trial judge acknowledged a duty of good faith during the formation of a contract, no such recognition was granted to a concept of good faith in common law contracts in the S.C.C. For QCL *see supra* note 431. *Denzell*; For TL *see* Article 2.1.15 UNIDROIT Principles. *See also supra* note 508. Goderre .

[970] *Supra* note 51. *Bhasin*.

[971] *Ibid*. Bhasin limits good faith to a duty imposed by law during the performance of a contract; QCL imposes a good faith principle imperatively by law during the formation, performance and extinction of a contract.TC imposes that contractual performance must be made in good faith CISG, UNIDROIT Article 1.7 require that a party must act in good faith in international trade contracts. Party autonomy imposes that no reasonable person would enter into a contract without a minimum standard of conduct: *See also supra* note 15. Ghauri on trust; *see supra* note 146 Leggatt, J in *Yam Seng*; *See supra* note 352. Leeson on customary merchant law.

[972] *Guay Inc. v. Payette*, 2013 SCC 45, J.E. 2013-1588, 363 D.L.R (4th) 445. Justice Wagner, (McLaughlin C.J.C. and LeBel, Fish, Rothstein, Cromwell and Karakatsanis, JJ. concurring) While evaluating the scope of the party's obligation during the parties' negotiations suggested: "…it is also necessary to consider the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the resources to which they had access at that time." at paragraph 62.

[973] *Supra* note 267. *Lac Minerals*.

[974] QCL: *see Richard Howarth et al v. DPM Securities Inc. et al,* [*Howarth*] 2004 QJ 9794; *Mason Graphite Inc.* v. *Quinto Mining Corporation* [*Quinto*], 2016 QCCS 6342.

[975] QCL: *4379047 Canada Inc.* v. *Christos Papagiannis,* 2017 QCCS 90 (CanLII); *Sobeys* EYB 2005-9832 (C.A.) *See also Mercille v. 9221-8247 Québec Inc*., 2016 QCCA 49. *Canadian National Bank* v. *Houle* (1990) 3 S.C.R. 122 extended the principle of good faith to qualify that it does not require malice for a principle of good faith to apply objectively by law.

[976] Expressed stipulations that are unambiguous are recognized by all sources of law. *See supra* not 51. *Bhasin* at para. [77].

[977] The primary resistance stems from CCL whereby there is a resistance to impose a general duty of good faith during the formation of a contract, let alone recognize agreements to negotiate in good faith.

[36] There is no consensus between the Monitors as to how to measure the nature and scope of such a duty of good faith even if it could be considered that a duty of good faith is imposed by law during negotiations.

FOR THESE REASONS, THE MOOT DECISION:

[37] **DECLARES** that there is no evidence that PA and GF have entered into an agreement recognized by law.

[38] **REJECTS** the request by GF to homologate the agreement.

[39] **REJECTS** the allegation by PA that GF has interfered in the economic activities during the exercise of freedoms of contract for want of evidence.[978]

[40] **ACKNOWLEDGES** the existence of a general duty of good faith implied by the parties in virtue of their business relationship that is not sanctionable since there is no evidence of damages in this case nor a causal link between the general duty of good faith and the conduct of PA since the nature and scope of the duty of good faith cannot be measured.

[41] **ORDERS** the parties and monitors to collaborate in the future to establish a better manner to record the exercise of freedoms of contract during negotiations and a way to record the nature and scope of a duty of good faith.

1.2 Critique of the Moot Decision

The decision raises a roar in the back of the courtroom while the Parties and Monitors squabble about the outcome and what it means for the future development of TBN. The gavel pounds three consecutive times while the adjudicator commands, “Order in the Court!”.

The parties are forced to kibitz civilly. PA is smug. An empty threat of a vague good faith duty has little to no impact on party autonomy. GF is disgruntled that so little progress has been made towards recognition of a good faith standard as an imperative duty during the processes of negotiations. She is willing to compromise by allowing PA to select the nature and scope of good faith insofar as minimum legal standards are maintained.

CCL, being the most irate, wipes a brow. While CCL is relieved that the court could not find an agreement, thus promoting freedom from contract, CCL does not, in principle, recognize a duty to

[978] If GF had, in fact, interfered with the economic activities of PA, it would not matter whether GF had intended to do so or not: *Supra* note 974. The decision in *Houle* established that it is not necessary to establish malice for a duty of good faith to be imposed by law.

negotiate in good faith. CCL disagrees with the decision and argues that the adjudicator exceeded its powers to decide on the matter of whether the organizing duty of good faith in common law contracts can be applied to TBN. CCL contends that a duty of good faith has only recently been recognized as an organizing principle that applies to contracting parties during the *performance* of their contractual obligations and must be *imposed by operation of law* on an objective level. CCL further altercates that it is unfathomable that such a subjective factor would enter into a Decision.[979] Furthermore, the very idea of a good faith duty during negotiations is "inherently repugnant to the adversarial position of the parties when involved in negotiations"[980] and interferes with the proper competition expected during negotiations,[981] unless a party has entered into circumstances where an adjudicator can find that there has been misuse of confidential information,[982] misrepresentation[983] or non disclosure of basic facts.[984]

QCL agrees with the decision with some qualifications. QCL observes that neither a subjective test nor an objective test could be used to establish that there was an agreement between the parties in this case. There is no evidence of a meeting of the minds and essential elements of a contract are missing. While the QCL recognizes there is an overriding, imperative duty of good faith that is applicable when parties are exercising their civil rights under Article 6 of the C.c.Q., the code is not specific to negotiations, per say, and therefore there are limitations to its application. If an

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[979] *Supra* note 36. *Jumbo King*.

[980] *Supra* note 91. *Walford*.

[981] *See supra* note 9. CCL Swan at 535 [fn. 2]. Swan explains: "For example, the negative obligations to refrain from negligent misrepresentation or deceit will arise as soon as the parties start communicating with each other. In some limited cases, there will be positive obligations to disclose information as well. Swan cites further John Cartwright, "Liability in Tort for Pre-Contractual Non-Disclosure" in Andrew Burrows & Edwin Peel, eds., *Contract Formation and Parties* (Oxford: Oxford University Press, 2010) 137; and Stephen Waddams, "Pre-Contractual Duties of Disclosure" in Peter Cane & Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991) 237. *See also* Swan at 537. [fn13] refers to John Cartwright, "Liability in Tort for Pre-Contractual Non-Disclosure" in Andrew Burrows & Edwin Peel, eds., *Contract Formation and Parties*, Oxford University Press, Oxford, 2010, 137; and Stephen Waddams, "Pre-Contractual Duties of Disclosure" in Peter Cane & Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991), 237. *See also reference to Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd*., [1989] 1 Q.B. 433, [1988] 1 All E.R. 348, [1988] 2 W.L.R. 615 (C.A.), 90, 240, 241, 319, 329, 344, 729, 730, 846, 858, 859, 860, 861, 864, 867, 868, 869, 870, 876. A seller's "standard sales contract" was considered unenforceable due to letters written too small to be reasonably read by the average person. The court did commit to an overriding principle of good faith but recognized piece-meal solutions that could be applied in fairness in C.A.

[982] *Supra* note 267. *Lac Minerals*.

[983] *See* 1.1 in Section 3 of Chapter 1, Part I regarding promissory estoppel and reliance.

[984] *See supra* note 9. CCL Swan at 535-537.

agreement had been formed, then QCL would have recognized that good faith must be applied to the *formation*, *performance* and *extinction* of contractual duties.[985] QCL also extends the duty of good faith beyond honesty as it also imposes a duty of loyalty and collaboration,[986] and breach of good faith causing damage to an injured party is sanctioned by law.[987] Although the good faith principle does not allow a party to unjustifiably rupture negotiations, it does not extend so far as to enforce parties to enter into an agreement.[988] QCL argues that the context of the case clearly falls outside of those circumstances where law has identified a breach of good faith, since it is not obvious that negotiations have been broken off in breach of good faith,[989] or that PA breached matters of disclosure or misrepresentation,[990] or that PA misused confidentiality,[991] and there is no evidence of unequal bargaining power between the parties.[992]

Function and normativity: The function of good faith is to provide an imperative minimum standard of conduct. QCL provides for the principle of good faith under the C.c.Q. While CCL do not overtly recognize this minimum standard, other mechanisms are set up to clothe a minimum standard of conduct. In this case matter, there is no evidence of breach of an obligation to negotiate in good faith, nor facts on which CCL could clothe a different remedy. QCL does recognize that parties are free to specifically express the nature and scope of good faith they intend to exercise during negotiations.[993]

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[985] Article 1375 C.c.Q. *See* Sylvette Guillemard, « Qualification juridique de la négociation d'un contrat et nature de l'obligation de bonne foi», (1994) 25 R.G.D. 49-82 and Vincent Karim, « La règle de la bonne foi prévue dans l'article 1375 du Code civil du Québec: sa portée et les sanctions qui en découlent », (2000) 41 *Les Cahiers de Droit*, 435. *See also Pegasus Partners Inc*. v. *Groupe Larue Inc*. 2007 QCCS 476 for good faith application during the formation of a contract.

[986] *Formédica Ltee* v. *Silipos Canada Inc*., 2010 QCCS 6074 at para [89]. The judgment cited, in particular, Didier Lluelles and Benoît Moore, *Droit des obligations*, Montreal, Éditions Themis, 2006, no. 1978 at 1069-1070.

[987] *See* Brigitte Lefebvre, «La bonne foi dans la formation du contract », Éditions Yvon Blais Inc., 1998 at 157-158.

[988] *Supra* note 985. *Pegasus* at para. [29]; *Friedman* v. *Ruby*, 2012 QCCS 1778 at para. [49].

[989] *Supra* note 618. *Papagiannis*.

[990] *See* 1.2 in Section 1, Chapter 1 Part II. *See also supra* notes 485 and 980. *Comeau* and *Howarth*; *see also Bank of Montreal* v. *Bail Ltée*, [1992] 2 S.C.R. 554.

[991] *Supra* note 267. *Lac Minerals*.

[992] *See supra* note 972 and 990. *Guay, Bail*.

[993] *See* 1.1.2 in Section 1 of Chapter 2, Part I.

TL considers that parties are free to negotiate and exercise their freedoms of contract under the TGPL of *pacta sunt servanda*.[994] This freedom does not come freely,[995] rather it is accompanied by other TGPL that require a duty for negotiating parties not to act in bad faith under Article 2.1.15 of the UNIDROIT Principle. Bad faith applies to negotiation parties if a party "breaks off negotiations in bad faith [or] enter[s] into, or continues, negotiations when there is no intention to reach an agreement with the other party".[996] Furthermore, if a party breaches a duty not to disclose confidential information an injured party would be eligible for compensation under Article 2.1.16 of the UNIDROIT Principles. These overriding principles apply regardless of party consent so there is no need to establish an agreement for a duty of good faith and fairness to apply. Arbitrators have been willing to decide on matters of fairness beyond the UNIDROIT Principles on a case to case basis.[997] Parties are free to exercise the freedom to contract and specifically express the nature and scope of

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[994] This basic principle of freedom is found in Article 1.1 of the UNIDROIT Principles, referred to in Article 2.1.15 to apply directly to negotiations. The proposed sanction is that "a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party." at Article 2.1.15 (2). See also Case 1584: CISG [1]; 8; 8(3); 19(3); 23; 35(2); 38(1); 39(1); 46(3); 60; 72(1) Spain: Badajoz Provincial High Court (Section 3) No. 109/2014 (previously heard by Almendralejo Court of First Instance no., 2, 2 September 2013. J. Garcia Carrión, S.A. v. Cruz & Cia., LDA 20 May 2014 Original in Spanish Complete text: http://www.cisgspanish.com Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondant remarking on a case of a Spanish buyer and a Portugese having prior business relations in the sale of wine: "customary practice in commercial trade…[requires] that the parties express their intentions unequivocally both in pre-contractual discussions and negotiations and in any matters that might subsequently be relevant to the conclusion, performance or fulfillment of the contract."

[995] Article 1.1 of the UNIDROIT Principles is subject to good faith and fair dealing found in Article 1.7 of the UNIDROIT Principles. A party must justify if it breaks off negotiations abruptly or without justification if an offer has been made, which offer may be subject to delays specified in Article 2.1.4 of the UNIDROIT Principles.

[996] BELGIUM: Hof van Beroep Gent (*NV A.R. v. NV I.*) (*Design of radio phone case*) 15 May 2002 Case law on UNCITRAL texts [A/CN.9/SER.C/ABSTRACTS/103], CLOUT abstract no. 1017 *Reproduced with permission of UNCITRAL Abstract prepared by Andrey A. Panov*: The Belgian seller and the French buyer entered into negotiations regarding the production and supply of pagers. The parties executed a letter of intent, which expressly stipulated that the final agreement was still to be reached after subsequent negotiations...The Court noted that the formation of sales contracts is dealt with in Part II of the CISG, requiring an offer and acceptance to be found, but also noted that the parties can reach an agreement gradually as a result of negotiations (with no clearly distinguishable offer and acceptance) on the basis of the principle of party autonomy set forth in Article 6 CISG. In their letter of intent the parties stipulated a number of important elements of the anticipated contract. The letter of intent was regarded as an agreement on principle, which prevented the parties from stepping back on the points on which agreement had already been reached. The formal agreement had never been executed; however, the parties kept negotiating and there was an agreement between them on certain points. Hence, the buyer's argument that the order had never been made was not followed. When the feasibility of the whole project became doubtful and the parties had negotiated possible solutions, the options had included calling off the order. The seller did not react within a reasonable time after receiving the minutes of the relevant meeting and did not question their contents. According to Articles 29 (1) and 11 CISG an agreement can be modified or terminated by mere agreement of the parties, which may be proved by any means, including the parties' own behaviour. The needs of international trade obliged the parties to protest within a reasonable time after receiving a communication they could not agree with, for in trade, a positive meaning is attached to silence when receiving all kinds of documentation. The order had been annulled by the agreement of the parties and the seller's claim that the buyer must still buy the 30,000 pagers was unfounded and irreconcilable with the rule of good faith, which must be observed in application and interpretation of CISG (Article 7 (1) CISG). Therefore, the Court dismissed the seller's claim. [our underline].

[997] *See supra* note 721. RUS negotiated an agreement to supply natural gas to MOL but RUS delivered directly to the recipient thereby risking non-payment since the recipient was not part of the negotiation process. The Court decided that RUS failed to act in the implied good faith under Art. 1.7 UNIDROIT Principles and Arts. 7 and 8 CISG. "International practice considers good faith and fair dealing as implied obligations (Article 5.1.2 of the UNIDROIT Principles)."; *See also supra* note 493. Spanish Co (SP) v. German Co. (GER). The Court concluded that the general principle of good faith in Art. 7(1) CISG requires that the parties cooperate and give necessary information to one another, including exemption of liability.

good faith they intend to exercise during negotiations.[998] TL is satisfied with the Decision and hopes to promote the cooperation and uniformity of her parallel sisters.

PAJ does not operate as a "free-for-all". There are expectations of behavior while parties exercise their freedoms of contract during negotiations.[999] PAJ has learned from business perception that successful negotiations are attained by considering the opposing party's position respectfully to promote trust.[1000] PAJ does not object to the Decision.

Transplant test and legal culture: While the Parties and Monitors appear to be diverse regarding when, why and how negotiations should be regulated, to truly grasp the clamor requires a transplant test and another look at legal culture. Transplanting legal rules is more than just a discussion of differences and similarities; rather it is a search for solutions in a legal culture that has sufficient capacity to regulate evolving situations.

A global merchant custom has been transforming in the transnational global world for centuries, supporting party autonomy while upholding fairness in commercial dealings.[1001] We must seek whether there are universal standards of communications and behavioral standards that have been set by TBN parties themselves[1002] that could be recognized by all sources of law. If only there was a manner to identify the meaning of the semiotics communicated between TBN parties! Each legal approach uses different semantics to express how law is regulating. For example, although good

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[998] *Pacta sunt servanda*. *See also supra* note 994. *Cruz*.

[999] *Supra* note 186. Mr. Leggatt's comment in *Yam Seng* at para. [149].

[1000] *See supra* note 49. Usunier.

[1001] The dynamic transformation of *lex mercatoria* has traveled post haste to law. For an analogy: *Know ye all* sports lovers: For example the game of American football, which is more often played with the players' hands. Rather than naming it "handball", contextually, returning to Medieval roots, football was considered any game that was played "on foot" (rather than the foot kicking the ball) Although many equate its development from a transplant of rubgy or soccer (termed "football" in Europe) it is thought that its actual derivitive is based on the "small ball game", the ancient Greek game of *Phaininda,* "romanized" as *harpaston*. http://www.aerobiologicalengineering.com/wxk116/Roman/BallGames/harpasta.html. *See also supra* note 110. Yovel's comparaison of legal norms with basketball rules.

[1002] *Supra* note 939. Russi at 579. Russi describes Diamond/Foss "two-track system" that presumes a certain commercial "reasonableness" on one hand and "dishonesty" in the other. The first criteria serves to impose limitations on parties "irrespective of dishonesty." at 581. *See also supra* note 936. Diamond/Foss at 600-601.

faith was not used overtly to guide commercial behaviour during the performance of contracts under CCL, nevertheless other remedies have clothed a standard of fairness.[1003]

All sources of law respect a certain amount of party autonomy in commercial dealings and all sources of law have some sort of standard of conduct. However, the similarities are not easily detected because of inconsistent categorization of negotiations. The sources of law do not have the same response on how to balance between the two tensions between party autonomy and good faith.

On a domestic level, both CCL and QCL systems value party autonomy based on fundamental rights of freedom inherent to Western legal culture. Legal culture has been borrowed from the civil law to the common law based on the will theory,[1004] but the way the will theory has been embraced is quite dissimilar. Although the will theory is fairly innate in civil law jurisdictions, the common law has performed gymnastics to accept a modified version of the will theory.[1005] On a positivist level, party autonomy receives its breath due to the force of Sovereign laws.

Both systems agree, in principle, that consent is essential when party autonomy is invoked. However, the manner that party behavior is interpreted differs. CCL considers an objective test when determining party intention; what reasonable persons would do under similar circumstances. Only *if* the parties have expressly and unambiguously stipulated their intentions, will the specific, subjective intention be recognized. On the other hand, QCL uses a subjective test to ascertain the intentions of the parties unless the parties have not expressed themselves specifically, in which case an objective

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[1003] *Supra* note 9. CCL Swan at 546 [fn 34] *See supra* note 981. [1988] 2 W.L.R. 615 at 181 (C.A.). Swan references Bingham L.J. opens his judgment with the comment that in legal systems other than the common law, the problem before the Court of Appeal would be dealt with under the heading of good faith: "English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness." While not perhaps a synonym for "good faith", a concern for "unfairness" is apt to "discipline" in some way almost, if not all, of the bad behaviour characterized as "bad faith". See also *J. Spurling Ltd. v. Bradshaw*, [1956] 2 All E.R. 121, [1956] 1 W.L.R. 461 (C.A.); and, more generally, *Parker v. South Eastern Railway Co.* (1877), 2 C.P.D. 416 (C.A.). The issue raised by this case and the development of a law of contracts for the industrial age and the era of the mass-produced contract will be dealt with later in section 4.2.4. *See also* Swan referring to *Interfoto* "...any solution to the problem is influenced by the fairness (or unfairness) inherent in the facts." at 255 [fn 40].

[1004] *See* 2. In Section 3 of Chapter 2, Part I.

[1005] *See* discussion in 3. In Section 3 of Chapter 2, Part I regarding self-regulated industries. *See also supra* note 804. Kennedy.

test will be applied.[1006] The subjective test under QCL and what actually transpired during negotiations will more readily enter a courtroom as evidence (for example, evidence of breach of good faith).[1007] Both systems share the inability to recognize intangible communications native to TBN and therefore struggle to identify the meaning that parties intended and how to measure the terms and conditions of their promises and agreements.

Legal transplants have been considered to arise when domestic laws "internalize" transnational principles and vice versa.[1008] This "internalization" can be "up-loaded" or "down-loaded" between these sources of law to provide a certain harmonization between the sources of law.[1009] All sources of law recognize the legal culture of customary laws, including industry standards created between merchants.[1010] However, neither source of law has determined how to measure the content and intensity of these standards during TBN with precision.

Transnational laws have the flexibility to use the broad principles found in TGPL to fill gaps through application by international arbitration[1011] to balance party autonomy and fairness in commercial dealings. Yet even broad, flexible principles do not provide TBN parties with the required juridical tools to express themselves and may inadvertently interfere with the true intentions of the parties. For example, if TBN parties form an agreement in principle through *pact sunt servanda* but it remains unrecorded, TBN parties may face a conflicting application of TGPL of the tension between *pact sunt servanda* and the requirement of parties to maintain a fair playing field if adjudicators do not

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[1006] *Supra* note 38. Beaudouin/Jobin.

[1007] Art. 6 C.c.Q.

[1008] *Supra* note 189. Koh at 200.

[1009] *Supra* note 77. Zumbansen (Piercing) Zumbansen expounds: "This implies a whole range of difficulties in trying to assess the heavily prejudiced relationship between national and transnational law – both in doctrinal as in historical terms."[beyond the nation State horizons] transnational law does not and cannot directly follow the path of the materialization [of Nation State experiences]." at 42.; *See also supra* note 77. Zumbansen (Defining the Space of Transnational Law).

[1010] *Supra* note 189. Gaillard at 70 et s. *See also supra* note 654. Glenn at 462: "Even today the common law in England will yield to custom, which meets the contemporary requirements of proof." *See* the historical analysis at 464 et s.

[1011] Art. 1.9 and 4.3 of UNIDROIT Principles and Art. 1.7 of the *Vienna International Sales Convention*, 1980. Furthermore, transnational institutional settings are found in conventions which are not legislatively based but must be ratified by sovereign sources. Party autonomy allows the parties to refer to principles of supratransnational law in a binding power.

have sufficient evidence to expose the parties' intended promises and agreements. All legal systems would benefit from a new way of assessing party intention.

What if the parties had a manner to choose their own level of good faith that they were willing to apply to their relationships? Should an arbitrator nevertheless apply a TGPL standard? If so which one dominates? Under domestic laws[1012] and TGPL (*pact sunt servanda*), the parties are free to choose a level of good faith, insofar as it remains within the boundaries of the legal ballroom. However, currently the parties are not truly free, since there are currently no juridical tools readily accessible with which to *record* party choice (unless it is evidenced in a legally recognized contract). This need could be provided through the proposal of a new institutional setting: a gyroscopic orientation of the legal regulation of TBN.

Institutional settings: Institutional settings in the context of TBN are not monistic; rather they appear in at least three dimensions. Domestic regulatory sources are more commonly administered by legislative bodies or domestic courts with a vision, in principle, to support party autonomy. However, domestic laws are also responsible for protecting citizens within its boundaries thus impose certain limitations to party autonomy.

Transnational institutional settings include international arbitration and international committees that set up treaties, such as the CISG, UNIDROIT Principles and the like. They are also framed in a manner to promote party autonomy. Party autonomy is struggling like a palm tree enveloped by a strangler fig tree, for recognition by the other regulatory sources of law to have party choice acknowledged, subject to harnessing fairness and community standards within a particular trade or industry, such as merchant custom.[1013]

[1012] *Supra* note 51. *Bhasin* at para. [77].

[1013] *See supra* note 125. Macdonald illuminating.

Although parties, mostly, settle their own disputes and available jurisprudence is always based on circumstances where parties have been unable to settle their own disputes (consequently does not reflect the entire reality of legal regulation), when there is an irresolvable dispute, TBN parties prefer to turn to international arbitration, the ultimate institutional setting for party autonomy.[1014] We concede that party autonomy in the context of TBN may currently be considered to fall short of recognition as its own juridical order due to the potential argument that it has no agent, other than the parties themselves, to enforce the laws chosen by TBN parties, but that could change with the creation of an institutionalized setting.

If an institutional setting were to be set up to accommodate party autonomy during TBN and guide the parties by providing a manner to record meaningful communications and a standard of conduct that the parties agree to apply to their relationship, an arbitration centre within such an institutional setting could then act as the agent to enforce the law chosen between the parties.[1015] Then the criteria necessary to consider party autonomy as its own juridical order in TBN could be unequivocally met.[1016]

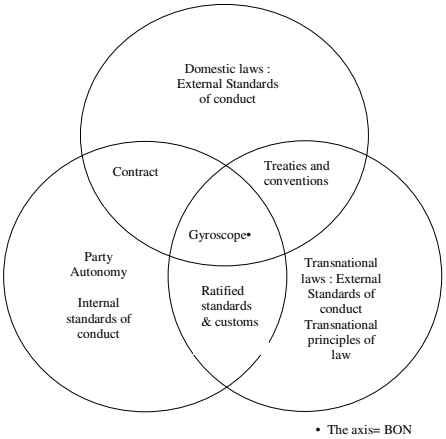
Considering the global interests to ensure the proper functioning of TBN, transplant tests and legal culture, as well as institutional settings that drive the forces of law in different directions, the gyroscope is the new institutional setting that could resolve the tensions between the pluralistic regulatory sources of law.

[1014] *See supra* note 22. Carbonneau.

[1015] If there was a way to recognize a minimum formation of law, by introducing an institutional setting that could harbour parties from the potential threats to their autonomy, we posit that this new juridical order need not exclude international arbitration as an ultimate source of remedy if party autonomy fails to find a fast track solution in the institutional setting which would accommodate TBN parties to a swifter resolve. A new institutional setting will eradicate the necessity of conflict laws in commercial disputes, and resolve the incongruity between legal families, such as the objective and subjective tests; consideration, application of extra-contractual remedies and pre-contractual liability.

[1016] *See supra* note 824. Rocher's criteria for recognition of a juridical order.

Balance of tri-dimensional sources of law



Conclusion: The tension between party autonomy and a duty of good faith can be resolved. If we consider the function of law in regulating TBN is to provide a standard of fairness while supporting party autonomy we have detected a willingness in all sources of law, to some extent, to uphold parties' specifically and unambiguously expressed stipulations, while considering a necessity to find a manner to impose a certain degree of fairness in commercial dealings.

However, the current manner that law is regulating is hazardous to TBN, since current laws cannot track all the parties' intentions and therefore the parties are subject to conjecture when their disputes are adjudicated. While domestic laws have offered a short list of solutions to categorize TBN with the use of extra-contractual remedies that are unsuitable to dissect obligations occurring during TBN, none have properly identified obligations during TBN and how to determine what is non-performance of negotiation obligations. On the one hand, TBN parties are not certain that their promises and agreements will be recognized by law. On the other hand, TBN parties are not certain that they will not be subject to unwanted surprises by imposition of obligations that they did not expect. This manner of legal regulation does not support the treasured normative values of efficiency, autonomy and *certainty* required by TBN parties.[1017] Consequently, there is no foreseeability regarding what an adjudicator will decide in a dispute.

On a transnational level, there is a need to update antiquated laws. For example, the CISG is unable to accommodate the full scope of e-commerce on its own.[1018] Furthermore, it leaves the legal

[1017] *Supra* note 11. Hogg/Gutmann/Piazzon.

[1018] Historically, the CISG began in the 1920s when internet was inconceivable and after may drafts was finally embraced by UNCITRAL in 1980. *See* Siegfried Eiselen, "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980", 6 EDI Law Review (1999) 21-46. http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html. Eiselen refers to Article 24 regarding pre-contractual circumstances: "From this

community uncertain whether TBN are contemplated by CISG. The CISG's current rigid structure does not cater to the flexibility required by TBN parties. Both CISG and UNIDROIT[1019] have no articles that deal with the measurement of the content and intensity of obligations inherent to rights and obligations under TBN. Within the scope of party autonomy, the parties have not had the opportunity to fully exercise the full capacity of party autonomy since classical contractual vehicles are often unsuitable to identify the nature of obligations arising during TBN, since agreements are typically incomplete. If a valid contract can be recognized whereby the terms have been *specifically* and *unambiguously* expressed by the parties, all sources of law will recognize the agreement (insofar as it is not breaching mandatory rules of law), but there is no current way to document semiotics occurring in TBN during the formation or renegotiation of contracts.

There is, however, within the very boundaries of this rupture an illuminating factor. All three regulatory sources normatively strive to accomplish the same goal: to establish a minimum standard of conduct for contracting parties. While a minimum standard of conduct may appear to interfere with party autonomy, we posit that it is the very corner stone of the freedoms of contract. This freedom is not a "free for all" rather based on a responsibility that parties assume when negotiating together, the very core of why this liberty exists. Freedom entails respecting the liberty of the opposing parties as well and, therefore, maintaining a certain standard of conduct must be applicable to TBN.

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formulation [of Article 24 CISG] it is clear that he Convention does not directly mak provison for electronic communications and it ill depend on the rules of interpretation whether this gap can be filled. " at 28. Eiselen details the dilemma with regard to contracts: "The question as to when communications will become valid and binding in the case of parties who are not in touch directly, has been solved...[under] four main theories. " at 23. *See also* Charles H. Martin, "The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law", [Tulane J. of Int'l & Comp. Law Vol. 16:467]. Martin deals directly with th concept of communications, to conclude that the Advisory Council has affirmed that "[The] CISG enables parties to conclude contracts electronically." at 475. However, Martin does not deal directly with pre-contractual issues. Martin concludes that the interpretation of electronic contracts is based on general principles of good faith and equity and customary international laws rather than the CISG itself: "Without the new CUECIC [Convention on the Use of Electronic Communications in International Contracts] rules, the main sources of applicable international electronic contract law will remain....Equity and good faith." at 501 and 502.

[1019] UNIDROIT Principles are open to the form of agreement in Article 1.2 However, specific to negotiations is Article 2.1.15. Preliminary agreements and how to determine party intention is found in Article 4.3

How a pattern of legal culture is established means finding a common framework that includes common normativity, "common scientific language, a commonest of concepts and a common basic world view."[1020] If party autonomy could operate independently and institutionally granting the opportunity for parties to express themselves adequately, an adjudicator would no longer have to supplement by "select[ing] the choice of law rule it considers most appropriate, and then to apply that rule to determine the governing law."[1021] An adjudicator would then be in a position to enforce expressly stipulated promises and agreements exchanged between the parties.

2. Identifying a duty of good faith

The "concept of good faith means different things to different people at various times"[1022] and is contingent on context.[1023] Holmes describes good faith, in Greek culture, as a "universal social force" to regulate social relationships.[1024] In terms of *ius naturale*, good faith is posited as a universal norm that is based on honesty.[1025] Historically, the embryo of good faith was recognized in the common law through the workings of Lord Mansfield.[1026] One of the first common law decisions

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[1020] *Supra* note 92. Van Hoecke refers to Thomas Kuh, philosopher of science at 513. *See also supra* note 624. According to Hall, custom is also a source of positive international law which can overreach if it has attained the "status of a *ius cogens* norm [a peremptory norm of general international law]." at 286. Hall quotes Brierly to conceptualize custom: "…a customary rule is observed, not because it has been consented to, but because it is believed to be binding…and its binding force does not depend…on the approval of the individual or the state to which it is addressed."[J.L. Brierly, *The Law of Nations* (5th ed., 1950) at 52-53] Hall distinguishes that international law is recognized by the law of nations, "which are the people themselves" as opposed to the law of the state. Therefore, custom adapted by TBN parties themselves forms a quasi-consensual agreement assuming a minimum standard between negotiation parties exercising party autonomy. *See also supra* note 916. Henry.

[1021] *Supra* note 724. Karton at 34.

[1022] *Supra* note 467 at 400. Homes.

[1023] Paul-André Crépeau, *L'intensité de l'obligation juridique,* Cowansville, Québec, Les Éditions Yvon Blais Inc., 1989.For a CCL approach, *see supra* note 47. Yam *Seng* at para [147].

[1024] *Supra* note 461 at 400. Homes depicts: "The Greeks, for example, saw good faith as a *universal social force* that governed their social interrelationships- that is, each citizen had an obligation to act in good faith toward all citizens. This objective conception, universally applied to all transactions, comports with Pound's jural postulate: "Men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith."" at 402.

[1025] *Ibid*. Homes says: "The Canon Law posited that good faith was a universal moral norm, rather than a social norm...This Cononist concept thus used a subjective moral standard based on individual honesty." at 402. Holmes describes how honesty is understood: "Honesty, however, can be understood in several ways: as individual moral honesty ("honesty in mind"), individual social honesty ("honesty in fact" upon compliance with standards of conduct established by the public interest), or individual commercial honesty ("honesty in fact" according to reasonable commercial standards of customary dealing.)" at 403.

[1026] *Supra* note 12. Yee refers historically to: "The high watermark of good faith came when Lord Mansfield made a famous reference in *Carter* v. *Boehm* to good faith as '[t]he governing principle…applicable to *all* contracts and dealing.' However, reaction against good faith started roughly from the 1980s. This coincided with the rise of legal positivism and the laissez-faire theory, fueling the establishment of the classical theory of contract." at 195.

regarding good faith in commercial dealings was based on trade practices that required disclosure of basic facts.[1027]

Although negotiations are an ancient and innate human activity, domestic laws have not specifically legislated rules pertaining to negotiations, other than one codified exception.[1028] Since there are no specific rules regarding a duty to negotiate in good faith under Canadian laws, we will further investigate the matter of a duty to negotiate in good faith under Canadian domestic laws. To assess the divergence between QCL and CCL regarding the matter of the application of a duty to negotiate in good faith and to determine if they ever converge, we will address a set of germane questions. *Why* should an obligation to negotiate in good faith be imposed by law? *Does* an obligation of good faith impede on party autonomy? *When* is a duty to negotiate in good faith recognized under domestic laws? *What* constitutes a duty of good faith? *How* is a duty to negotiate in good faith recognized?

2.1 Why should an obligation to negotiate in good faith be imposed by law?

Law has an interest in guiding human behavior in human activities. Negotiations are not an exception; rather they fall within the scope of an innate human activity. Law has an interest in guiding human activity. Law has an interest in ensuring that proper behaviour is exercised when parties are exchanging promises or agreements, or have entered into a commercial relationship. Law has an interest in providing certainty to business parties who have begun the negotiation dance and how that dance is performed. Prominently, law has an interest to identify when rights and obligations may commence to accrue between the parties, in particular an obligation to conduct business honestly and

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[1027] *Supra* note 467. Homes describes the embryo of good faith in the common law: "Mansfield's opinion is the first comprehensive common law decision to impose a duty to disclose basic facts. Founded on trade practices, the law merchant, and equitable principles, the Chief Justice's formulation created a suitable commercial doctrine of good-faith disclosure which measures the good faith and materiality of a party's silence by trade customs and "natural equity." at 434. The debate regarding whether the theory of contract law is based on morality, economics or strict liability may be satisfied by the fact that: "...contract law is not morally neutral. Even minimal constraints of the classical contract law reflect some morality. 'The law, after all, is essentially a social and a practical enterprise.'" *Supra* note 12. Yee continues: "It must be noted that good faith...merely qualifies the adversarial pursuit of self-interest, enabling courts to give effect to the spirit of the deal. Thus, the 'aim of any mature system of contract law must be to promote the observance of good faith and fair dealing in the conclusion and performance of contracts'" at 196.

[1028] Article 1335 *Codice Civile* (Italian).

fairly[1029] in commercial dealings. Law has an interest to guide party conduct during negotiations, but must do so by continuing to preserve party autonomy.

How can law actually accomplish this necessity without the proper tools to record and follow evidence that allow adjudicators to ascertain that a deal has, in fact, been made? How can substantive issues determined by the parties themselves which are meant to be legally binding be identified? Currently, there is no certain manner to record these promises, agreements and the business relationship in terms of what the parties meant to be legally binding.

Good faith implies that parties are precluded from acting in a manner that would be construed as opportunism or abusive.[1030] Breach of good faith is sanctionable by law.[1031] Good faith may apply on a subjective level, in accordance with the intentions of the parties, or on objective levels when imposed by operation of law or custom. However, there is a decisive smudge ongoing as courts intermeddle in trying to determine a proper distinction between the levels of good faith.[1032]

2.2 Does an obligation of good faith imposed by law impede on party autonomy?

There are commentators who advocate that all commercial contracts should be subject to a duty of good faith.[1033] It is simply logical that business parties would not do business together if there was not some reasonable expectation of honesty:[1034]

> "…in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly."[1035]

[1029] *See supra* note 51. Cromwell, J. identifies that "Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce" at para. [62] .

[1030] *Supra* note 38. Baudouin/Jobin at 222.

[1031] *Ibid* at 223. Baudouin/Jobin refer to obligations that are not derived from contract as a "universality of other obligations".

[1032] *See* 2.5 of the current section.

[1033] Shannon Kathleen O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments", (2007) 86 CBR 193 at 208. O'Byrne expounds: "Treating the duty of good faith as an inherent part of every contract unless the parties have expressly and clearly contracted out of the duty will create certainty while honouring the intent of the parties." at 244. O'Byrne refers to F. Paul Morrison and Hovsep Afarian, "Good Faith in Contracts: A Continuing Evolution" in Justice Todd Archibald and Michael Cochraine, eds., Annual Review of Civil Litigation, 003 (Toronto: Carswell, 2004) 197 at 224. *See also* Shannon Kathleen O'Byrne, "The Contractual Principle of Good Faith and the Duty of Honesty in Bhasin v. Hrynew", (2015) ALR 53:1.

[1034] *Supra* note 9. Swan at §4.214. In fact, Swan considers that "One can be as hard-nosed or as aggressive a bargainer as one wants and still behave decently." at 552. *See also* supra note 47. *Yam Seng*.

[1035] *Ibid Yam Seng* at para. [149].

For a duty of good faith *not* to impede on party autonomy, the parties themselves must have a mechanism to "relax the requirements of the doctrine as long as they respect its minimum core requirements"[1036] and determine for themselves what the scope and nature of this duty means to their business relationship.

Establishing that every contract would be subject to good faith may be fraught with a battle of uniformity, since even if we could construe that "every contract" was subject to a duty of good faith, and that the CCL could run parallel with her civil law sister, QCL, the exact scope (or content) and nature (or intensity) would still have to be measured in accordance with the circumstances of each case, unless there was a manner for parties to record these measurements.

2.3 When is a duty to negotiate in good faith recognized by domestic laws?

Remaining with our Canadian models to answer the question of when a duty to negotiate in good faith is recognized under Canadian laws, the CCL and QCL are divided in their approaches to the application of a good faith duty during the *formation*, *performance* and *extinction* of contracts.

The scope of good faith is contingent on context hence "varies widely, depending on the relation created... Any long-term relation is certain to assume that each party will behave in good faith."[1037] The recent decision of the Supreme Court of Canada in *Bhasin* decided that there was an imperative organizing duty of good faith in the *performance* of common law contracts which is *imposed by law*. The outcome of the decision endowed hope that CCL and QCL would draw closer together on the matter of fairness,[1038] but there is still a large canyon existing in the two other phases of contracts (formation and extinction).

Firstly, the Supreme Court of Canada only applied a good faith duty to common law contracts during the *performance* of a contract, whereas QCL imposes such a duty during the *formation*,

[1036] *Supra* note 51. Bhasin at para. [77].
[1037] *Ibid*. Swan §8.136 at 1046.
[1038] *See supra* note 545. Buckwold at 26.

performance and *extinction* of a contract. Since CCL and QCL are now in sync regarding a duty of good faith owing during the *performance* of a contract, we will focus on the problematic of applying a good faith duty to the period during the *formation* of a contract. (Unfortunately, due to lack of space, this thesis cannot extend to address matters of *extinction*).

Can *formation* of a contract be equated to *negotiations*? The answer, of course, depends on context.[1039] While the formation of a contract may not be considered part of the negotiation processes in short term negotiations, they have certainly been recognized in long-term negotiations that result in a contract. In *Addison Chevrolet Buick GMC Ltd*. v. *General Motors of Canada Ltd*.[1040] Justice Dunphy noted that: "Good faith and honesty are the boundaries of the field to which the contractual relationship is *negotiated* and performed."[1041]

We posit that in the context of TBN, *formation* of a contract begins once the negotiation dance has begun. The problematic is that law is blinded to see the line between window shopping and when negotiations begin. Even though business parties consider that they know when the negotiations begin,[1042] these communications are still intangible to law. Therefore, either law must devise a formula that can detect this black line or the parties themselves need to have a manner to indicate when they have agreed that negotiations have begun; consequently, in Western terms, that they are in the processes of the *formation* of a contract.

QCL can recognize an agreement when all the *essential elements* of a contract exist and there is a "*meeting of the minds*" between the parties during negotiations even though such agreement be incomplete.[1043] The CCL is more resistant. When recognizing whether an agreement exists between

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[1039] The challenge then lies to determine whether there should be a difference if business negotiations do not result in a contract. Could they still be considered to be in the process of formation of a contract if no contract ensues?

[1040] 2015 ONSC 3404 (CanLII).

[1041] *Ibid*. *Addison* at para. 116.

[1042] *See*, in particular, 2. in Section 2 of Chapter 1, Part I. *See also supra* note 15. Ghauri and *supra* note 208. Docherty/Campbell.

[1043] *See* 3.2 in Section 1 of Chapter 2, Part I: "meeting of the minds". *See also supra* note 38. Baudouin/Jobin distinguish: « L'offre, tout d'abord, doit être sérieuse, ferme et précise. L'offre faite pour plaisanter, pour explorer un terrain d'une entente éventuelle ou qui est trop imprécise n'est pas la

the parties, there must be a contract, validly entered into with an objective sign from the parties that they intended to be legally bound by an offer that, in turn, is a mirrored acceptance by the other party.

Under QCL, a general obligation applies as an overriding principle to contracts as well as other acts or facts attached by law. Parties to a contract must act in good faith at the time of the *formation* of the contract,[1044] during *performance* of the contract,[1045] and upon *extinction* or discharge of the contract.[1046]

The challenge is shifted to business negotiations that do not result in a contract. Is it necessary to distinguish arrangements that transpire between TBN parties that do not result in a contract versus arrangements that conclude in the fruition of a contract? Does it really change the fact that the parties intended to be legally bound by promises and agreements exchanged between the parties during negotiations? Does it impact the standards of conduct that the parties assume in their business relationship? If only law could envision precisely *when* the parties desire to be legally bound to at any moment in time. As one example to this challenge, where does a standard of good faith stand in the presence of TBN?

Historically, the principle of good faith which has now been infused in Quebec laws under a general duty,[1047] was not included in the Civil Code of Lower Canada [C.c.B.C.]. The matter came to light in 1981 with a decision by the Supreme Court of Canada in *Banque National v. Soucisse* [*Soucisse*],[1048] later confirmed by *Banque National du Canada v. Houle*[1049] and *Banque du Montreal*

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manifestation d'une volonté claire de conclure un contrat. L'offre, ensuite, doit contenir tous les éléments essentiels du contrat projeté pour permettre l'adhésion de l'acceptant. Si la proposition oblige la personne à qui elle est faite a une négociation, à une demande de renseignements ou de précisions sur ces éléments, elle ne constitue pas alors une offre véritable, mais une simple invitation. » at 253 and 254.

[1044] *See supra* note 38. Baudouin/Jobin. *See also* Didier Lluelles and Benoît Moore, *Manuel de doctrine sur le régime des obligations*- tome 1, Montreal, Quebec, Les Éditions Thémis, 2005. *See also supra* note 985. *Pegasus* at para. [29]; *Friedman* v. *Ruby*, 2012 QCCS 1778 at para. [49].

[1045] *Ibid.* Lluelles/Moore at 1069 to 1070. *See also supra* note 984. *Silipos* at para 89.

[1046] *See supra* note 38. Baudouin/Jobin. *See also supra* note 766. Rolland.

[1047] *Ibid*. Cromwell refers to *National Bank of Canada* v. *Soucisse*, [1981] 2 S.C.R. 339; *supra* note 975. *Houle*; *supra* note 990. *Bail* at para. [85].

[1048] *Ibid*. Soucisse.

[1049] *Supra* note 990.

v. Bail [*Bail*].[1050] Mr. Justice Beetz in *Soucisse* used article 1024 of the C.C.B.C.[1051] (now 1434 C.c.Q.) to imply an obligation of good faith in the *performance* of a contract through equity which required an additional obligation on the part of the bank to disclose to the heirs at law that a suretyship had been entered into by a deceased in which the heirs at law would be bound. Failure to disclose this fact resulted in the bank being unable to proceed with an action against the estate ("fin de non recevoir").

Justice L'Heureux-Dube in *Houle* extended the precedence of *Soucisse* to a principle of good faith imposed by operation of law that can override express contractual stipulations when the Court finds unreasonable behavior:[1052]

> "While the doctrine may represent a departure from the absolutist approach of previous decades, consecrated in the well-known maxim "la volonté des parties fait loi", it inserts itself into today's trend towards a just and fair approach to rights and obligations."[1053]

The decision in *Bhasin*, thus, appears to align the CCL position with regard to good faith in the performance of a contract to QCL's position recorded in *Houle* in 1992.

Under QCL, and in the same hermeneutic timeframe as *Houle*, Gonthier, J. in *Bail* extended the duty of good faith during the performance of contract to a good faith duty in the *formation* of a contract. This principle was codified in the new C.c.Q under Article 1375 that says: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished." Even though no specific duty of good faith is imposed on negotiating parties, it is argued that the very principle of good faith can sustain that pre-contractual negotiations require parties to negotiate (exercise their civil rights) in good faith and, therefore, if one of the parties

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[1050] *Ibid*.

[1051] Article 1024 C.c.B.C. : "The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature."

[1052] An example was described as a demand loan that must require reasonable notice. Under CCL *see supra* note 1033. O'Byrne (This impacts a difference between unreasonable behavior vs. fraud see O'Byrne).

[1053] L'Heureux-Dube, J. in *supra* note 975. *Houle* at [120].

lacked good faith, it is probable that evidence taking place during negotiations, would be admissible in court.[1054] How far is the divide between QCL and CCL in embracing a duty of good faith? The CCL is now only shy of three decades behind the QCL as to *when* a good faith duty can be applied to negotiations. Perhaps the recognition in *Bhasin* will accelerate this timing.

2.4 What constitutes a duty to negotiate in good faith?

The second distinction to a duty of good faith between QCL and CCL is that the Supreme Court of Canada limited the scope of good faith under CCL to include only *honesty*, rather than the QCL broader acceptance of honesty, loyalty and cooperation.

Is good faith only honesty? Cromwell, J. in *Bhasin*, acknowledged that parties, during the negotiation processes, must be free to pursue their own individual self-interests,[1055] but to do so is accompanied with a minimum standard of honesty in contractual arrangements.[1056] The court was only willing to hold that this duty is a "requirement to act honestly...it is a simple requirement not to lie or mislead the other party about one's contractual performance."[1057] Mr. Justice Cromwell

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[1054] *See Union Carbide Canada Inc*. v. *Bombardier Inc*., 2014 CSC 35, [2014] 1 R.C.S. 800. The question of interpretation of a term in the contract was considered on the basis of the origin of the intention of the parties. Mr. Justice Wagner referenced *Les obligations* (7e éd. 2013), P.-G. Jobin et N. Vézina, dir., at 488 to 489) as well as Articles 1425 to 1427 and 1431 C.c.Q. Para. [60] La Cour d'appel du Québec a expliqué cette méthode d'interprétation dans l'arrêt *Sobeys Québec inc. c. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, [2006] R.J.Q. 100 : « Il faut pour déterminer la volonté réelle des parties et leur commune intention au sens de l'article 1425 C.C.Q. examiner le texte même du contrat, bien sûr, mais aussi, comme le prescrit l'article 1426 C.C.Q., sa nature, les circonstances dans lesquelles il a été conclu, l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que les usages…Par ailleurs, le principe énoncé par l'article 1425 C.c.Q. présuppose qu'il y a toujours une intention commune à « découvrir ». Or, il n'en est pas toujours ainsi. Certes, pour qu'il y ait contrat, il doit y avoir un minimum d'intention commune, mais il peut fort bien arriver que les parties, tout en ayant véritablement une intention commune quant aux éléments essentiels du contrat, se soient également entendues sur certaines clauses accessoires tout en leur donnant cependant chacune en son for intérieur, des interprétations divergentes. En un tel cas, on ne peut évidemment pas s'en remettre à l'intention commune des parties puisqu'il n'y en a pas. On n'a alors pas d'autre choix que de s'en remettre à l'interprétation qui se concilie le mieux au reste du contrat et aux circonstances ayant entouré sa conclusion. Further référence was made to *Québec (Agence du revenu) c. Services Environnementaux AES inc.*, 2013 CSC 65, [2013] 3 R.C.S. 838 : « . . . la recherche de l'intention ou volonté commune des parties représente une véritable opération d'interprétation » (par. 48; voir aussi D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 1587-1590; S. Grammond, A.-F. Debruche et Y. Campagnolo, *Quebec Contract Law* (2011), par. 297-301). » at para [60]. The conclusion of the court was to establish there is a general rule that negotiations can serve to interpret a contractual term : « Les parties n'ont pas renoncé à la règle de la common law, qui s'applique également au Québec, suivant laquelle les communications faites au cours des négociations peuvent servir à prouver les modalités d'un règlement. » at para. [68]. *See also* Lluelles, Didier, "Droit des contrats", Revue du Barreau Tome 64, Printemps, 2004; Didier Lluelles and Benoît Moore, *Manuel de doctrine sur le régime des obligations*- tome 1, Montreal, Quebec, Les Éditions Thémis, 2005.

[1055] *Supra* note 51. Bhasin at para. [70].

[1056] *Ibid*. Bhasin at para. [77].

[1057] *Ibid*. Mr. Justice Cromwell at para. [73]. Cromwell references Swan and Adamski, at § 8.135; Shannon O'Byrne and Ronnie Cohen, "the Contractual Principle of Good Faith and the Duty of Honest in Bhasin v. Hrynew", Alberta Law Reiew, (2015) 53:1; *supra* note 2015 O'Byrne, "Good Faith in Contractual Performance: Recent Developments" at 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. *See also supra* note 9. Swan at §4.214. In fact, Swan considers that "One can be as hard-nosed or as aggressive a bargainer as one wants and still behave decently." at 552. According to Swan, to honour the standard of good faith conduct, parties must behave in a *decent* manner, but that does not entail disclosure of things a party would prefer to keep confidential. The duty of good faith does require that a "person exercising a power of discretion to have regard to the other person's

underlined that the scope of the good faith principle was limited, obliterating Mr. Justice Leggatt's broader vision of the concept of good faith which included loyalty and cooperation with the proviso that: "This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract."[1058]

CCL and QCL do not merge on *what* constitutes a duty of good faith. QCL recognizes a wider range of good faith, enlarging the scope from a simple concept of honesty to include loyalty and cooperation.[1059] An interesting example of this enlargement is *Provigo Distribution v. Supermarché ARG*.[1060] Cromwell, J. Himself recognized the "broad duty of good faith" present in our new C.c.Q. during the deliberations in *Bhasin*.[1061] Cromwell specifically referred to the wider scope of the duty of good faith under QCL: "which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights."[1062]

Where QCL and CCL converge is demonstrated by the leading case in Canada that purports to protect honesty during the processes of negotiations in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*[1063] While parties were in the process of negotiating, Defendant misused confidential information attained from Plaintiff during negotiations and purchased a contiguous lot in competition

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interests but this does not necessarily mean that the other person' interests are paramount." at 552 . Swan quotes Weiler J.A.'s idea of what an obligation of good faith entails, referring to *978011 Ontario Ltd.* v. *Cornell Engineering Co. Ltd.* (2001), 53 O.R. (3d) 783, 198 D.L.R. (4th) 615, 12 B.L.R. (3d) 169, [2001] O.J. No. 1446 at para. [33] (Ont. C.A.).

[1058] *Ibid* at para. [73]. *See supra* note 47. Mr. Justice Legatt expands good faith beyond *honesty*: "In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards." at para. [138]."Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen." at para [139]. [Then he refers to English case law on the interpretation of contracts in *Rainy Sky SA v. Kookmin Bank* [2001] 1 WLR 2900 and *Lloyds TSB Foundation for Scotland v. Lloyds Banking Group Plc* [2013] UKSC 3 at [23], [45] and [54]. Ibid. He continues to explain in this paragraph that "cooperation in the performance of the contract has been implied: see *Mackay v. Dick* (1881) 6 App Cas 251, 263 and the cases referred to in Chitty on Contracts (31st Ed. Vol 1 at paras 13-012 – 13-014."] [our underline]. *See also* D. Scott DeRue, Donald E. Conlon, Henry Moon and Harold W. Willaby, "When is Straightforwardness a Liability in Negotiations? The Role of Integrative Potential and Structural Power", Journal of Applied Psychology, 2009, Vol. 94, No. 4, 1032-1047.

[1059] *See supra* note 986. *Silipos*. *See also supra* note 1044. Lluelles/Moore; *See also supra* note 987. Lefebvre specifically addresses good faith during the formation of a contract at 96 and 97.

[1060] [1998] R.J.Q. 47 (C.A.). The court decided that the franchise agreement between Supermarche ARG and Provigo imposed a high expectation of a standard of good faith and that Provigo breached its obligation to act in good faith by aggressively providing lower prices to Provigo stores adjacent to ARG stores.

[1061] *Ibid*. Bhasin at para. [83].

[1062] *Ibid*. Cromwell refers to Articles 6, 7 and 1375 C.c.Q.

[1063] *Supra* note 267. *See supra* note 9. CCL Swan at 532 (protecting the negotiation relationship).

with the on-going negotiations of a joint venture to resource a mine with Plaintiff. The court decided that negotiating parties must conduct themselves with a certain standard of honesty in good faith. The court held that Defendant injured the Plaintiff by taking dishonest measures and procuring the land wrongfully. Therefore, since there is no tortious duty to conduct negotiations in good faith in Canada, the Court clothed the Plaintiff's entitlement to protection by considering that Defendant's action was equivalent to a constructive trust in favour of Plaintiff to protect the expectations of the Plaintiff regarding honest disclosure.

The outcome of *Lac Minerals* has created precedence in Canada that pre-contractual instruments of writing which are not considered contracts can, nevertheless, serve to prove the lack of good faith during negotiations, such as breach of confidential information that causes damage to the party who suffers as a result of trade secrets.[1064] Likewise, non-disclosure of material information pertinent for a party to assess whether negotiations can attain fruition of the mutual goals may be considered breach of good faith.[1065]

Although there are commentators who vaticinate that the two Canadian systems are advancing towards a certain merge of recognition of some standard of good faith duty in the *performance* of contracts,[1066] we are still a far stretch from conjugating the two legal systems together in any uniform fashion in terms of a good faith duty arising during the *formation* of contracts, accordingly, during negotiations.

[1064] *Supra* note 267. *Lac Minerals Ltd.*

[1065] *Supra* note 418. In *Comeau* a right of first refusal had been granted to a third party in parallel negotiations. See supra note 9. Swan CCL on how *Lac Minerals* affected CCL. Swan explains: "A case such as *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 44 B.L.R. 1, 6 R.P.R. (2d) 1, [1989] S.C.J. No. 83 (S.C.C.) illustrates the serious consequences that can flow from a single act of bad faith during the period when, though no contract ever comes into existence, the parties are negotiating." at 535 [fn 1].

2 For example, the negative obligations

[1066] *See supra* note 545. Buckwold.

2.5 How is a duty of good faith in good faith recognized?

The duty of good faith during the performance of contracts was not recognized overtly in the CCL until recently. In 2014 *Bhasin* was a refreshing Supreme Court of Canada decision that many commentators aspired would reconcile the duty of good faith in common law contracts under CCL with the principle of good faith under QCL. Not all commentators agree. In fact there are those commentators who argue that the decision in *Bhasin* created more uncertainty by opening up litigations that would otherwise have little chance of recourse.[1067] *Bhasin* has made a step towards bridging Canada's duality of legal traditions providing a step towards uniformity in commercial contract law aspiring that business parties should not be permitted to act differently in different Canadian provinces,[1068] but there remains a long road to travel to coordinate the two Canadian laws.

The decision in *Yam Seng* impacted the Supreme Court of Canada in the recent case of *Bhasin*[1069] which ultimately recognized a duty of good faith as an organizing principle in the *performance* of common law contracts. However, unlike the decision of *Yam Seng* that leaned on a duty of good faith both *objectively* applied by law and *implied by the parties themselves*, the decision in the S.C.C. in *Bhasin* abandoned any implied duty of good faith by the parties themselves, imposing only a general duty of good faith in common law contract *by operation of law*. A closer look at what lower courts are deciding under CCL may aid the development of a good faith duty under CCL and

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[1067] Mitchell Grosswell, "Duty of Good Faith in the Performance of Contracts Post-Bhasin", Nov. 28, 2014, Western Uniersity's Law Students' Association, Canliiconnects.org. Grosswell argues that the finding by the S.C.C. of a new duty of good faith only produces more uncertainty. Public policy concerns arise since parties no longer know the full extent of this duty. *See also supra* note 9. CCL Swan suggests that while courts will refuse to recognize a vague agreement there are circumstances where "courts use different devices to offer protection to the party who has certain reasonable expectations that the process will be conducted in accordance with agreed standards, or who has, in reasonable reliance on the outcome of the process, incurred expenses or otherwise put itself at the mercy of the other." at 532 and 533. "There are, however, many situations where the parties' negotiations are messy; where it is not clear what their expectations were at each stage and where, if no relief is given, one party will be caught by unfair surprise." at 532.

[1068] *Supra* note 51. Bhasin. Cromwell concedes: "The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts…This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties." at para. [32].

[1069] *Supra* note 51.

bridge some of the gaps between CCL and QCL. Therefore, we will follow the progression through the courts in the case of *Bhasin* to illuminate some of the background rumble and why the application of a duty of good faith is stifled under CCL.

The facts of *Bhasin* v. *Hrynew*

Bhasin and Hrynew were enrollment directors for Canadian American Financial Corp [Can-Am]. Both parties sold education savings plans to investors through an agreement with Can-Am governed by an "Enrollment Director's Agreement" [EDA] which had an automatic renewal clause subject to a termination notice six months prior to the date for renewal.

Can-Am was secretly negotiating a merger between Bhasin and Hrynew in absence of Bhasin's knowledge. Can-Am requested Bhasin to allow Hrynew to access confidential records in an audit by Hrynew which Can-Am feigned was required by the Alberta Securities Commission. When Bhasin refused to give access to his confidential records, Can-Am sent a notice to terminate the Enrollment Agreement.

Even though the contract did not provide for a duty of good faith, at trial level, Moen, J. decided that an implied duty of good faith could override the "entire agreement clause" in the EDA[1070] as he considered that the duty of good faith could be *imposed by law* regardless of the absence of expressed terms of this duty in the agreement. Furthermore, the court provided that the duty of good faith was also *implied by the parties themselves*, justifying his position as it "reflects the unstated intentions of the parties at the time of the *formation* of the contract."[1071] It was the opinion of the court that Cam-Am had breached its duty of good faith by attempting to force Bhasin to enter into a merger agreement with its competitor by exercising its non-renewal clause. As a result, the court

[1070] *Bhasin* v. *Hrynew*, 2011 ABQB 637 at para.[111]

[1071] *Ibid*. Bhasin trial at para. [89]. The extension of a duty of good faith to the *time that the obligation has arisen*, considered the formation of the contract rather than merely the performance of the contract.

found that Cam-Am had been dishonest, in a misleading fashion, about the restructuring of the business and pending merger of Bhasin and Hrynew's businesses.

The court of appeal found no such breach.[1072] In fact, the Court limited the manner a court can imply terms in contracts, identifying three situations where an implied term in a contract could be justified and decided that Bhasin did not qualify for these exceptions. The court of appeal considered that a new term comprised of an implied duty of good faith would have to be "(i) so obvious that it was not even thought necessary to mention, or (ii) truly necessary to make the contract work at all, not merely reasonable or fair." The court added that "both parties must have intended the term" emphasizing that there is a presumption in law against implying terms. Most importantly, the court held that "a term cannot be implied in a contract which would contradict an expressed term of that contract"[1073] and that (iii) "some degree of inequality in bargaining power, need, or knowledge, is not enough to upset or amend the terms of a contract, short of actual unconscionability."[1074]

It was considered that "Courts should not attempt after the fact to rewrite the contract to accord with what the court now thinks, or one party now believes, is more just or more businesslike, especially in the full light of hindsight."[1075] The court of appeal held that "[t]he trial Reasons relied on evidence of oral promises. The entire-contract clause bars such evidence from entering the courtroom, and makes such promises inoperative."[1076] In the Court's opinion, there "were no ambiguous words",[1077] consequently no breach of contract and therefore allowed the appeal and dismissed the action.

[1072] *Bhasin* v. *Hrynew*, 2013 ABCA98 (CanLII) at para. [G. 3.].
[1073] *Ibid* at para. G. [4.].
[1074] *Ibid* at para. G. [6.].
[1075] *Ibid* at para. G. [10.].
[1076] *Ibid* at para. H. [30.].
[1077] *Ibid*.

The Supreme Court of Canada took, yet, a different approach. While it concluded that there was a general organizing principle of good faith in common law contract law, the court found that the source of such obligation was implied by *operation of law* rather than as a result of implied party intention. The court also recognized that the timeframe ancillary to this general organizing principle[1078] of good faith is a common law duty that applies to all contracting parties to act honestly in the *performance* of their contractual obligations. It did not go so far as to find that the duty of good faith includes loyalty or cooperation,[1079] recognized by Mr. Justice Leggatt in *Yam Seng*,[1080] nor did it address obligations of good faith during the *formation* of a contract, thus limiting the application of what constitutes a duty of good faith and when it can be imposed by CCL.

Breaking down the sources of standards of good faith: Three sources of the standard of good faith have been explored by the courts: whether industry standards determine that parties should have had a certain standard of conduct by virtue of custom or general acceptance within a particular trade, whether it can be implied as the parties themselves, in virtue of their relationship that would have expect a standard of good faith,[1081] or whether by operation of law a minimum standard of good faith standard is imposed on contracting parties.

The SCC in *Bhasin* distinguished between the QCL's principle of good faith that requires not only honesty but also loyalty and cooperation from a simple the CCL's duty to perform honesty, setting loyalty and cooperation aside under CCL.

[1078] *Supra* note 51. Cromwell, J. is sensitive to business needs: "The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith." at para. [65]. Furthermore, "The principle of good faith must be applied in a manner that is consistent with th freedom of contracting parties to pursue their individual self-interest: "In commerce, a party may sometimes cause loss to another-even intentionally-in the legitimate pursuit of economic self-interest: Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency." at para. [70].

[1079] *Supra* note 51. *Bhasin*. Mr. Justice Cromwell enunciates: "This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contrat; it is a simple requirement not to lie or mislead the other party about one's contractual performance." at para. [73].

[1080] *Supra* note 47. *Yam Seng*.

[1081] *Supra* note 1070. Bhasin trial at para. [93].

To understand how a duty of good faith is applied by law requires contemplation of the source of the duty, so we have broadened the discussion to four instances:

- ❖ good faith chosen and expressed by the parties themselves;
- ❖ good faith deemed to be implied by the parties in virtue of their relationship;
- ❖ good faith imposed objectively by operation of law (divided into type of contract, failure of disclosure, unequal bargaining power, or abusive action, confidentiality etc.
- ❖ good faith imposed by custom or trade usage

2.5.1 Good faith chosen by the parties themselves

While a minimum standard of honesty or decency expected between negotiating business parties, it has also been recognized that the parties can exercise their freedoms to contract by selecting a "relaxed" standard[1082] so the parties are free to define the nature and scope of the good faith duty they intend to apply to their business relationship. But there is no current way of monitoring a duty of good faith in TBN other than resorting to an expressed, unambiguous valid contract. This is the core reason for our thesis: to provide a manner that law can better regulate by supporting party autonomy thus enabling the parties to choose, expressly, the standards applicable to their business relationship within a certain minimum standard.[1083]

2.5.2 Good faith implied in virtue of the parties' relationship

The second way a term can be implied in a contract is by the parties themselves, if it "reflects [the] unstated intentions of the parties[1084] or parties have expressly agreed that a standard of good faith

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[1082] *Supra* note 51. Bhasin at para. [77].

[1083] *See supra* note 9. CCL. Swan is explicit: "§4.178 In many common business transactions, the parties will conduct their negotiations on the terms of agreements that will reflect their progress to a deal, and these agreements will illustrate that the ultimate deal is built on the earlier ones. It is, for example, common for parties who are contemplating the purchase and sale of a business to sign a confidentiality agreement before the negotiations have gone very far. Since a large part of the process of purchasing a business involves the acquisition by the buyer of information about the seller or the seller's business, the seller has to be sure that the information that it will disclose to a prospective buyer will not be made available outside the context of the negotiations. If the buyer is satisfied by its initial examination of the seller's business, it may proceed to the next stage and a letter of intent will be executed to govern such matters as the due diligence process that will precede the final agreement. While the parties are free at any time not to move to the next stage, they are not free at any stage from the restrictions the
agreements they have executed have already imposed on them." at 533.

[1084] *Supra* note 1070. Bhasin trial at para. [89]. *See also supra note* 1033. O'Byrne at 203.

would "govern their relationship."[1085] The difficulty then becomes how party intention can be identified, and how it may be measured by the parties conduct during the *formation* of the contract.[1086]

Where parties have specifically expressed that their contract is governed by a certain standard of good faith, the courts will enforce this standard by acknowledging the freedom of contract. Where parties have not specifically expressed a standard of good faith in a contract, the courts may review how the parties have dealt with one another in the past or turn to trade usage[1087] or use an objective test of what would be reasonable between the parties,[1088] by considering "the whole relationship and whether a duty of good faith were required to preserve "business efficacy".[1089]

O'Byrne suggests that long-term "complex contracts, it is particularly difficult to recite all the rights and obligations of the parties or to expressly enumerate how contractual powers can and cannot be exercised. Exploiting such a vacuum, one party may grow into a dominating position and find itself with the opportunity to take undue advantage of a power granted to it under the contract."[1090]

[1085] *Ibid*. Bhasin trial at para. [90].

[1086] *Ibid*. Bhasin trial at para. [92]. Mr. Justice Moen relied on supra note 1030. O'Byrne 2007 at 203.

[1087] *Ibid*. Bhasin trial at para. [93].

[1088] *Ibid*. Bhasin trial at para. [95]. For QCL the principle of good faith is an imperative characteristic applying to human behavior. *Supra* note 421. Baudouin/Jobin at 220. Article 1375 C.C.Q. *See also* Commentaires du ministre de la justice, Les publications du Québec, Tome I, Quebec, Bibliothèque nationale du Quebec, 2e trimestre 1993 : "…la bonne foi est une notion qui sert à relier les principes juridiques aux notions fondamentales de justice. Sa codification, dans le domaine des obligations, devrait contribuer à inspirer tous les actes juridiques…"at 832. *See also*§276 of the German BGB, Article 1335 of the Italian code, Arts. 1137 and 1147 of the French code. This is considered similar to the expectations of good faith in Article 1.7 of the UNIDROIT Principles, in which our Paul-André Crepeau played a hand. However, good faith as a principle has not been readily accepted in most common law jurisdictions. Perhaps one reason for the apparent resistance to accept the good faith principle lies in its illusive definition at 221. In other words, there is a general presumption, under the good faith principle, that a person is expected to act fairly in both contractual and extra-contractual circumstances. It presumes not only honesty, but also loyalty at 221. It reinforces that a person cannot act illegally or illegitimately at 220. Subjective good faith relates to intention of the parties. QCL applies a subjective test to imply a standard of good faith based on the subjective conduct by the parties or oral commitment. The subjective test is examined first but where there is insufficient subjective evidence, the courts will resort to an objective test at 142 and 143.

[1089] *Ibid*. Bhasin trial at para. [101].The trial court in *Bhasin* considered that a duty of good faith implied by the parties themselves does not impede party autonomy, as it is the presumed logical and deducible intentions of parties who do business together.

[1090] *Supra* note 1033. O'Byrne 2007 at 228 and 229. *See also supra* note 1033. O'Byrne 2015 discusses whether a duty of good faith should fall under tort or contract: "...caveat emptor allocates the risk to the buyer to ask, not the seller to tell. Therefore, if the seller remains silent, failure to disclose may be considered dishonest rather than fraudulent, which would be a tort of fraudulent misrepresentation. O'Byrne explains: "Category two [good faith implied by the parties] is challenging, partly because it is difficult to interpret a contractual silence…On the one hand, it could be argued that good faith should be implied in such circumstances, because it is intended as a device for filling in "contractual gaps"…On the other hand, it could be argued that the very absence of a good faith clause means that no good faith is owed, on a plain reading of the contract…By way of contrast, contractual silence in category one [good faith imposed by law] contracts concerning a good faith clause is not ambiguous by definition since the good faith obligation is owed regardless of what parties think or intend." at 10 and 11."Canadian law does not recognize a tortious duty to bargain in good faith." *See also supra* note 1070. Trial *Bhasin* at para. [89]. Therefore, how a contractual obligation to negotiation in good faith that would be considered legally enforceable can be implied is of great relevance. According to the trial case of *Bhasin* and commentators coming out of Alberta, the implied term of a duty of good faith in contractual commitments can be implied by law or implied by the parties themselves. The trial *Bhasin* decision expounded this term at para. [67-109]. A little further West in *Moulton Contracting Ltd*. v. *British Columbia*, 2015 BCCA 89, the case was focused on whether a blockade set up re: timber licence was a breach of an implied term in a contract. Moulton claimed it suffered loss as a result of the blockage by the Province. (Aboriginal case). Trial said

"Whether the contract includes an implied term of good faith is a matter of contractual interpretation and a legal conclusion."[1091]

The QCL approach to implying a standard of good faith is based on subjective party intention through application of the principle of good faith as an **implied** obligation; in other words, it can be inferred by the parties' actions or oral presentations that their intentions were to conduct themselves in good faith.[1092] If a contract includes implied terms owing an obligation of good faith and such implied term is breached, then the court will favour the injured party. For example, as to the "quality" and "fitness for [the] purpose"[1093] in which the goods are intended, the courts consider that these implied obligations are considered "essential conditions of the contract."[1094]

If a person's behaviour is deemed to have breached good faith, the opposing party is placed in a position where it can resiliate a contractual term. For example, in *Domaine de la Côte Mont-Rigaud Inc.* v. *Laura Sabourin* [*Sabourin*],[1095] a repeat customer filed for the return of its deposit for Icewine juice from Defendant resulting from inferior quality compared to past acquisitions between the parties. The question before the Court was whether the Defendant breached the express and implied obligations under the contract to supply an elevated quality of IceWine juice. The court concluded that the IceWine juice "breached the quality and fitness for purpose conditions of the contract, entitling

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there was an implied term in licences to inform a company in advance of a blockade so it would have time to find another source of timber. Court of Appeal overturned the decision to say there was no such implied term and therefore no breach of contract. The court of appeal considered *Bhasin* and argued that implied term resulted from a duty of good faith but rejected on the basis that good faith was a separate issue and did not relate to whether an implied term to inform existed.This finding was not recognized in the Supreme Court.

[1091] *Supra* note 1070. Trial Bhasin at para. [33].

[1092] *See supra* note 38. Baudouin/Jobin detail various elements that a court would consider regarding party intention: « Les circonstances qui ont mène à la conclusion du contrat constituent un guide utile dans la recherché de l'intention des parties et permettent assez souvent d'en déduire l'interprétation qui y est la plus conforme. Des documents préparatoires (cahiers d'appel d'offre, par exemple) ou des documents périphériques (un tarif, une lettre, ou un autre contrat conclu entre les mêmes parties) sont une source précieuse à cet égard, de même que l'existence de certains faits et gestes lors de la formation du contrat…C'est ainsi qu'un acte d'exécution partielle du contrat, à condition d'être libre et non le fruit d'une erreur, peut empêcher par la suite, devant le tribunal, une interprétation contraire à l'acte posé. Les tribunaux prennent souvent acte du comportement des parties pour voir comment les contractant avaient compris leur engagement et repousser une tentative d'interprétation contredisant cette conduit. » at 450.

[1093] *Domaine de la Côte Mont-Rigaud Inc.* v. *Laura Sabourin* [*Sabourin*], 2016 QCCQ 14368 at para. [22].

[1094] *Ibid.* [*Sabourin*] at para. [29].

[1095] *Ibid*.

DCMR [plaintiff] to reject it"[1096] and, consequently, concluded that "DCMR was entitled to repudiate the Contract and obtain the return of the deposit."[1097]

Negotiations are not free from this implied principle of good faith. *Lennie Ryer* v. *Stephen R. Potten* [*Potten*][1098] addressed whether there was a breach to negotiate and cooperate in good faith towards the conclusion of an agreement regarding the terms of a letter of intent. Defendant established a company that had distributed barbecues and accessories throughout the Canadian provinces since 1978. The court was of the opinion that an offer to sell the company was made by the Defendant which was not considered seriously accepted by the Plaintiff.[1099] Plaintiff alleged that Defendant acted in "bad faith and unlawful repudiation of his obligations under the Letter of intent" seeking $3,686,517.84 for compensation of various damages.[1100] The Court concluded that:

> "It is a well known principle that the right to disagree and to refuse to enter into a contract is part of the contractual freedom of parties. The obligation to negotiate in good faith and collaborate towards the conclusion of a contract does not amount to an absolute obligation to ultimately agree. If a material disagreement arises, a party can terminate the negotiations, provided that such termination is done in a reasonable manner, not abusively."[1101]

2.5.3 Good faith imposed by operation of law

Under the CCL a good faith duty applies to parties during the *performance* of contract by operation of law. Firstly, the duty of good faith can operate by law by virtue of the nature of the contract itself, such as employment, franchise and insurance contracts[1102] or where the term is

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[1096] *Ibid*. [*Sabourin*] at para. [33].

[1097] *Ibid*. [*Sabourin*] at para. [46]. Similarly, in *supra* note 426, *Multipix Communications* the court regarded that the Defendant's conduct fell short of the "openness and good faith" that Plaintiff was entitled to by virtue of the relationship. *See* para. [41] and [42] of the judgement referring to Article 1375 C.c.Q..) and ordered the Defendant to pay the sum of $40,174.37 to the Plaintiff. at para. [59].

[1098] 2014 QCCS 3349.

[1099] *Ibid*. *Potten* at para. [110].

[1100] *Ibid*. *Potten* at para. [4].

[1101] *Ibid*. *Potten* at para. [111]. The judge cited *Greenberg* v. *Capital d'Amérique CDPQ inc.*, 2011 QCCA 958 par. 17, 31; *Compagnie France Film inc.* c. *Imax Corp*, J.E. 2002-5 (C.A), par 37; *Fournier* v. *Villagi*, 2011 QCCA 1869, par 3; *Jolicoeur* v. *Rainville* [2000] AZ-50068793, par. 49, 51, 52, 5 (C.A.); *Placements Jeton Bleu inc.* v. *Bedo Compagnie internationale de mode inc*., 2013 QCCS 6317, par. 36, 42, 43; *Friedman* v. *Ruby*, 2012 QCCS 1968, par 99, 10, *Supra I Pegasus* at par1. 31, 32 and 33.

[1102] *Supra* note 1070. Bhasin trial at para. [68].

"necessary for the fair functioning of the agreement".[1103] Secondly, the court will find a duty of good faith if there has been unequal bargaining,[1104] (including matters of disclosure, including misuse of confidential information[1105] or misrepresentation[1106]) or where the parties are in a relationship where one party has exercised a certain quantum of unconscionability;[1107] To qualify the source of the good faith principle, Mr. Justice Cromwell recognized that:

> "An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations."[1108]

Cromwell, J. disregarded the debate whether the duty of good faith is an implied term by law or an implied term by fact, and decided that this duty is imposed by law:

> "It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability."[1109]

Thus, it the belief of the court that a good faith duty imposed by operation of law supersedes the parties' freedom of contract. In *Transamerica Life Canada Inc*. v. *ING Canada Inc*:[1110]

> "Canadian common law courts have not recognized a stand-alone, general duty of good faith between commercially contracting parties…They do, however, recognize such a duty in specific cases and in certain categories of cases"[1111] and where "parties do not act in a way that eviscerates or defeats the objectives of the agreement."[1112]

The circumstances of when the application of a duty of good faith between contracting parties is recognized by law has been divided into categories of application, but the courts do not always

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[1103] *Ibid*. Bhasin trial at para. [74].

[1104] *Ibid.* Bhasin trial refers to *Wallace* v. *United Grain Growers Ltd*., [1997] 3 SCR 701 at para. [68].

[1105] *Supra* note 267. *Lac Minerals*.

[1106] *See supra* note 9. CCL Swan, "4.2.2 The Protection of the Negotiating Relation".

[1107] *See supra* note 1072. Bhasin CA. The court distinguished: "Some degree of inequality in bargaining power, need or knowledge, is not enough to upset or amend the terms of a contract, short of actual unconscionability." at para. G. [6]. On the other hand, the trial court found that there was "no doubt that the defendants acted unconscionably." at para. [513].

[1108] *Supra* note 51 at para [64]. Cromwell references examples: *R. v. Jones*, [1994] 2 S.C.R. 229, at 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. [124]; Supra note 1108. Dworkin at 47.

[1109] *Ibid* at para [74].

[1110] [2004] 68 OR (3d) 457 (Ont. CA).

[1111] *Ibid*. Transamerica at para. [51].

[1112] *Ibid* at para [53].

distinguish between the categories. For example, in *Wallace*,[1113] an employment case, the court did not distinguish between the type of contract and unequal bargaining power. Furthermore, the court determined that the bargaining power at the time of the formation of the contract was unequal and therefore there were disclosure issues since the weaker party could not access the appropriate information for more favourable terms, bordering on matters of disclosure.[1114]

[1113] 197 CanLII 332 (SCC), 3 SCR 701, 219 NR 161. Where a contract has ensued, the courts have, nevertheless, limited the application of a duty of good faith imposed by law to three categories: the type of contract, unequal bargaining power between the parties and issues of disclosure. **Type of contract:** Interpretation of a contract includes identifying the type of contract and categorizing it within the sphere of **categories** of contract that have been recognized by the Legislature and the Courts to be subject to a standard of conduct due to the type of relationship inherent to the type of contract or because it is interpreted that there are implied terms in the contract because the contract would, otherwise, not make any sense. For example, under CCL supra note 1067. Bhasin trial judge referred to the employment case of *Wallace* v. *United Grain Growers*, at para. [68] which the court of appeal denied was merely a narrow interpretation within the scope of an employment contract. Examples were identified by Mr. Justice Moen in the trial court of *Bhasin* trial as "employment, franchise, and insurance contracts, which *prima facie* have a good faith term implied – because an imbalance of power is inherent in the nature of the contract." at para [68] O'Byrne identified other types of contract that could be subject to the category of the duty of good faith implied by the operation of law. *Supra* note 1033. O'Byrne 2007 at 223. O'Byrne demonstrates through the example of *Cancor Developments Corp*. v. *Cadillac Fairview*, [1994] B.C.J. No. 162 (S.C.) (QL) regarding a British Columbia joint venture contract which was subject to partnership legislation that imposed that a partner must act with "utmost fairness and good faith" at 99 of the judgment. Later Mr. Justice Moen in the trial decision of Bhasin follows O'Byrne's reasoning to declare that the list is not a limited: "However, there is nothing in the case law to suggest that these classes of contracts are closed." Bhasin trial at para. [71]. The court of appeal in Bhasin, however, considered that even in employment contracts, the scope of the duty of good faith "is relatively narrow". at para. G. [2]. In fact, the reasoning of the decision included: "Here, the type of agreement with which we are dealing is close in character to both an employment contract and a franchise contract."*Ibid* at para [72]. The matter of whether the type of contract implies a duty of good faith as an implied term in the contract or whether the source of the duty is imposed by operation of law has not been consistently established in the CCL courts. The Courts have been known to mix the two concepts together and apply the duty of good faith, generally referring to unequal bargaining power whereby the conduct of a stronger party is considered abusive towards a weaker party, regardless of whether there is a specific clause in a contract [*Supra* note 1033. O'Byrne 2007 at 224.] rendering the contract "unjust or inequitable" under CCL. O'Byrne refers to *Mason* v. *Freedman* [1958] S.C.R. 483. at 224. O'Byrne references *Abdool* v. *Somerset Place Developments of Georgetown Ltd*. (1992), 58 O.A.C. 176 at para. 41 where parties could not rely on technical deficiencies to avoid contractual obligations. [*See also supra* note 1030. O'Byrne 2007 at 224.] or "abusive" under QCL.[See sura note 618. Papagiannis at [173].

Unequal bargaining power: Until recently, the presumption in law was that business parties in a commercial setting possessed equal bargaining and unequal bargaining claims were reserved for consumers or parties in a certain category of law that were prone to be in a weaker position, such as labour law or insurance. A new awareness is expanding the concept of unequal bargaining power to commercial settings. *See supra* note 972. *Guay*. Justice Wagner, (McLaughlin C.J.C. and LeBel, Fish, Rothstein, Cromwell and Karakatsanis, JJ. concurring). *See supra* note 990. In *Bank of Montreal* v. *Bail Ltee* the court not only widened the time-span of the duty of good faith under QCL on an objective level of what reasonable person would do in similar circumstances by pegging the duty to when the obligation arose; in other words the court established that unequal bargaining power could occur during the *formation* of the contract. The Court held that because the parties had unequal bargaining power a "positive duty of disclosure" was owing to the weaker party and the stronger party was "not to knowingly mislead" or give false information. Disclosure was also considered an objective standard in this case, was considered ancillary to the principle of good faith.The Court identified a test comprising three factors to determine whether unequal bargaining exists. The first consideration was one of risk allocation; in other words, who assumes the risks (during a tender): who is assuming the risk? (Eg: during a tender, the other party must not mislead by its action or inaction. The second considers the relative expertise of the parties (who is more informed) and the third relates to the disclosure of information and how much disclosure is required.

[1114] *Supra* note 1070. Moen, J. relied heavily on the work of *supra* note 1033. O'Byrne 2007 at 208. Unequal bargaining power has been identified in the formation of a contract between parties having unequal bargaining power, where the weaker person cannot access information and where the power imbalance affects other aspects of the contractual relationship. Mr. Justice Moen considered that in *Bhasin*, "[t]he very nature of this contract was not balanced from its inception" *Supra* note 1067. Bhasin trial at para. [75] and, therefore, a term should be implied by law "given the relationship of the parties." *Ibid*. Bhasin trial at para. [86]. *See also supra* note 1033. O'Byrne 2015 at 8.

Disclosure: Disclosure can be identified in any one of three forms: misuse of confidential information to one's own self-interests disregarding the interests of the other negotiating party, [*See supra* note 267 *Lac Minerals*] a lack of disclosure to allow the opposite party to see that negotiations were frivolous or induce the other party to purchase or other misrepresentation. *See supra* note 974. Under QCL, the court considered several aspects that enable a court to determine what it means to understand verbal representations made during negotiations and how to determine what transpired during the negotiations. In *Howarth* the court decided that "…the determination of a subjective and individual evaluation of the state of mind and appreciation of each member, their investment knowledge and experience; their investment objectives, their investment concerns; their education and experience including prior investment experience; and their appreciation and comprehension of the representations made to them and the contract they individually agreed to and concluded." at para. [38]. The court allowed the action to proceed against DPM in regard to the misrepresentations made by the representatives of DPM during the negotiations of subscription agreements ("prior to the execution of the subscription agreements.") at para [42]. Misrepresentation can be considered as a derivative of disclosure which, depending on the gravity of the false presentations, may be so grave as to be considered a delictual offence, requiring a court to determine a subjective state of mind of the parties. *In Howarth* the Court considered the circumstances of the case which were he sale and purchase investments securities. It considered that under Art. 1003 C.c.p. that there were two stages that required

Obiter dictum of Justice Wagner considered that the scope of the party's obligations in commercial negotiations rested on whether there was unequal balance of power between the parties.[1115] Meanwhile, *Canadian National Bank* v. *Houle* extended the principle of good faith in an objective manner to recognize that the measurement of the standard of prudence required by a reasonable person does not require malice. It is simply a standard which is imperatively imposed by the operation of law.[1116] We must be wary of how much intervention by law is needed to guide the regulation of negotiations without hindering its natural path in the global market.

Has *Bhasin* created more uncertainty having failed to bridge uniformity of a duty of good faith between CCL and QCL?

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investigation: 1) …"The terms under which each contract of purchase was negotiated;" and what occurred during "the performance of the terms of the contract". at para. [31]. Grave misrepresentations may lead to the vitiation of the contract or non-recognition of a contract. *See also supra* note 418. *Quinto*. Conduct may be examined during negotiations in order for a Court to conclude whether negotiations ended in bad faith or abusively. *See supra* note 618. In *Papagiannis* the Court examined whether Plaintiffs had suffered any damages as a result of abusive negotiations. The Court conceded that "the common intention of the parties can be challenging at times" and cited *Sobeys Québec Inc.* v. *Coopérative des consommateurs de Sainte-Foy* as an illustration that sometimes literal appearances do not reflect the true reality of the "volonté réelle", the intentions, of the parties. *See supra* note 618. *Papagiannis* at para. [46]. *supra* note 619. *Sobeys* EYB 2005-9832 (C.A.) ; *Mercille v. 9221-8247 Québec Inc*., 2016 QCCA 49, para. 48; *Dunkin'Brands Canada Ltd.* v. *Bernice Inc. et al*, 2013 QCCA 867 where the Court of Appeal considered that the trial judge did not err in considering implicit obligations which "flowed from the general nature of franchise agreements versus relying "solely on the express terms of the contractual agreements." at para. [4] and concluded that "the trial judge found that express and implied contractual obligations were binding upon the parties. This is, in fact, typical of the interpretation of contracts by courts in commercial disputes." at para. [29]. "Hence, one needs to look at the documentary evidence available as well as the subsequent conduct of the parties to find out whether they considered the MOA to be a legally binding agreement."at para. [47]. Even though the Court in *Papagiannis dismissed* the action on the basis that there was no legally binding agreement, nevertheless, the Court condemned the Plantiffs to pay extrajudicial fees and disbursements. The Court considered that Plaintiffs had proceeded in abusive action during the 18-month negotiation period.

Abusive actions: Abuse of contract is another aspect of unequal bargaining power that raises the level of good faith parties must not encroach upon. In *Papagiannis*, the Court addressed whether the meetings during *negotiations* were abusive, warranting a damage claim: "Abuse of procedure" is "evident when a case is clearly unfounded, frivolous or intended to delay. Abuse can also arise when a procedure is excessive or unreasonable or causes a prejudice to a person or attempts to defeat the ends of justice. *Supra* note 618. *Papagiannis* at para. [125]. The case law sets out that an abusive action is one that is rash and foolhardy, that is, one that a reasonable and prudent person in similar circumstance would conclude is without merit. This is an objective test that is to be examined regardless of intent. One needs to assess all of the circumstances of a case to be able to determine whether an action had a sound legal foundation when the procedure was taken." at para. [126]. The Court turned to *Royal Lepage Commercial Inc.* v. *109650 Canada Inc*. [2007] QCCA 915., [*Royal Lepage*] to describe "a "foolhardy litigant" is when there a reasonable and prudent person would find that there is no foundation to commence a procedure. "L'absence de centre cause raisonnable et probable fait présumer sinon l'intention de nuire ou la mauvaise foi, du moins la négligence ou la témérité". *See supra* note 618. In *Papagiannis*, the Court took the position that when Plaintiffs took the law into their own hands and imposed the MOA as a legally binding agreement upon the Defendants, "they caused serious harm to the Defendants." at para. [163]; "The obligation of good faith requires a higher standard of behaviour. Article 7 C.C.Q. provides that no right may be exercised with the intent of insuring another or in an excessive and unreasonable manner." at para. [75]. Annoyed at the audacity of the Plaintiff, the court retorted: "The legal system is a public good. It is not a lever to be used in a commercial battle to carve out non-competition territories. To use the legal system in such a manner is what is described in Article 51 C.P.C. as an attempt to defeat the ends of justice." at para. [195]. The Plaintiffs in this case were condemned to pay damages to the Defendants in the amount of $200,000.00 for extrajudicial fees and disbursements that the Court arbitrated in light of the lengthy progression of the legal procedures when the parties had convened to settle their dispute.

[1115] *See supra* note 972. *Guay*. The court evaluated the scope of the party's obligation during the parties' negotiations suggested: "…it is also necessary to consider the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the resources to which they had access at that time." at paragraph 62.

[1116] *See also Trust La Laurentienne du Canada inc*. c. *Losier*, J.E. 2001-254 (C.A.).

The intention of the Supreme Court of Canada was to end the fragmented approach the common law has taken to the duty of good faith, being "piecemeal, unsettled and unclear."[1117] But will *Bhasin* cause an "incremental change"[1118] or will it have little impact on the CCL? There are commentators who believe Bhasin will have a positive impact on CCL whereas others would seem to indicate that there is no real change.[1119] The judgement was meant to end the discussion revolving around when, how and what application good faith had over contracting parties and harness the good faith principle to a manner that would provide certainty as to its application.

O'Byrne concludes that "it is difficult to predict exactly where the good faith principle will take Canadian common law and the extent to which the duty of honesty can be reduced, if at all…If this trend holds, the principle of good faith is likely to be more prominent in explaining and defending existing common law doctrine concerning good faith than it is in opening new and unfamiliar frontiers,"[1120] rather than trying to peg the duty into certain *types* of contract, unequal bargaining power or some other miscellaneous reason.

According to Mr. Justice Leggatt in *Yam Seng*: "There is nothing unduly vague or unworkable about the concept [of good faith]…Its application involves no more uncertainty than is inherent in the process of contractual interpretation."[1121] Cromwell J. inserts that "Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is clear and easy to apply."[1122] Cromwell, J. referred both to

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[1117] *Supra* note 51 at para [59]. *See also* David Stack, "The Two Standards of Good Faith in Canadian Contract Law", 62 Sask. L. Rev. 201, 1999.

[1118] *Ibid*. Cromwell expresses the "Court's responsibility to make incremental changes in the common law when appropriate."at para [34].

[1119] *Kramer's Technical Services Inc*. v. *Eco-Industrial Business Park Inc*., 2015 ABQB 59 (CanLII) Justice Veit of the Alberta Court of Queen's Bench declared that the organizing principle of good faith is "already manifest in our law of contract and that, generally, issues relating to the good faith principle in contract law will continue to be dealt with as they have been in the existing law." at para 35.

[1120] *Supra* note 1033. O'Byrne 2015 at 33 and 34.

[1121] *Supra* note 47. *Yam Seng* para. [152].

[1122] *Supra* note 51. *Bhasin* at para. [80].

QCL[1123] and the American UCC,[1124] expressing that, "[e]xperience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability".[1125]

The concept of good faith		
	Q.C.L As a Principle	C.C.L As a duty
When	Formation, performance and extinction of a contract	Performance of a contract
What	Honesty, loyalty and cooperation	Honesty
How	Chosen by the parties Subjectively / \ Implied by the parties Usage or previous relationship Implied by the parties Objectively / \ Imposed by law or custom	Imposed by law - Type of contract or interpretation - Unequal bargaining

Unfortunately, the decision of *Bhasin* has not provided the certainty under CCL that the Court desired. The scope of the duty of good faith has not opened beyond that of a duty of honesty.[1126] Furthermore, *Bhasin* did not address a duty of good faith during the *formation* or *extinction* of a contract, rather only during the *performance* of a contract. Nor did the court open the scope to a duty of good faith implied by the parties themselves, rather good faith applies through operation of law, imposed by law. Consequently, the manner that a duty of good faith is applied remains in a state of uncertainty.[1127]

[1123] *Ibid* at para. [83].

[1124] *Ibid* at para. [84].

[1125] *Ibid* at para [85]. Cromwell refers to J. Pineau.

[1126] For example, *Lavrijsen Campgrounds Ltd.* v. *Reville*, 2015 ONSC 103. By contrast, the court in *Infinity Gold Mining Inc.* v. *Wega Mining AS*, 2015 ONSC 607 held that a duty of honesty does not require to include disclosure of emails suggesting that he deal may not proceed."

[1127] Although the SCC regarding *Bhasin* is hoped and anticipated by many to be a landmark case to build on with regard to a general duty of good faith, other commentators are sceptical to claim that the duty of good faith has been resolved. This the result of the reasoning in cases like *Molson Canada 2005* v. *Miller Brewing Company*, 2013 ONSC 2758 (CanLII); Docket:CV-13-10053-CL. an exclusive licence agreement to distribute Wisconsin-based Miller beers in Canada was entered into with Molson. An amendment was negotiated upon merger between Molson and Coors whereby the relationship between the parties was modified and a letter of intent was agreed upon whereby the parties agreed that further negotiations would be conducted in good

2.5.4 Good faith imposed by custom

Custom provides a little more certainty with regard to the existence of a duty of good faith, serving as a compliment to how parties should behave in a certain social circle or within a given trade. They are boundaries that presume a certain behavior or social normativity. Party autonomy is the very reason for the development of custom and trade usage in the first place, considered as expected social practices, recognized by domestic laws,[1128] transnational laws and by the transformation of party autonomy. The greatest difficulty is determining which side of the line obligations are situated.[1129] In other words, there are customs in every society that are not tantamount to law and other customs that have been treated as law, and therefore have the force of law.

Under domestic laws, customs were initially accepted as a separate source of law identified more fully during the nineteenth century through the works of Blackstone[1130] and Lord Mansfield's recognition of merchant custom, profoundly developed by international arbitration in the form of TGPL.[1131] The separation between law and custom was considered on the basis of context; that in

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faith and a termination clause was added whereby Miller's rights could be terminated by notice if sales failed to produce a certain quantum. Molson sought an interlocutor injunction following such termination in 2013. The court addressed whether it could be argued that there was a contractual commitment to negotiate in good faith that could lead to an enforceable obligation. The court held that: "Ultimately, any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed. The issue is not whether a court should imply an obligation to negotiate in good faith as a matter of commercial morality but rather whether the parties themselves understood from the circumstances in which an express commitment to negotiate in good faith was given, and intended in those circumstances, that any breach of the specific commitment was to have some legal consequences. In this regard, in my opinion *Siga* and the case law cited therein reflect a much more nuanced and modern understanding of commercial realities than the arbitrary and formulaic approach evidenced in the case law which would exclude the possibility of an enforceable obligation to negotiate in good faith under all circumstances." at para. [108].

[1128] George Rutherglen, "Custom and Usage as Action under Color of State Law: An Essay on the Forgotten Terms of Section 1983", 89 Va. L. Rev. 925, 2003 at 926. *See also* Fabien Gélinas, « Codes, silence et harmonie- Réflexions sur les principes généraux et les usages du commerce dans le droit transnational des contrats », (2005) 46 *Les Cahiers de Droit* 941.

[1129] *See also supra* note 629. Stephan relates how custom becomes law: "A custom thus can become law, in the sense that those who violate it may face legal sanctions. During the interval between the supposed formation of a custom as a binding obligation and its subsequent confirmation through enforcement, considerable uncertainty may exist about its exact legal status….International practice and the existence of a sense of legal obligation, the elements of CIL, can be deeply uncertain. These phenomena might crystallize into CIL, in the sense that the rule possesses sufficient reliability to influence behavior, only during law enforcement process." at 1585 and 1586.

[1130] *Supra* note 1128. Rutherglen suggests that although Blackstone divided custom into three separate categories, "[only] particular customs that persist in various localities or trades" would be considered today at 930. *See also supra* note 398. Blackstone.

[1131] *See supra* note 380 at 5. Cooke; *see also supra* note 636. Berman/Kaufman at 226.

commercial contexts, custom may be more suitable as an application than common law.[1132] The development of custom and its ability to spawn legal norms fell into a broader range of contexts, such as civil rights law,[1133] reinforcing its influence on commercial matters.

The rise of legal positivism and legal formalism denied that sources of law exist outside the legislative paradigm; in other words, claiming that the state alone is responsible for recognition and enforcement of law and even a contract is "related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the parties."[1134] Even though custom has influenced the law,[1135] it is not considered to have the ability to supersede official public decisions.[1136]American common law, as opposed to English common law, was able to break through the influence of legal positivism by enacting legislatively the Uniform Commercial Code that has swept across the United States, recognizing both merchant custom and the principle of good faith in commercial dealings.

Custom has had its place as a source of juridical obligations.[1137] In *Wabasso*[1138] the Supreme Court of Canada allowed a delictual recourse resulting from recognition of custom even though the relationship between the parties was a contractual one. Justice Haanappel's position was that the delict was independent of the contract.[1139] Therefore, obligations may be applied because of normative

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[1132] *Supra* note 1128. Rutherglen refers to Geroge F. Comstock, ed., 1 James Kent, *Commentaries on American Law* 514, Boston, Little Brown & Co, 11th ed. 1867 at 935.

[1133] *Ibid*. Rutherglen at 940.

[1134] *Supra* note 171. Maniruzzaman refers to *Saudi Arabia* v. *Arabian American Oil Co.* (*Aramco*) 27 I.L.R. 117, at 165 (Arbitration Tribunal 1958) at 703.

[1135] Columbia Law Review Association, Inc., "Custom and Trade Usage: It's Application to Commercial Dealings and the Common Law", 55 Colum. L. Rev., 1192, 1955 at 1193.

[1136] *Supra* note 1128 at 970. Rutherglen.

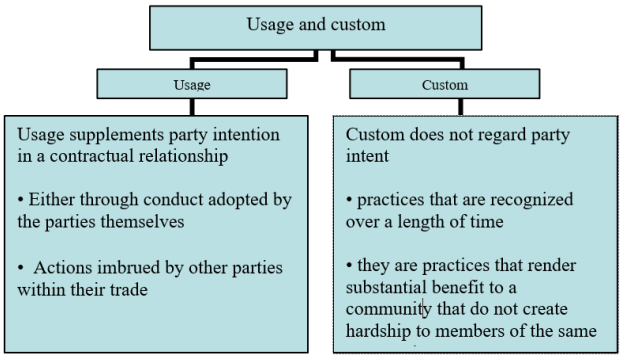
[1137] *Supra* note 402. Tancelin at 429 and Article 1457 al 1. C.c.Q. *See also supra* note 755. Rolland at 588. Rolland further argues that usage is considered a source of law : "Les Principes consacrent donc formellement les usages comme sources de droits et d'obligations, sources externes issues de l'environnement socio-économique, fondées sur les attentes légitimes des parties et leurs appartenances identitaires…" at 606.

[1138] *Wabasso Ltd.* v. *National Drying Machinery Co*. [1981] 1 S.C.R. 578. Justice Chouinard sums up: "I conclude that the same fact can constitute both contractual fault and delictual fault and that the existence of contractual relations between the parties does not deprive the victim of the right to base his remedy on delictual fault." at 590.

[1139] Petrus P.C. Haanappel, "La relation entre les responsabilités civiles contractuelle et délictuelle: L'arrêt Wabasso en croit Québécois et en droit comparé", Revue internationale de droit comparé, Vol. 34(1) janvier-mars 1982, 103-118. This is the common law position in *Nunes Diamonds Ltd.* v. *Dominion Electric Protection Co.*[1972] R.C.S. 769 cited by Haanappel, "La relation entre les responsabilités civiles contractuelle et délictuelle: L'arrêt

constraints established by custom and industry standards that initiate obligations between the parties.[1140]

Although some commentators group usage and custom as a singular concept,[1141] since usage looks similar to a "habit",[1142] and habits resemble "custom,"[1143] Lluelles differentiates the two terms. The nature of custom *imposes* a legal norm of behaviour objectively on the parties regardless of party consent that has been widely accepted within a certain trade and has a minimum formation of law[1144] whereas usage requires a contractual relationship between the parties.[1145] The role of usage is to allow an adjudicator to *fill gaps* in the contract, founded on the *presumed intentions* of the parties,[1146] based on supplementary terms presumed, subjectively, part of the parties' relationship when an agreement has been formed between them in a given trade, even if the parties have not expressly stipulated.[1147]



Wabasso en croit Québécois et en droit comparé", Revue internationale de droit comparé, Vol. 34(1) janvier-mars 1982, 103-118 at 113. However, Haanappel warns that non-accumulation and option could suffocate extra-contractual liabilities under implied contracts at 114.

[1140] *Supra* note 47. *Yam Seng* was later referred to by our own Supreme Court of Canada in *supra* note 51, recognizing good faith as an organizing principle in the common law at para [141] and para [145] but Mr. Justice Leggatt, presiding justice of *Yam Seng* widened the scope of *First Energy (UK) Ltd*.

[1141] Dave De Ruysscher, "From Usages of Merchants to Default Rules: Practices of Trade, Ius Commune and Urban Law in Early Modern Antwerp", The Journal of Legal History, Vol. 33, no. 1, April 2012, 3-29. De Ruysscher groups "commercial agreements and related situations, on the one hand, and usages and customs of merchants on the other" acknowledging that government perception is unclear at 3.

[1142] Didier Lluelles, « Du bon usage de l'usage comme source de stipulations implicites », 36 R.J.T. n.s. 83, 2002.

[1143] *Ibid* at 98. Lluelles.

[1144] *See supra* note 23. Fecteau.

[1145] *Supra* note 1142 at 98 and 99. Lluelles embellishes: "L'usage n'impose aucune obligation à une personne à l'égard d'une autre, si ces personnes ne sont pas déjà liées par une convention.".

[1146] *Ibid* at 91 and 92.

[1147] *Ibid* at 92. Lluelles instructs that usage is also dependent on the practice being generalized, constant, uniform and in circulation for a long period of time in which it is presumed that the parties voluntarily accepted said usage. *See* Lluelles at 102 and 106. Lluelles refers to Article 9(2) the Vienna Convention on the contracts of sale of international goods which accepts usage as a presumed knowledge existing between the parties even though they may not actually be cognizant. Lluelles explains, however, that the burden of proof rests with the party who invoked "usage" at 110.

This distinction may wade in murky waters during negotiations where it is not always evident whether there is a contract, an agreement, a partial agreement or some other commitment, such as TBN relationships. Nevertheless, commercial circles recognize that there is an implied customary standard of conduct when TBN parties are exercising their autonomy, accompanied by an expected standard of behavior between negotiating parties.[1148]

Conclusion: There is no uniformity in Canadian domestic laws as to how a duty of good faith is identified, nor how to determine its scope and intensity. Since CCL remains resistant to the recognition of a duty of good faith during negotiations and QCL has only determined a few scattered circumstances where good faith would apply to negotiations, the state of law remains indeterminate and sundry.

There is no consensus between the Canadian domestic laws as to whether the concept of good faith can be applied to the formation of contract since the Supreme Court of Canada limited the duty of good faith under CCL to be imposed by law during the "performance" of a contract and limited the scope of good faith to that of honesty. Cromwell did confirm that the QCL vision of duty of good faith applied to the *formation* of contract, the *performance* of contract and the *extinction* of contract and included a broader scope honesty, loyalty and collaboration.[1149] QCL has access to both a subjective test to determine the extent of good faith applicable in any given circumstance (which may be presumed between the parties), but also recognizes a general sweeping imposition of law to a minimum standard of good faith. However, this minimum standard has only been identified by the courts to apply under limited circumstances during negotiations.[1150]

[1148] *See* 2. in Section 2 of Chapter 1, Part I.

[1149] *Supra* note 51. *Bhasin* at para. [83]; Michael Bridge, "Discharge for Breach of the Contract of Sale of Goods", 28 McGill L. J. Bridge refers to *Bentsen* v. *Taylor, Sons & Co.* [1867 1982-1983 893] 2 Q.B. 274 (C.A.).Performance was considered a "condition precedent to a contract to engage the parties' interests…emphasis was laid upon its effect in inducing the other party to contract." at 884.

[1150] *See supra* notes 1113 and 1114 on the discussion of categories of application.

How can we convince legal authorities to extend the "formation of contract" in long-term relationships to the pre-negotiation and face-to-face negotiation stages? Fontaine replies: "Legal ramifications are probable at inception." To understand "inception" entails the identification of when the negotiation dance begins. We argue that once the negotiation dance begins, the principle of good faith is an internal duty to conduct negotiations with a minimum standard of good faith that should be left to party choice to allocate the level of good faith standard they desire to preserve the trust in their relationship.[1151]

To avoid uncertainty of whether the parties can rely on the enforceability of an agreement to negotiate in good faith requires an alternative view of categorizing negotiations under the semiotic umbrella. We have observed in our interdisciplinary voyage that long-term negotiations are not a mere phase that magically disappears just prior to the signature of a contract.[1152] We argue that negotiations *are* part of the formation of the contract. During the formation of contracts, the processes of negotiations comprise pre-negotiation and face-to-face negotiations. Furthermore, due to the continuum of the negotiation relationship, negotiations do not only operate during the formation of a contract, they also continue through the performance of contract which may require readjustment and renegotiation of terms (post-contractual) and last until the extinction of the contract (termination).

Why should law have to guess? To find a manner to more precisely fill the current caveats exposed through our comparative analysis, we will turn to the inspirations of scholarship theory.

[1151] *Supra* note 51. Mr. Justice Cromwell in *Bhasin* enunciates: "Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations." at para. [81].

[1152] *See supra* note 1040. *Addison Chevrolet*.

Section 2: Why are Current Legal Theories not Contributing Predictable and Reliable Methods to the Functioning and Regulation of TBN?

The purpose of law and legal regulation is to guide human behavior. Theories have been developed to methodologically explain how law should be guiding human activities and the source of law that should govern. But law does not stand still even if it is slow to transform. Naturalists favour party autonomy to support individualistic freedom of rights based on freedom and equality. "[N]o one ought to harm another in his life, health, liberty or regarding another's possessions;"[1153] in other words, there is a general presumption in favour of fairness.[1154] Morality and law remain intertwined in naturalist theories, supported by legal philosophers, in their time, such as Thomas Aquinas.[1155] Natural law originates back to Aristotle and Greek philosophy,[1156] where law was considered to derive from the law of nature. Moral implications under natural laws are considered with what is fair and what is right for the collective good. Natural law's flexibility irritated juridical positivists who argued

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[1153] Jean Leclair, "L'avènement du constitutionnalisme en Occident: fondements philosophiques et contingence historique", (2011) 41 *R.D.U.S.* 159 at 176.

[1154] *See* Robert Kolb, "Principles as Sources of International Law (With Special Reference to Good Faith", Netherlands International Law Review, Vol. 53 (1), May 2006, 1-36 T 12. Kolb depicts: "…the principle of good faith came at a certain moment, during the middle ages, to encompass the newly developed rule against abuse of rights (aemulatio)…the same happened at the level of international law in the twentieth century, when the rule against abuse of rights penetrated the international legal system…a general principle will often operate as a source of obligation." at 12. On customary law *see supra* note 123. Roebuck explains what law is: "Any group of humans living together as a community needs some common rules to govern the behaviour of the individuals within it. Even within a group seeking to function as a family there must be some system, however rudimentary and implicit. The rules of a kin group have more effective sanctions than those of a state. Life in such communal societies has been observed in recent times by anthropologists. It is fair to accept, if great care is taken, that some fundamental characteristics of modern communal societies are the same as those in earlier societies which archaeology shows had similar ways of life." at 22.

[1155] *Supra* note 1153. Leclair translated loosely from French: "national laws in the naturalist view are based on what each person discerning what is good and what is bad. The nature of jusnaturalism was freedom and complete equality. Enlightment naturalism, on the other had, also stood on the philosophical belief that people should live contentedly but that they should also submit their will to a sovereign with the conclusion that the government is appointed by the people and that the government is the expression of the general will. at 181.

[1156] *Supra* note 624. Hall reflects on the theory of Aquinas that "positive law can be derived from natural law." at 294. Hall reconciles international law and domestic laws, using traditional natural laws as the foundation of international law: "The natural law and positive laws are complementary elements of a single juridical reality. The natural law calls forth the positive law and endows the latter with its binding character. The positive law gives determined form to the natural law's general precepts and principles." at 274. *See also* Christopher N.Warren, "John Milton and the Epochs of International Law", EJIL (2013) Vol 24 No. 2 557-581. Warren observes three types of law during the renaissance era: natural law (common to all animals) civil law (code of a society) and *ius gentium*, law of nations common to humans at 559.

that there was no consistency or certainty in the application of natural law.[1157] Whereas Naturalist theories consider law and morality inseparable, positivists prefer a more salubrious approach.

The juridical positivist movement arising out of the nineteenth century, founded by Jeremy Bentham and John Austin, quashed the development of "enlightenment" naturalism and the interdependence between moral values and legal rules.[1158] Sovereign law was seen as secular, "set by men to men",[1159] turning to the Judge to interpret Sovereign legislative creations.[1160] Austin maintained that law must be analyzed as its own structure and that "every law or rule is a command."[1161] His theory attempts to clarify a distinction between law and morality whereby law is scientific and there is no judgment of right or wrong. Law is simply applied through sanctions if law is disobeyed. Austin's view of law obliged the positivist movement to seek justification for the recognition of customary laws. He argued that "*customary laws* must be excepted from the proposition 'that laws are a species of commands…they are thought to oblige legally [independently of the sovereign or state], *because* the citizens or subjects have observed or kept them…they exist as *positive law* by the spontaneous adoption of the governed."[1162] Customary laws developed over time through observance by the citizens without the intervention of the sovereign and "can also be regarded as laws property…if they are imperative commands of a general character set by a determinate source

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[1157] John Austin, *The Province of Jurisprudence Determined*, London, Lowe and Brydone, 1968. Austin viewed the "...law of nature as ambiguous and misleading." at 13. *Supra* note 51. Kelsen posits : « la theorie du droit comme science du droit positif s'oppose a la doctrine du droit naturel qui recherche l'essence du droit dans une justice transcendante. » at 578.

[1158] Norberto Bobbio, "Sur le positivism juridique", dans Mélanges Paul Roubier, tome 1, Paris, Dalloz et Sirey, 1961. Bobbio summarizes juridical positivist ideology: "Le droit, par la manière dont il est posé et mis en valeur…a par lui-même une valeur positive, et on doit preciser obéissance inconditionnée à ses prescriptions." at 62.

[1159] *Supra* note 624. Hall quotes John Austin, *The Province of Jurisprudence Determined* (1932: 1995 edition edited by Wilfred E. Rumble at 19) at 279.

[1160] *Supra* note 1154. Kolb discusses the concept of sources of law: "Legal science turns [during the nineteenth century] deliberately to the judge…the judge being ideally what Montesquieu had already terms '*la bouche qui prononce les paroles de la loi*'." at 2 and 3.

[1161] *Supra* note 1157. Austin at 13.

[1162] *Ibid*, Austin at 30. [our underline].

armed with sanctions."[1163] Custom could be transformed into positive law if it is recognized by judicial authority,[1164] considered a tacit command of the State.[1165]

The theory of juridical positivism is contextual.[1166] The rise of sovereignty brought theories of juridical positivism setting a hierarchy of norms and public order using a system of formal sources where the peak of the pyramid lies in politics and the State legislature, philosophically alienating law from metaphysical knowledge and the impact of the dynamics of the economic and social infrastructure.[1167] Kelsen spent an entire lifetime on his "*Pure Theory of Law*" toiling to separate law and morality; the science of law and politics.[1168] He maintained that for a norm to be valid, it must be preceded by a higher norm, imposed by a competent authority; thus the pyramid of norms, with State legislature as the hierarchy. The highest norm, the *Grundnorm*, is described by Hall as "simply a necessary presupposition, and itself non-positive in character."[1169]A theory of law is created through social reality.[1170] In Kelsen's theory the State is, in fact, a juridical order whereby the legislative system is the hierarchy in the pyramid of norms.

As juridical positivism progressed, the niggling puzzle to maintain inter-dependence between law and morals[1171] became assimilated in Dworkin's theory of interpretative attitude.[1172] Dworkin's normative theory of how a rule could be distinguished by law also proposed discretion as a substitute

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[1163] *Supra* note 624. Hall at 280.

[1164] *Supra* note 1157. Austin at 31.

[1165] *Ibid*. Austin at 32.

[1166] *Supra* note 92. Samuel argues, "Law is not a natural phenomenon. It is, at best, a social science and this implies that it is subject to all the epistemological difficulties which attach to social science." at 118. Samuel adds that "Knowledge may be determined by the way one 'sees' an object and such an object can often be seen in different ways by different people." "Similarly, institutional representations of legal facts can be 'seen' in different ways." at 116.

[1167] Jean-Michel Berthelot, *La construction de la sociologie*, Paris, Presses universitaires de France, 1991 at 20. *See also* Alain Caillé, Christian Lazzeri et Michel Senellart, (dir.), *Histoire raisonné de la philosophie morale et politique. Le bonheur et l'utile*, Paris, La Decouverte, 2001.Caillé argues that there is a connection between law and norms through a combination of both happiness and utility and that the legislature is both philosophical and political which influences the way we see social justice at 12.

[1168] Supra note 98. Kelsen, (*Théorie pure du droit*) Kelson calls for division from morality: « la pureté de la théorie repose sur la séparation de la science du droit et du politique. » at 557.

[1169] *Supra* note 624. Hall at 300.

[1170] *Supra* note 98. Kelsen explains the breakdown of law: "une théorie du droit réel, du droit tel qu'il est effectivement crée par la coutume, la législation, la jurisprudence et tel qu'il se trouve, en fait, dans la réalité sociale." at 577.

[1171] *Supra* note 202. Burton at 526.

[1172] Thom Brooks, "Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory", 23 Ga. St. U. L. Rev. 513, 2006-2007.

to resolve the moral debate of the positivist movement.[1173] International principles could not be recognized by Austin's tapered definition of law, perhaps resulting from the early positivists' irreconcilable evil eye that saw international laws as natural laws.[1174] As the positivist movement accelerated, the theory could not accommodate the recognition of international law unless the will of the Sovereign could be conceived as the source of law.[1175] According to Hall, *pacta sunt servanda* became, perhaps, the first general international principle that bound states together through implied or explicit consent.[1176]

In virtue of TBN, the law must take a socio-economic stance due to the combination of efficiency normativity and social behavioral normativity inherent to business negotiations.[1177] In a transnational setting, law cannot serve a political master. In an idealist mode, law must cater to the plurality of requirements of the global market, social behavior of the negotiating players in determining proper conduct; meanwhile it must bow to the laws of the nations who are entitled to protect their "people". Pragmatically, the law must set up traffic lights and supervise "rules" of the game. The negotiating parties play the game as they desire insofar as they do not contravene mandatory rules,[1178] therefore it is up to law to preserve party autonomy in TBN. How can business parties have an awareness of mandatory rules set outside the inner standards expected of party autonomy, when the law has not clearly defined defaults in this area of law with certainty? To

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[1173] *Supra* note 104. Dworkin (positivisme) Dworkin distinguishes rules from commands: "Une règle se distingue d'un ordre, notamment, par le fait qu'elle est "normative", qu'elle institute un standard de conduite, qui s'impose à ses sujets au délà de la menace qui peut la faire appliquer…Une règle peut devenir obligatoire pour un groupe de gens parce que ce groupe…accepte la règle comme un standard de conduite…[qu'ils] ont…accepté une règle qui les y obligerait…" at 34. That it must be normative and that the rule must become obligatory using two factors:1-its *acceptance* as an obligatory standard of conduct;2- because it is *validly* handed down in conformity with secondary rules having the right to impose obligatory rules. Dworkin continues: "Une règle peut egalement devenir obligatoire…si elle a été emise en conformite avec une règle secondaire, qui dispose que les règles emises de telle facon seront obligatoires…parce qu'elle est valide." at 34.

[1174] *Supra* note 624. Hall at 281.

[1175] *Ibid* at 282.

[1176] *Ibid* at 285.

[1177] Whereby the predominant norm is autonomy, comprised of reciprocity, flexibility and solidarity. *See supra* note 11. Hogg/ Gutmann. Other commentators have divided the norms creating obligations between autonomous norms and "rights-based norms" to justify the enforcement of obligations between contracting parties. *See supra* note 198. Charny at 1823 and 1824. *See also supra* note 202. Burton Good Faith at 1558.

[1178] *See supra* note 868. Graves at 86.

regulate, law must be sensitive to social needs and detect weaknesses that need protection.[1179] The purpose of law is to guide human behavior and ensure that contractual obligations are performed and enforced by law.[1180] How can law direct suitable behavior during negotiations?

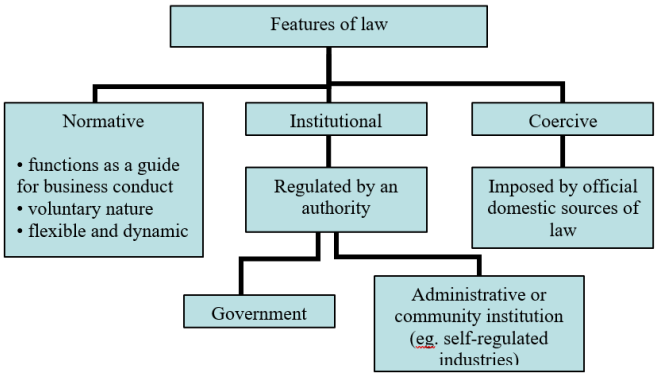
There are three features in law within the metaphorical legal ballroom. Insofar as the parties do not crash into the coercive nature of domestic legal walls of mandatory laws or jump higher than the transnational ceiling, TBN parties can become authors of their own laws. Party autonomy is not simply a creation of social order that law must supervise. Party autonomy has rules of its own, fashioned through what is now the recognized principle of *pacta sunt servanda*, exercised out of the necessity of the legal culture of socio-economic needs of merchants.[1181] Custom arises out of normative patterning of behaviour which are voluntary, flexible and dynamic, functioning as a guide for business conduct between TBN parties.

Party autonomy could be enhanced through an institutionalized legal setting that is able to follow and record business relationships and the promises and agreements that are entered into along the negotiation path. These promises and agreements are exchanged through semiotic communications that could be recorded while the negotiation processes are in session. Law should be interested in these signals, since it is the semiotic communications that determine what is being communicated, the intentions of the parties and whether a promise or agreement has been undertaken by one or more parties.

[1179] *Supra* note 539. Rödl describes the role of contract law was to "prevent a stronger party from exploiting a weaker party." at 60.

[1180] *Supra* note 867. Peterson at 908. *See also* Agasha Mugasha, "Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts", 45 Wayne L. Rev. 1789, 1999-2000 at 1823. *See also supra* note 939. Diamond/Foss refer to Pierre Legrand's skepticism along with Alan Watson's ambitious optimism regarding the possibility of transplanting the concept of good faith on a global level only to investigate the proposal of whether a configuration of institutions can be established, "the principles of good faith play the role of the major binding arrangement between the rules of private law and economic production regimes" at 14 and 25. *See also supra* note 81, Muir Watt; *Contra supra* note 159. Siems.

[1181] *Supra* notes 47 and 51. *Yam Seng* and *Bhasin*. *See supra* note 636 at 226. Berman/Kaufman. It is recognized that Lord Mansfield aided these medieval customs to be recognized as law between the parties. *See also supra* note 724. Karton who observes that this recognition carried through to International arbitration.



The purpose of law is to provide certainty to human activities. While cooperation between all these sources of law is an optimum goal it is clear that, where we stand today, law does not provide the certainty that TBN parties require. Characterization of negotiations has been inconsistent and ad hoc, depending not only on the facts and law that we can see, but also how an adjudicator will interpret the characterization of negotiations. In domestic laws, there are varying manners in which adjudicators have characterized negotiations, vacillating between implied contracts and pre-contractual liability.

We foresee a future in transnational trade that will require more legal involvement to maintain the intricacy and celerity of modern transnational transactions and provide the certainty that business parties anticipate. Law has straggled behind while transnational transactions velociously speed forward. The world is still a large place to hide if a seller has sent empty barrels to a buyer, or if a buyer refuses delivery with an argument based on invalidity of contract. Legal theory is meant to provide a methodology to deduct principles relating to human activities in a foreseeable and steadfast manner.[1182] Can legal theory aid in the development of a manner to better regulate TBN?

[1182] Roy Kreitner, "Fear of Contract", 2004 Wis. L. Rev. 429. Kreitner reports, for example, that: "Contract law is an infrastructure: its most important societal role is to supply frameworks for cooperative activity. Like the proper functioning of say, a highway, contract depends not only on written rules of the road, but also on the reliability of contextual practices. Courts cannot ignore those practices any more than they can decide disputes without recourse to language. The heart of such a regime is the objective theory of contracts, applicable to precontractual representations and to contractual interpretation. Such a theory necessarily implies that contractual relations will sometimes be imposed on parties even against their will. Without such a theory, contract cannot act as a facilitator of consensual transactions in a market; with such a theory, contract cannot depend exclusively on actual consent." at 430. *See also* Roy Kreitner, "On the New Pluralism in Contract Theory", Suffolk University Law Review, Vol ILV: 915, 2012. Kreitner concludes why legal theory is necessary: "In the end, our views about what contract theory should look like are deeply tied to our inclinations about what legal scholarship

We have discussed the general theory of legal obligations,[1183] which aids to detect the ravines negotiations can fall into inadvertently, but does not offer a methodology to uncover the intricacies of principles belonging to negotiations, let alone TBN. We will examine legal negotiation theory and the common law debate on contract theory to seek further clarification.

1. Legal Negotiation theory [LNT]

Menkel-Meadow is one of the leading specialists in the legal theory of business negotiations in general terms. She has drawn on interdisciplinary levels to observe that the functioning of negotiations is based "on the particular strategies or tactics we choose…[which] may well be affected by our conception of negotiation".[1184]

LNT aids the understanding that the purpose of negotiations is to lead a communication path designed towards a mutual goal between the business parties while maintaining self-interests.[1185] Negotiations provide a forum for transactions and feature an innate constructability as dispute resolution mechanisms. This purpose is accomplished through a system of negotiation processes in which the parties travel step-by-step through negotiation steps, positions and stages by considering parties' own interests and the interests of the opposing party(ies) to advance to the next stage of negotiation.

Many approaches can be taken during negotiations, whereby the purpose of the exchange is to reconcile the tensions existing between self-interest and the attainment of the projected mutual goal. Zartman, advances:

> "Like the proverbial blind men who confronted the elephant and brought back conflicting accounts of its salient characteristics, contemporary analysis of negotiation appear to be talking about different things under the name of the same phenomenon…In

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can or should do more generally. Devising a theory that yields predictable and reliable methods of deduction from first principles is obviously useful, especially for courts and working lawyers." at 932.

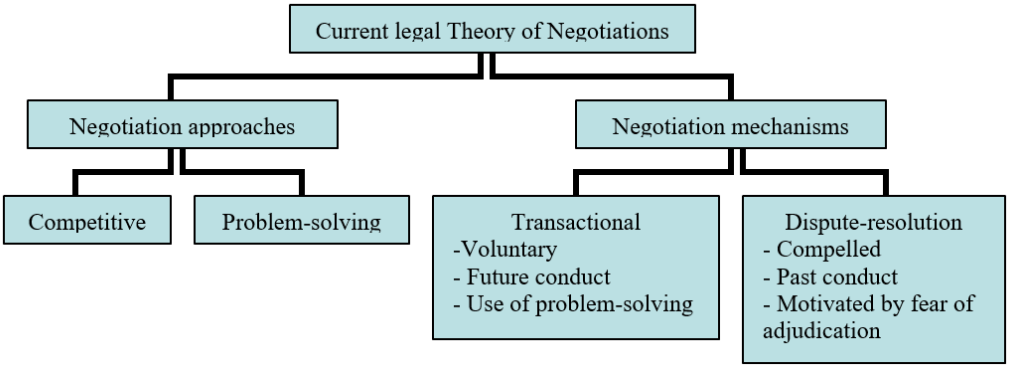
[1183] *See* 1. in Section 3 of Chapter 1, Part I.

[1184] *Supra* note 53. Menkel-Meadow refers to Pruitt & Lewis' psychology of bargaining, where "behaviors were clearly affected by what they perceived as their purpose." at 759.

[1185] *Supra* note 1. Holmes Norton at 330.

simple terms, negotiation is a process of combining conflicting positions into a common position."[1186]

Legal negotiation theory has contributed to legal understanding of the process of negotiations by identifying two negotiation approaches and two negotiation mechanisms.



Negotiation approaches: Negotiation approaches relate how negotiation parties conduct themselves during negotiations; comprised of tactics and strategies. One party chooses which tactics and strategies to begin with and the opposing party will either alter the tactics and strategies by "challenging" the first party's position or attempt to "match" the opposing party's position. Negotiations then become a teeter-totter between the parties who maintain their own self-interests while stepping towards a relationship that will reap mutual goals and produce satisfactory results that neither party could accomplish alone.

There are two basic negotiation approaches that have been identified by law: the competitive approach and the problem-solving approach. Which orientation will be used is chosen by the parties themselves. Throughout negotiations and while parties modify their strategies and tactics towards one another there are three consistent factors that are common to both approaches:

[1186] *See supra* note 195 at 31 and 32. [our underline] Professor of advanced International studies: Zartman describes negotiating approaches: Structural Analysis at 33 (power or parties' positions); Strategic Analysis at 34 (game theory); Process Analysis at 35 (outcome of concessions); Behavioral Analysis at 36 (establishing personality variables); and Integrative Analysis at 37 (overall analysis, including the arrangement of common and conflicting interests to find commonality) at 32. *See also* William Zartman, Daniel Druckman, Lloyd Jensen, Dean G. Pruitt & H. Peyton Young, "Negotiation as a Search for Justice", International Negotiation 1: 79-98, 1996.

1) They are exchanges between two or more business parties;
2) Negotiations are subject to tensions between self-interests and a common, mutual goal; and
3) Negotiations are voluntary.

Two or more parties are subject to an exchange which may provoke the creation of conditional promises between them. While they each have their own self-interests, there is a mutual goal in which both or all parties anticipate a benefit.[1187] Negotiations are voluntary, meaning they are not coerced. Because of their voluntary nature, they also require listening skills and communications between the parties, therefore negotiations are not only about price but also about farming information, including solutions that involve dispute resolution tools.

Korobkin[1188] has pointed out that "[s]cholarly and popular literature often describe the discipline of negotiations at the level of tactical choices" but in recent years, scholars have attempted to widen the categorization to distinguish between cooperative and competitive styles of negotiations.[1189] Although popular discussions depict negotiations as a mere phase leading up to the signing of a contract or agreement, Menkel-Meadow sums up the confusion:

> "[There is] confusion of description and prescription, the lack of empirical foundation for many assertions, the conflation of goals and processes, and often over generalized and acontextual statements about negotiation."[1190]

We will review current legal theory on competitive negotiation approaches and problem-solving negotiation approaches.

Competitive negotiation approaches: Legal negotiation theories often dwell on competitive approaches to negotiations, demonstrating a certain distaste for the adversarial "model"; a "win-lose"

[1187] *Supra* note 5. Chuah describes the importance of negotiations as economic activities: "International trade allows countries to enjoy goods which they would not have been able, for lack of indigenous raw materials or technology, to produce, and to earn vital foreign exchange by selling goods which they are able to produce, and to earn vital foreign exchange by selling goods which they are able to produce or manufacture at an advantage over other countries. The mutual demand and supply for goods in turn stimulates the economy, resulting in growth and employments." at 1.

[1188] *Supra* note 357. Korobkin. Positive at 1789. *See also* Harold Hongju Koh, "Transnational Legal Process", 75 Neb L. Rev. 181, 1996.

[1189] *Ibid* at 179. *See also supra* note 179. Menkel-Meadow concurs that "early work on negotiation was largely atheoretical and focused primarily on suggesting specific strategies." at 910.

[1190] *Ibid*. Menkel-Meadow at 906.

scenario whereby one party desires to maximize its own interest to the detriment of the opposing party.[1191] In other words, competitive approaches are considered struggles to obtain the largest piece of the pie whereby the more one party gains, the less the opposing party will receive. It is considered that during competitive negotiations, the parties are polarized and will compromise only within a certain bargaining zone.[1192] Menkel-Meadow reports that the adversarial approach is unproductive because "the type and quality of solutions may depend a great deal on the process used."[1193] Furthermore, competitive approaches to negotiations may prohibit proper communications between the parties that would enable them to identify solutions.[1194] Menkel-Meadow further alludes that a competitive approach to negotiations may conceal important information that the opposing party requires to make a valid decision, inducing "manipulative, competitive and adversarial" negotiation behavior,[1195] seemingly bordering disclosure and misrepresentation issues. According to legal theory, competitive approaches are expected to be used when the only issue is price and that the parties "desire equally and exclusively the thing by which that issue is measured [by] money."[1196]

Problem-solving negotiation approaches: What has been identified by legal theory as an *alternative* approach to negotiations has also promoted by legal theory of negotiations in recent years. Although conflicts are inevitable during negotiations due to the tensions between each party protecting their own interests, the strong incentive is the fact that parties are better off together than alone.[1197] Problem-solving approaches encourage parties to look for solutions. Legal negotiation theory considers that this type of solution can be best exercised through problem-solving

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[1191] *Supra* note 53. Menkel-Meadow at 764.

[1192] *See* Russell Korobkin, Michael Moffitt and Nancy Welsh, "The Law of Bargaining", 87 Marq. L. Rev. 839, 2003-2004 on zone definition and resistance points. *See also supra* note 53. Menkel-Meadow who considers that the competitive approach is linear. "A linear negotiation structure [i.e. adversarial] might work in those few cases where there is really only one issue." at 771. See also Russell Korobkin, "Bargaining Power as Threat of Impasse", 87 Marq. L. Rev. 861, 2003-2004.

[1193] *Supra* note 53. Menkel-Meadow at 775.

[1194] *Ibid*. Menkel-Meadow at 776.

[1195] *Ibid*. Menkel-Meadow at 780.

[1196] *Ibid*. Menkel-Meadow at 784.

[1197] *Ibid*. Menkel-Meadow at 771 and *supra* note 179. Lowenthal.

communications.[1198] We have observed from the business perspective, however, that one negotiation approach is not "better" than the other; in fact, that negotiations are often a combination of competitive and problem-solving approaches. In fact, business parties use a combination of competitive and problem-solving negotiation approaches. We have also learned from a business perspective that both approaches serve to extract information and position the parties.[1199]

Aside from the discussion of negotiation approaches, the legal community has found that the way negotiating parties resolve their conflicts is accomplished through distinct mechanisms: negotiations as transactional mechanisms and negotiations as dispute resolution mechanisms.

Negotiation mechanisms: Due to the confusion in the juridical positioning of negotiations, commentators have attempted to expand legal knowledge through legal negotiation theories by dividing negotiations distinctly between transactional mechanisms (or "rule-making") on the one hand, and negotiations as dispute resolution mechanisms (or "backward looking")"[1200] on the other. We will first review negotiations as transactional mechanisms and then compare negotiations as dispute resolution mechanisms.

Negotiations as transactional mechanisms: Menkel-Meadow breaks down three components inherent to legal negotiation theory as transactional mechanisms:

1) Transactional negotiations are *voluntary*;
2) They serve to establish *future conduct* between the parties; and
3) They are used to promote *problem-solving*.

The first factor in the structure of transactional mechanisms is that they are *voluntary*.[1201] Menkel-Meadow refers to the interdisciplinary perception to characterize the transactional phase,

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[1198] *Ibid.* Menkel-Meadow's recount of two children sharing a chocolate cake at 771.

[1199] *Supra* note 288. Saner.

[1200] *Supra* note 179. Menkel-Meadow at 926. *See also supra* note 179 and *infra* note 1214. Lowenthal and Eisenberg.

[1201] *Ibid*. Menkel-Meadow depicts: "Most transactional negotiations are voluntary – the parties may walk away from each other if the solutions they seek are not forthcoming; but dispute resolution negotiations may be "compelled"." at 926.

based on the need for negotiation parties to self-regulate.[1202] The original study embarked with the examination of the work of anthropologist, Philip Gulliver. Gulliver investigated a northern Tanzania society in Arusha[1203] and formed two models[1204] in which he identified eight phases of negotiation during the developmental model,[1205] demonstrating the inherent conflictual nature of negotiations, which he considered intrinsic to negotiations while parties strive towards the final destination of mutuality formed by party consent. The reason law needs to promote party autonomy is so that parties can accept inherent risks related to business negotiations by determining risk allocation.[1206] Without a certain degree of self-regulation efficiency would be unattainable.[1207] This efficiency is dependent on the voluntary will of the parties or, to be more harmonious with the plurality of regulatory sources of law, "party consent".[1208] The voluntariness of business negotiations is a fundamental component and characteristic to these negotiations.

The second factor present in transactional negotiations is that they *establish future conduct* between the parties. Negotiating parties strive to attain their mutual purpose during negotiations, impacting future conduct of the parties. The strategies and tactics chosen by the parties are affected by the parties' concept of negotiations.[1209] "When people negotiate they engage in a particular kind of

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[1202] *Ibid*. Menkel-Meadow describes the process: "*a process* of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished *consensually as contrasted with the force of law*. [Menkel-Meadow footnotes her references from Bellow & Moulton at 11 Robert Mathews, "Negotiation: A Pedagogical Challenge", 6 J. Legal Educ. 93 (1953) at 94.] at 908.

[1203] *Ibid*. Menkel-Meadow refers to Gulliver and Eisenberg who "both construct a structural-functional approach to the study of negotiation- what are the purposes of negotiation and what are the continuous structures that occur in these negotiations." Footnote at 917.

[1204] 1) the cyclical model which determines how parties exchange information through strategy to influence a mutual agreement; and
2) the developmental model which guides negotiators from one stage to the next.

[1205] *Ibid* at 918: 1) Choosing the arena, 2) Setting an agenda, 3) Exploration of differences, 4) Discarding some differences, 5) preliminary agreements, 6) final bargaining, 7) "ritualization" of the outcome and 8) some form of execution which demonstrates agreement. *See also* Roy Stuckey, "Understanding Casablanca: A values-Based Approach to Legal Negotiations", 5 Clinical L. Rev. 211, 1998-1999. Stuckey identifies the same eight elements.

[1206] *See supra* note 81. Muir-Watt links the necessity of expanding free choice of the parties to a utilitarian justification which is required in international trade at 6 and 7. The discussion revolves around the function of public policy regulation over private ordering. For a common law perspective, *see supra* note 818. Kennedy describes the importance of private law: "The state ought to and largely did in fact define the rules of law so as to guarantee the free exercise of individual will, subject to the constraint that willing actors respect the like rights of other willing actors." at 96.

[1207] *See supra* note 11. Hogg/Gutmann.

[1208] *Supra* note 911. Rolland By comparing the Quebec Civil Code and UNIDROIT Principles, Rolland observes that while the Civil Code of Quebec recognizes the *will* of the parties in Article 1378 C.c.Q., UNIDROIT Principles propose the *freedom* of the parties to conclude a contract. The common denominator for Rolland is consent at 589.

[1209] *Supra* note 53 at 759.

social behavior; they seek to do together what they cannot do alone."[1210] Although negotiations may appear to be intangible and chameleonic, Menkel-Meadow advocates that there is an identifiable structure[1211] that resembles a dance.[1212] From the lens of behavioral scientists, the business perception resembles a dance, including "offers, counter demands, threats, concessions, and compromises" generally viewed in "models of winner-take-all"[1213] but, as we have seen, there is an alternative problem-solving approach that the negotiation dancers can use to influence the future conduct of parties while attaining the mutual goal.

Analogously to Menkel-Meadow, Eisenberg considers that transactional negotiations ("rulemaking-negotiations") "establish rules to govern future conduct."[1214] Bühring-Uhle identifies the distinction between "dispute-negotiation" and "rulemaking–negotiation" in a similar light.[1215] While we do not deny that future conduct is envisioned in negotiations, the prospect of what is occurring at any given time during negotiations has not been addressed.

Regarding party conduct during negotiations, the law is interested in the behavior of the parties during negotiations and the "extent to which one negotiator can take advantage of another"[1216] while Menkel-Meadow philosophies that legal regulation should work towards "a way which

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[1210] *Ibid* at 755.

[1211] *Ibid*. Menkel-Meadow refers to Gulliver: "Gulliver, like Eisenberg, holds that the uniformity of these processes in varying types of negotiations permits us to analyze the norms and rules that govern negotiation in much the way we study adjudicative processes. Thus, negotiation is not the formless, informal, hidden, and unstructured process many scholars and practitioners think it is…" at 755.

[1212] Carrie Menkel-Meadow, "Critical Moments in Negotiation: Implications for Research, Pedagogy, and Practice", Negotiation Journal, April, 2004, 341. Menkel-Meadow effects the comparison: "like a dancer, a negotiator may have to keep a steady "focus" on a "focal point" to keep balanced, to achieve particular outcomes, to have a purpose or "anchor"…to the negotiation." *See also supra* note 179, where Menkel-Meadow compares Raiffa's "negotiation dance" (with Bellow & Moulton's "bargaining range") at 920. This analogy is in keeping with the results of our interdisciplinary studies.

[1213] *Supra* note 179 at 912.

[1214] Melvin Aron Eisenberg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking", 89 Harv. L. Rev. 637, 1975-1976. *See also* Melvin A. Eisenberg, "Corporate Law and Social Norms", 99 Colum. L. Rev. 1253, 1999; Melvin A. Eisenberg, "The Revocation of Offers", 2004 Wis. L. Rev. 271; Melvin Aron Eisenberg, "The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance", in Ben-Shahar, Omri and Ariel Porat, (Eds.) Fault in American Contract Law, New York, Cambridge University Press, 2010.

[1215] *Supra* note 193 at 144.

[1216] *Supra* note 179 at 71.

promotes and maximizes human interactions that are creative, enfranchising, enriching and empowering, rather than alienating and conflict-provoking."[1217]

Negotiations as dispute resolution mechanisms: Although there are similarities between negotiations as transactional mechanisms and negotiations as dispute resolution mechanisms, current negotiation theories maintain three fundamental differences between the two mechanisms.

1) Dispute resolution mechanisms are *compelled* rather than voluntary acts;
2) Dispute resolution *rectifies past conduct* as opposed to future conduct; and
3) The *motivation* to encourage parties to settle conflicts is considered fear from third party intervention who may grant a less favourable resolution.

The first distinction given to dispute-resolution negotiation mechanisms in legal negotiation theories is they are aimed at resolving issues between the parties,[1218] Negotiations as dispute resolution mechanisms are considered "compelled"[1219] since parties are considered to be "forced" to resolve their disputes since the alternative would be to have their disputes resolved by a third party adjudicator, risking a less favourable and flexible resolution to the dispute.[1220]

The second distinction represents that dispute resolution negotiations are focused on how to resolve a conflict based on *past conduct* of the parties,[1221] as the negotiation dance ensues. A series of issues and conflicts arise challenging the parties to find solutions to conflicts of TBN. Menkel-Meadow promotes collaboration and problem-solving[1222] by discouraging competitive strategies and

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[1217] *Supra* note 53 at 763.

[1218] On an interdisciplinary perspective, commentators would not agree since studies reeal that parties prefer to resolve disputes between themselves as a choice. *See supra* note 15. Ghauri at 22. *See also supra* note 64. Edlund at 427-445 and Roxenhall/ Ghauri.

[1219] *Supra* note 53. Menkel-Meadow considers the "primary advantages of negotiation [as a dispute resolution mechanism] over adjudication…Thus negotiators could better use the negotiation process to explore the possibility of solutions which may be different and perhaps more advantageous to the parties than those the court has to choose." at 787.

[1220] *Supra* note 193 at 145. Bühring-Uhle addresses the distinction between normative considerations as opposed to strategies in negotiation. He argues that strategies relate to bargaining power while normative considerations "are a common feature of all negotiations" and that negotiations are rarely "norm-free". Bühring-Uhle provides distinguishing factors between a "*normative dimension* ("what is right") and a *predictive dimension* ("how will the courts decide") that influence the behavior of the negotiators whereby potential enforceability of legal rights and obligations is considered a bargaining advantage. See also supra note 179. Although Lowenthal concentrates mostly on negotiation strategy, he underlines that "legal scholarship on the negotiation process also is necessary for the formulation of rational societal rules to regulate the conduct of negotiators." t 71.

[1221] *Supra* note 179. Menkel-Meadow at 908. In the legal context, this translates into two types of negotiation mechanisms. Menkel-Meadow claims that "negotiations about transactions (what will happen)" are considered more frequently in legal theories than "negotiations about disputes (what has already happened)".

[1222] *Supra* note 53. Menkel-Meadow demonstrates how problem solving can be used to partition the pie with the example of two children arguing over a piece of cake which would ordinarily result in a parent cutting the piece in half. She uses the example to demonstrate that the answer may, rather, be that

tactics,[1223] capturing ideals of Fisher and Ury and Raiffa, in her theory,[1224] while asking fundamental questions:

> "Why do we negotiate?...Why do we negotiate the way we do?…How do different conceptions about the purpose of negotiation affect the behaviors we choose and the outcomes those behaviors produce?" [1225]

It is considered that parties resolve past differences between themselves through dispute-resolution negotiations to create more flexibility and open alternate manners to resolve disputes. This component has its foundation in the third element of *motivation*; whether parties can resolve the issues between themselves or whether they must turn to third party adjudication. Two positive motivations encourage parties to resolve their own disputes: the relief of embarrassment of the party admitting fault;[1226] and the introduction of an adjudicative element.[1227] Relief of embarrassment protects the ego of the party but more importantly, the relationship, which is crucial to long-term relationships.[1228] The fear of adjudication allegedly spawns the parties to resolve their own disputes, lest an adjudicator should find a less attractive solution to the dispute. Furthermore, "a negotiated settlement can take account of competing norms" whereas adjudication cannot.[1229] Eisenberg maintains that self-regulation allows for flexibility whereby conflicting norms can be assessed rather than discarded as

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"one prefers the cake and the other the icing" at 771. Menkel-Meadow continues by adding "is that no judgment need be made about whose argument is right or wrong. Parties can agree to settle on principles such as community norms or values that are broader than those the court can consider." at 826.

[1223] *Ibid*. Menkel-Meadow explains: "Adversarial assumptions affect not only the quality of solutions to negotiated problems but also the process by which these solutions are reached." at 775. Menkel-Meadow continues her thought: "Thus, by encouraging competitive strategies important information may not be communicated and the parties may arrive at unsatisfactory and inefficient solutions." at 776.

[1224] *Supra* note 179. Menkel-Meadow reiterates the need for interdisciplinary analysis regarding business negotiations: "Thus, Fisher & Ury and Raiffa have, in a sense, contributed to the development of new "theories" to be applied to the legal world" [to include cooperative or integrative bargaining not just distributive or competitive] at 918.

[1225] *Ibid* at 925.

[1226] *Ibid*. "Since dispute-negotiation usually turns in large part on whether the respondent has violated some norm,…difficulties involved in .admitting fault might therefore provide a substantial obstacle to settlement in many cases" at 660.

[1227] *Ibid*. "…since resolution of a dispute will turn in large part on the judgment each party renders on the norms and facts adduced by the other." at 662.

[1228] *Supra* note 15. Ghauri at 14. *See also supra* note 49. Usunier; *supra* note 59. Lewicki and Cova.

[1229] *Supra* note 1214 at 659. Eisenberg uses a normative discussion, identifying three categories of norms that fall into the scope of negotiations: *conflicting, colliding*, and *person-oriented norms* at 643.Eisenberg contrasts how norms conflict in court, where one norm may be treated as invalid or irrelevant, whereas negotiation is "typically open-ended…Thus it is characteristic of dispute-negotiation that when norms collide account is taken of both, although the eventual settlement may reflect an adjustment for relative applicability and weight." at 643 and 644.

legally invalid or secondary.[1230] These norms can influence a party's behavior and they "[are] not limited by a conception of what the court would do…"[1231] Alternatives are thus weighed by the parties in an attempt to bring them closer to a solution thereby controlling the process on their own.[1232]

Menkel-Meadow is skeptical as to whether generalization of negotiations can be accomplished because of the many facets congruent to negotiations.[1233] Within the scope of this thesis we will attempt to overcome these facets by addressing normative behavioral patterning, mutuality and alliance, personalities, culture and values of the respective negotiators, along with mode of communication between negotiators and how these aspects affect party conduct. In striving to identify how negotiation obligations are categorized, we endeavor to investigate whether empirical and normative studies have resulted in the detection of a consistent patterning establishing standards between business negotiation parties, or whether this patterning is still in process.[1234]

Upon further review of these negotiation mechanisms, combined with observations within interdisciplinary studies,[1235] we will notice that these mechanisms need not be delineated into two separate mechanisms that operate before or after an agreement has been entered into. Rather both mechanisms operate simultaneously or in tandem in any given phase of negotiation throughout the

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[1230] *Ibid* at 645. Furthermore, Eisenberg adds "person-oriented norms" [dependant on the personal characteristics of the parties] which can be taken into account just as well as "act-oriented norms." [dependant on the nature of the parties' acts].

[1231] *Supra* note 179. Menkel-Meadow at 924.

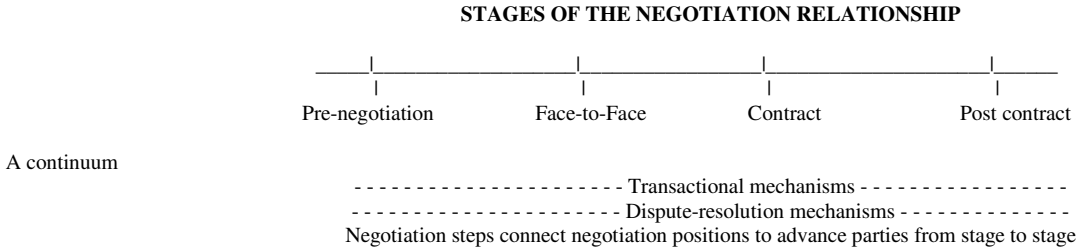
[1232] *Supra* note 1214. Eisenberg comments: "Finally, in cases in which norms and factual propositions are uncertain and conflicting, there will be a range of acceptable outcomes, and elements other than norms and facts **-** in particular, prominence, personal force, and risk-preference - will determine the precise point within that range at which the settlement falls."The success of dispute resolution negotiation is contingent on the willingness of the parties and the context of the dispute. Eisenberg explains: "A model of dispute-negotiation in which outcomes depend heavily on the determination of facts and the application of norms accounts for the verbal behavior of disputants, and for such phenomena as the precedential effect of negotiated settlements and the roles played by affiliates." at 680. *Supra* note 179. Menkel-Meadow stresses context: "…[to develop theory] must be sensitive to the various contexts in which negotiation occurs…it is presumed that the attributes of such phenomena as rules, procedure, discretion and negotiation are not fixed, but variable and conditional…" at 925. *See also supra* note 179. Lowenthal ""suggests that a number of characteristics may strongly affect whether a negotiation can be conducted collaboratively or competitively: (1) subject matter of the dispute; (2) normative constraints of the negotiator; (3) the on-going relationship between the parties, and (4) personalities and values of respective negotiators." at 73.

[1233] *Ibid.* Menkel-Meadow ponders the contrast between Bellow & Moulton [at 58-59] and Raiffa [at 138-139]: "By examining negotiation in different contexts we might learn, for example, that overbroad generalizations mask more than they reveal or cause us to have too unilinear a view of the process that is multidimentional." at 928. *See also*, Carrie Menkel-Meadow, Carrie, "Negotiation Journal Looks Back on Twenty-Five Years of Negotiation Theory, Research, Practice and Teaching", Negotiation Journal, October 2009, 415. "In my view, our early hope of creating a transdisciplinary field with simple, elegant, and generalizable principles, applicable to a wide range of diverse contexts, has given way to a more sophisticated understanding of the limits of theories that attempt to universalize in the context of great variations in the locations of conflict and negotiation." at 420.

[1234] We will be reviewing this factor by comprehending negotiation movements through the analogy of a series of dances in 2. in Section 2 of Chapter 1, Part I. *See also supra* note 279. Barkai; *Supra* note 195. Adair/Brett and Adair; *Supra* note 262. Young/ Schlie; *Supra* note 272. Gettinger.

[1235] *Supra* note 288. Saner at 51.

relationship: past, present and future, which is a continuum, proceeding from one dance sequence to another. We query the position that "problem-solving" and "competitive" approaches fall only under the rubric of "transactional mechanisms", as these approaches contribute inherently to dispute resolution mechanisms due to the very nature of negotiations. If we consider what we can gather from interdisciplinary studies, both orientations serve to reveal information about each party's interests and how these interests can be reconciled.[1236]



There is merit in current negotiation theories, having brought some of the interdisciplinary understanding back to law. The danger in classifying negotiations into two separate mechanisms is that law may fail to regard negotiations as a continuum; a dance that does not jerk from one stage to the other, rather transforms step by step in dance positions from one dance to the other. This continuum is accomplished through the parties' communications with one another, most of which is not transparent to classical regulation law. We have observed through the business perspective that approaches are used in various combinations, often in tandem,[1237] and transactional mechanisms and dispute-resolution mechanisms do not match a certain moment before or after a contract is signed, rather these mechanisms are used in accordance with circumstances that are often improvised.[1238]

Juridical consequences: Legal theory of negotiations recognizes that the court is limited by how few tools are available for adjudicators to decide on remedial outcomes between negotiating

[1236] *Ibid*. Saner at 51. Query: should law promote problem-solving negotiations or simply embrace the fact that both orientations are necessary to produce effective negotiating goals. Should the law regulate differently during problem-solving versus active competitive orientations?
[1237] *Ibid*. Saner.
[1238] *See supra* note 195. Adair.

parties.[1239] Current legal theory of negotiations queries how the behavior of the parties during the negotiation process will be viewed by a court, but does not expound on the juridical consequences of negotiations; that is whether rights and obligations are formed during the processes of negotiations, other than a linear approach of when negotiations lead to express agreements that can be enforced by adjudication. Are negotiation parties creating rights and obligations during the processes of negotiations? How should obligations arising during negotiations be categorized? Can obligations arising out of negotiations specifically expressed between the parties be recognized by law? Since these questions cannot be answered by current legal theory of negotiations, we investigated general legal theory of obligations in Section 3 of Chapter 1, Part I, which only added potential threats due to the confusion of how law would categorize negotiations.

We have observed that the business community and behaviour scientists have identified normative functioning of negotiation which includes an expectation of a minimum standard of behaviour during negotiations. Silent communications and signaling supplement ongoing exchanges between business negotiators during negotiation steps. During these exchanges, certain standards are expected to overcome misunderstandings of due to tensions between self-interests versus attaining a mutual goal, and cultural roadblocks and language barriers.

Although legal negotiation theory has widened the scope of understanding negotiation approaches and mechanisms and broadened the horizons of interdisciplinary comprehension, it has not fully grasped the normative patterning of behavior of negotiating parties, so it cannot fully explain the juridical consequences faced by negotiating parties other than popular linear concepts.

[1239] *Supra* note 53. Menkel-Meadow perpends: "To the extent that negotiations in the shadow of court are limited by conception of what the court would do, negotiation may present no real, substantive alternative to trial...While debate and some exaggeration may be tolerable in a trial with a third party to "mediate" the truth, such forms may be dysfunctional for achieving the best results in a situation where two parties negotiate voluntarily, without a third party to evaluate their relative claims." at 791.

Furthermore, it does not address how negotiations *are* regulated by law, whether they *should* be regulated by law and how they *could* be regulated by law.

2. Legal theories regarding contract law under common law

Legal theory is meant to be a way that legal scholarship can provide a steadfast and predictable methodology to an aspect of law.[1240] Having previously discussed the theory of general obligations to no proper conclusion regarding negotiations,[1241] we turned to the ongoing debate in theories of contract which led to a possible opening of a new legal negotiation theory of TBN to fill the gaps in legal negotiation theory regarding juridical consequences of arrangements made during TBN. We considered how this theoretical debate could impact negotiations and whether the debate would advance our knowledge of legal obligations that can arise during TBN.

To expose further aspects of this legal uncertainty, we reviewed the recent and ongoing debate in a 2014 Oxford symposium under basic legal contract theory in the common law. The discussion was polarized between whether contract theory should be based upon promise or whether contract should be based upon consent or agreement. We will review the broad strokes of this debate and consider the solutions proposed by Kostritsky and Hogg. We consider that Hogg's recommendation to amalgamate three theories of contract into a co-operative will theory is a valued contribution of legal scholarship that lends a solution towards a legal negotiations theory which could serve TBN.

We will commence the discussion of contract theory based upon promise (which is presumed to have some form of morality termed "the promise principle" which promotes good faith conduct in

[1240] *Supra* note 1182. Kreitner at 932.
[1241] *See* Section 3 of Chapter 1, Part I.

the formation, performance and discharge of contracts).[1242] Then we will converse on contract theory based purely on consent or agreement.[1243]

2.1 Contracts based upon promise

The identity crisis in contract law theory escalated in the 1970s when writings such as "*The Death of Contract*",[1244] "*The Rise and Fall of Freedom of Contract*",[1245] and "*The Death of Reliance*"[1246] were published. Then Fried, considered to have salvaged the theory of contract based upon promise, delivered an alternative manner to re-instate the autonomy of parties to self-regulate their own affairs based on a certain morality that accompanies autonomy: a duty of good faith.[1247] To Fried the promise itself is a self-imposed source of contractual obligation.[1248]

What is really meant by "contract based upon promise"? Is it simply a concept based upon autonomy whereby parties can freely assume duties subjectively between themselves by a promise willingly consented by a promisor and accepted by a promisee? Objections to contract based upon *promise* circulate around the fact that subjective intent cannot be proved,[1249] but there remain other concerns. We turned to Hogg's guidance who first defines "promise" in order to eliminate commitments that have no bearing on future performance. Hogg co-relates this concept with canon

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[1242] Charles Fried, "The Ambitions of Contract as Promise", in Gregory Klass, George Letsas, and Prince Saprai, *Philosophical Foundations of Contract Law*, Print publication date 2014, Oxford Scholarship Online March 2015, ISBN-13: 9780198713012 DOI 10.1093/acprof:oso/9780198713012.001.0001.

[1243] *Supra* note 86. Barnett (Death of Reliance). Contracts based upon consent or agreement requires courts to clothe fairness on a liability built from interpretation, construction, or implied terms in a contract,aimed towards economic efficiency.) *See supra* note 30. Schwartz/ Scott.

[1244] *Supra* note 84. Gilmore.

[1245] *Supra* note 84. Atiyah.

[1246] *Supra* note 86. Barnett (Is Reliance Still Dead?).

[1247] *Supra* note 85. Kostritsky (Promise) at 844. Kostritsky emphasizes that "Fried wants to theorize contract as involving a purely individual morality of promise-making and promise-keeping, which are values in themselves because they promote autonomy. They are self-binding through exercises of will." at 844.

[1248] *Ibid*. Kostritsky at 850. *Supra* note 86. Barnett (Contract is Not Promise). Barnett sums up the background of contract based upon promise: "Charles Fried's *Contract as Promise* arrived on the scene in 1981 at exactly the right moment. In the 1970s, contract law scholarship had come to be dominated by two competing visions: the "contract as tort" vision associated with many scholars, but presented most pithily by Grant Gilmore in his highly influential *The Death of Contract*, which appeared in 1974; and the "contract as effiency" vision of law and economics scholars, especially the prolific and accessible Richard Posner in his book *The Economic Analysis of Law*, the first edition of which was published in 1973." at 647. *See also* Eric Posner, Eric, "A Theory of Contract Law Under Conditions of Radical Judicial Error", 94 Nw. U. L. Rev. 749, 1999-2000.

[1249] *Supra* note 86. Barnett builds the argument: "Where we cannot discern the actual subjective intent or will of the parties, there is no practical problem since we may assume it corresponds to objectively manifested intentions. But where subjective intent can somehow be proved, and is contrary to objectively manifested behavior, the subjective intent should prevail if the moral integrity of the will principle is to be preserved." at 651. Barnett then considers the difficulty: "Nonetheless, the promise principle has difficulty explaining the enforcement of the objective agreement where it can be shown that the subjective understanding of a promisor differs from her objectively manifested behavior." at 652.

law where an oath or a promise is justified under *pacta sunt servanda*.[1250] He then addresses the potential five objections to the theory of contract as a promise.

The first contention reprimands the moral undertone of contract theory based upon promise.[1251] Hogg circumvents this objection by suggesting an alternative explanation by proposing that it is the parties themselves who choose, voluntarily, to consent to these obligations.[1252]

The second protest lies in the will theory itself. Hume's philosophy was that the human will cannot have any normative power.[1253] This objection is shared by Atiyah.[1254] Hogg counters Hume's position by positing that "the will itself is not the normative force of contractual (or unilateral promissory) obligations. On the contrary, the promisor is merely consenting to the imposition by the law of obligations upon him."[1255] How can we assess these obligations? Markovits interjects:

> "This family of theories commences, one might say, from Hume's familiar observation that "experience has taught us, that human affairs wou'd be conducted much more for mutual advantage, were there certain symbols or signs instituted, by which we might give each other security of our conduct in any particular incident." Making contracts, in particular, allows "individuals to bind themselves to a future course of conduct, to make it easier for others to arrange their lives in reliance on [a] promise," and in this way allows persons to coordinate their conduct to their joint advantage. Contract law is understood, on this view, as a social technology that enables such efficient coordination."[1256]

Based upon Hume's understanding of promising, Buckley concludes that: "promissory obligations arise through a convention and not from the mental act of willing a moral duty",[1257] but

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[1250] *Supra* note 11. Hogg at 18. We considered the *stipulatio*, derived from Roman law under Section 3 of Chapter 1, Part I. We have visited the three regulatory sources of law governing TBN in Chapter 2 of Part I to ascertain that *pacta sunt servanda* is firmly domiciled in all three sources of law.

[1251] *Supra* note 804. Kimel at 287.

[1252] *Supra* note 11. Hogg combats the argument: "A reconfigured promissory theory of contract [that] comes into being, while acknowledging that the normative force of the relationship derives from the determination by the state that such a promise-based relationship is to give rise to obligations, and that the obligations so incurred will be such as are assumed by the parties but moderated and supplemented by community values embodied in common law rules and legislative provisions." at 19.

[1253] *Ibid*. Hogg at 20.

[1254] *See supra* note 84. Atiyah.

[1255] *Supra* note 11. Hogg at 20 in support of party autonomy.

[1256] Daniel Markovits, "Making and Keeping Contracts", 92 Va. L. Rev. 1325, 2006 at 1333.[our underline].

[1257] *Supra* note 458. Buckley (Contract as Convention) at 16. Buckley elaborates: "Hume took the example of two farmers who need to cooperate to exploit a bargain opportunity over future crops. Your corn is ripe today; mine will be so tomorrow. 'Tis profitable for us both, that I should labour with you to-day, and that you should aid me to-morrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I should be disappointed, and that I should in vain depend upon your gratitude. Here then I leave you to labour alone; You treat me in the same manner. The seasons change; and both of us lose our

Hogg rebuts this argument by qualifying that the will theory has been misunderstood. It is not simply a "mental act of willing" rather innate within Hogg's "twin pillars" of contract as "a voluntary exercise of the will."[1258]

To reconcile the accusations against contracts based upon promise on a third strife must defy unilateral promises. Hogg suggests that the intrinsic characteristic of a promise is unilateral, versus a contract, which must be bilateral. Hogg cleverly promotes that "an exchange of conditional promises is a perfectly rational and logical way of describing the congruence of two unilateral acts in such a way that they produce a bilateral relationship."[1259] If only there were a manner in which to record this bilateral exchange through "symbols or signs instituted by which we might give each other security of our conduct in any particular incident."[1260]

Hogg combats the fourth grievance that contract based upon promise is circular and produces conditions that lead to an impasse in the "reality of contract formation process". Barnett argues that without an objective manifestation demonstrating mutual intent of the parties that accurate discernment of what has been communicated between the parties leads to uncertainty.[1261] However, from Hogg's point of view, "an offeree has already had the benefit of receiving the offeror's conditional promise, such offeree has no reason to wait further, and that offeree's acceptance therefore concludes the contract."[1262]

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harvests for want of mutual confidence and security.The opportunity for gain is before their eyes; yet the farmers cannot grasp it. What they lack, and what the institutions of promising and contract law provide, is the ability to make credible commitments of future performance. Promissory institutions permit the parties to rely on each other by imposing a cost on faithless promisors." at 7 and 8. Buckley turns to Hobbes to refute contract as a promise: "A bare promise, said Thomas Hobbes, is "but words, and breath," with "no force to oblige, contain, constrain, or protect any man." In a Hobbesian world, Hume's farmers would never agree to help each other, as "the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions." What then is needed, said Hobbes, is the coercive power of the state, in the form of the enforceable promises of contract law."at 8. [footnotes removed]

[1258] *Supra* note 11. Hogg at 25.

[1259] *Ibid*. Hogg at 20. This is the very basis of our BON.

[1260] *Supra* note 1256. Markovits at 1333.

[1261] *Supra* note 86. Barnett's point of view, following the circular accusations is that: "Without a manifestation of assent that is accessible to all affected parties, the law will have failed to clearly identify and communicate to both parties (and to third parties) the rightful boundaries that must be respected. Without such communication, parties to a transaction (and third parties) cannot accurately ascertain what constitutes rightful conduct andwhat constitutes a commitment on which they can rely. Disputes that might otherwise have been avoided will occur, and the attendant uncertainties of the transfer process will discourage beneficial reliance." at 658.

[1262] *Supra* note 11. Hogg at 21.

The last protest is based on "simultaneous transaction…where the undertaking of liability appears to occur simultaneously with performance" and therefore, since there is no promise of future performance, these promises cannot form a contract.[1263] Hogg concedes that this challenge surpasses the remaining arguments on the basis that a truly simultaneous transaction does "appear to lack promises of future performance [save ones that might be implied into the contract]…It may be that, for such transactions, one must look for a theory which bases the contract on agreement [conceived of in non-promissory terms] between the parties, or an assumption of obligations by the parties, rather than an exchange of promises."[1264] We will return to the examination of how Hogg has overcome this last protest by amalgamating contracts based upon promise, contracts based upon agreement and contracts based upon relationships in his co-operative will theory of contracts following the discussion of the theory of contracts as consent or agreement.

2.2 Contracts based upon consent or agreement

The reason the QCL does not enter into this debate is that it is well established in Quebec that contracts are based upon consent; "a meeting of the minds". The common law antithetical theory of contracts as agreements is based on individual obligations that induce remedies, (rather than the morality of promise), and focuses upon efficiency and economic undertones. Contracts are, thus, based on consent where "a world of exchange and promising are not just creations of the free will of the parties, but are social institutions created and collectively maintained by law."[1265] The ideology is based on choice: that law chooses to protect parties' self-interests and mutual goals.[1266]

[1263] *Ibid*. Hogg at 21.
[1264] *Ibid*. Hogg at 21 and 22.
[1265] *Supra* note 1182. Kreiter at 456.
[1266] *Supra* note 1242. Fried breaks down the economic theory of contract into three parts: "Work in the economic analysis of contract law takes three related forms: one analytical, one empirical and one normative." at 5. *See also supra* note 11. Hogg at 22 and 23.

Kostritsky describes efficiency theories inherent to contracts based upon consent: "The system naturally incorporates utilitarian criteria because it is structured to make all participants better off."[1267] Consent theory purports to build on the basis of rules that reflect the reasons why parties enter into a contract, rather than in terms of fairness or social norms. Preponderants claim that the reason that parties enter transactions together is for goal attainment which inadvertently protects the welfare of the state.[1268] Preponderants of contracts based on consent, the "perspective of economics", argue that theory based on contract as a promise fails.[1269] In search of predictability, Kostritsky attempts to reconcile the two polarized theory by proposing that we must not lose sight of the purpose of contracts: to help parties attain their mutual goals.[1270] Kostritsky sees no conflict with the ability of the courts to fill in gaps of a contract through residual principles of law, such as the duty of good faith, positing that, in fact, filling gaps contributes to the autonomy of the parties on the basis of Dworkin's principles that morality and rights already exist and can be expounded by the judge rather than created by him.[1271]

Kostritsky attempts to identify what both polarized legal theories of contract share that contract law can be ostracized from "understanding of human nature, relying solely on the parties'

[1267] *Supra* note 931. Kostritsky at 846.

[1268] *Ibid*. Kostritsky at 846.

[1269] *Supra* note 458. According to Buckley, "A private act of will is neither a sufficient nor a necessary condition of promising. It is not a sufficient condition because a private mental act of "promising" is not binding without a public act which others may recognize. And it is not a necessary condition because (unless the promisor is unconscious or incapacitated) a promise unaccompanied by a private resolution to perform is still a promise under the "objective" theory of contract. The promisor's private reservations do not excuse non-performance when a reasonable observer would have concluded that a promise had been made. Otherwise, the parties would drastically scale back their reliance upon promises, and the benefit of the institution would be lost. Even if the will theorist could meet this objection, his account of promising fails to offer a satisfactory account of how promissory institutions expand our freedom. To be sure, the institutions of promising and contract law give those who invoke them new powers. Their domain of alternatives has expanded, as it does whenever a new game is adopted and there is one more thing they may do. Before they could not promise; now they can. However, if the institution of promising increases our liberty by giving us more options, the same is true of baseball, since people could not hit home runs before the game was adopted. But if every new institution creates new alternatives, how can we say that one kind of autonomy is superior to another?" at 16 and 17. [footnotes removed]

[1270] *Supra* note 931. Kostritsky argues: "Contract law is all about relationships and allowing people to express their autonomy and enhance gains from trade through relationships. It is vital to recognize that here may be important hindrances to being able to achieve their goals through contract...In some cases intervention by courts beyond the express terms may facilitate autonomy by helping parties to reach their overall goals." at 862.

[1271] *Ibid*. Kostritsky at 867.

consent [Fried] or on the explicit exchange [Schwartz/Scott]."[1272] Kostritsky concludes that the goals of the contracting parties and the risks they may enter in a particular context should be determined to ascertain the contractual rule that could best deal with foreseeable obstacles and risks.[1273]

In a more tempered environment, Hogg's twin pillars provide the elements of contract based upon consent both in terms of agreement between the parties and the intention to be bound by legal obligations. In other words, "[t]he agreement is typically considered as arising through a process of mutual exchange of proposed terms called offer and acceptance."[1274] Hogg discusses the three criticisms of the theory of contract based upon agreement.

Firstly, unlike civilian jurisdictions that accept a subjective "meeting of the minds", the common law requires objective manifestations to validate an agreement. Hogg considers that commercial contracts have become more standardized since parties "do not actively ponder all the terms of their proposed agreement…at the time of contracting."[1275] Contracts as agreements in standardized form are neither objective nor subjective acceptances. In fact, it is probable that neither party has even read the contract therefore, the "agreement" implies that the parties have submitted to standardized format.

Secondly, contract based upon agreement "requires to be supplemented by an intention to be bound to the agreement [by contrast with the promise], which presupposes an intention to be bound."[1276] Hogg suggests a manner to "define agreement in such a way that it includes the idea of obligatory intention (or consent)...[since] it is not a consent in their opinions, but in their wills, to

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[1272] *Ibid*. Kotritsky continues: "In their view, once you move beyond the central core of consent or party sovereignty, you are either outside of the world of true contract, or you are unwisely sacrificing the effiency goals of the parties by importing other outside interests (such as fairness) and undermining the efficient contract reached by the parties." at 848.

[1273] *Ibid*. Kotritsky dissents: "My view diverges… one should begin with human beings as they are, and determine what goals they have in contracting and what risks they face in particular settings. Once those goals are determined, then one can begin to determine what contractual rule parties would prefer given the obstacles and risks." at 867.

[1274] *Supra* note 11. Hogg at 22.

[1275] *Ibid*. Hogg at 23.

[1276] *Ibid*. Hogg at 24.

oblige any of them."[1277] Consequently, Hogg argues that agreements need not require further elements since intention is innate within the pillars of an agreement. It is the evidence and dimensions of such intention that begs recording.

The third contestation is that an agreement, "cannot explain the whole content of many contracts, especially those into which terms are imposed by statute or the common law."[1278] Hogg argues that a will-based theory "need not attempt to explain the whole content of contracts as stemming from the will of the parties…[rather] that the existence of the contract was the result of a voluntary exercise of the will".[1279]

Hogg considers that the theory of contract based upon consent "is essentially an agreement between the parties, to do or abstain from doing something, which agreement the parties intend to give rise to binding obligations on both of them or conceivably…only on one of them."[1280] Contractual theory based on agreement uses both the voluntary exercise of the will and the ability for parties to express terms through party autonomy. Consequently, commonly regarded contractual norms are satisfied when an agreement intended to be binding by the parties is concluded and recognized.

Hogg amalgamates contracts based upon relationships with contracts based upon promise and contracts based upon consent or agreement

To satisfy the ongoing debate, Hogg suggests an alternative view of contract theory by amalgamating promise, consent and yet a third element to his co-operative will theory: contracts based upon relationships, which allows legal theory to follow the vast pre-contractual circumstances in context. This would allow for parties to choose, within their relationship, how to deal with obstacles and risks. Contract theories based on relationships determine that the content of a contract is

[1277] *Ibid*. Hogg at 24. Hogg considers the parallels between Scotish contract law and US contract law as described by Randy Barnett.
[1278] *Ibid*. Hogg at 25.
[1279] *Ibid*. Hogg at 25.
[1280] *Ibid*. Hogg at 22.

wider than any writing, as it is based on the relationship that exists between the contracting parties and not just the writing on a page.

The idea of relational contracts stems from realist American doctrine of contracts that recognize parties having a long term relationship require *reciprocity*, a normative factor in both contracts and long-term negotiating.[1281] We owe Macneil credence as primary founder of the relational theory of contract.[1282] "Relational contract dimensions" according to Macneil, are important in the "everyday working of exchange relations and transactions, or contract behavior;" and how laws relate to contractual behavior.[1283] For example, Macneil's realist contract theory is based on the "interaction of the parties in a specific instance of exchange: each may be relying upon societal, commercial or industry norms, or the parties may have a pre-existing relationship which will properly help to determine how the present transaction ought best be understood."[1284] Macneil recognizes the normative contractual behavior that interdisciplinary studies have identified: reciprocity, flexibility and solidarity and adds, "harmonization with the social matrix".[1285] Normative aspects of the relationship include industry norms and have an effect on the manner in which a contract is understood and interpreted.

[1281] *Supra* note 38. Baudouin/Jobin "une très grande confiance réciproque, des valeurs de coopération, voire de mutualité. Expressément ou implictement, les parties se sont engagées à collaborer étroitement en vue d'atteindre des objectifs communs de qualité, d'efficacité, de rentabilité…a partager systématiquement toute information utile." at 124. Baudouin/Jobin uses a manufacturer and his sub-contractor as an example.

[1282] Ian R. Macneil, "Relational Contract: What we do and do not know", 1985 Wis. L. Rev. 483, 1985; Stewart MaCaulay, "Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein", 2000 Northwestern U. L. Rev. Vol 94(3), 775 in A Symposium in Honor of Ian R. MacNeil; Whitford, William C., "Ian MacNeil's Contribution to Contracts Scholarship", 1985 Wis. L. Rev. 545. William C. Whitford, "Relational Contracts and the New Formalism", 2004 Wis. L. Rev. 631. Randy E. Barnett, "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract", 78 Va. L. Rev. 1175, 1992. MaCaulay uses a light switch to analogize that Macneil's relational dynamic theory is not an on/off switch at 778. See also MaCaulay, Stewart, "Non-Contractual Relations in Business: A preliminary study", American Sociological Review, Vol 28., No. 1 (Feb., 1963); MaCaulay, Stewart, "Elegant Models, Empirical Pictures, and the Complexities of Contract", 11 Law & Soc'y Rev. 507, 1976-1977; MaCaulay, Stewart, "Freedom From Contract: Solutions in Search of a Problem", Wis.L.Rev. 777, 2004.

[1283] *Ibid* at 484. Macneil. Macneil divides "discrete exchange" (interfaces of property or ownership) versus patterns of relational exchange that rely on social, political and intellectual factors at 488 and 490. *See also* Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, Oxford, UK, Oxford University Press, 2012. Furmston comments on contractual behavior between business parties the generally: "contract is not a discrete transaction but part of a continuing relationship between the parties and that insistence on certain strict legal rights would be disruptive of that relationship" at 30.

[1284] *Supra* note 11. Hogg at 29.

[1285] *Ibid*. Hogg at 29. *See also* Larry A. DiMatteo, "Harmonization of International Sales Law", in Larry A. DiMatteo, Qi Zhou and Severine Saintier, *Commercial Contract Law: Transatlantic Perspective*, CUP, 2013.

Conversely to classical contract theory, the dynamic nature of contracts based on relationships raises issues of stability since the exact moment in which a contract is concluded is not an essential factor; in other words, there is no "on-off switch"[1286] to determine when the contract was specifically formed. Legal theory of negotiations has not yet embraced the full extent of the continuum existing in business negotiations[1287] but Hogg considers that the relational theory of contracts "may offer solutions to problems at the pre-contractual stage, solutions which other theories find…hard if not impossible to provide…[and] may be argued to have played a role in giving the ideas of 'good faith' and 'trust' a greater prominence in Common law and mixed legal systems."[1288]

Since contractual obligations may be owed during three specific times during the life of a contract, namely during the *formation* of contracts, during the *performance* of contracts and at *extinction* of the contracts, the range that legal contract theory must undertake is too diverse for a monist approach. Furthermore, the breadth of the *formation* of contracts does not magically appear a few moments before the stroke of the plume. Rather, in the context of long-term TBN, a contract (if, in fact, there is one concluded) follows a lengthy negotiation period comprised of three processes of negotiations: negotiation stages, negotiation positions and negotiation steps in which many inter-connected commitments are exchanged by virtue of promise, agreement and the evolving relationship of the negotiating parties.

Hogg's co-operative will theory is therefore the ideal theoretical legal methodology to be applied to TBN since his theory can expand into the horizons of negotiations, during the *formation* of

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[1286] *Supra* note 1282. MaCaulay explains the dilemma on a contractual level: "Classic contract law assumes a light switch. A light is either on or off; the parties have agreed to a contract or they haven't. Often, however, in a long-term continuing relationship, the situation resembles a rheostat. As more and more power is sent to the bulb, we get more and more light. It is hard to say when the light has been turned on. On and off are not useful terms. Similarly, in a relational contract often it is hard to say when the contract is formed. Moreover, it is not likely to be formed once and for all. Rather than a scene frozen in a still photograph, a relational contract is more like an ongoing motion picture."at 778.

[1287] *Supra* note 92. Samuel 2010 at 80. Instantaneous and Long-term contracts are reviewed: "Neither the civil law nor the common law makes a formal distinction between instantaneous and long-term contracts. Nevertheless the disction is of importance in a number of ways. First, the relationship of the parties is likely to be so different as to generate different expectations. Thus a contractor will not hae the same expectations of a shop owner from whom he occasionally buyes a newspaper than of his employer for whom he has worked for many years. Secondly, a long-term contract is always subject to the risk of changing circumstances." at 80 and 81.

[1288] *Supra* note 11. Hogg at 29.

contracts, and provides the predictability required for legal theory. Amalgamation of these theories may appear as perilous pluralistic juridical waters that require the law to re-evaluate how to swim. But unless contract law theory can be pried open wide enough to encompass the visions of autonomous proponents, law and economic followers and communitarians, it will be difficult to reconcile the ongoing debate.[1289] Whether we consider that contracts are based upon promise, based upon consent or upon agreement, contracts based upon relationships or even an amalgamation of the three, the matter of whether the parties have intended to be legally bound[1290] will always require consideration and evidence.

Current legal theories have not impacted the functioning and regulation of TBN. To follow the vast range of the TBN habitat requires an expansion of legal theory into legal normative theories, including legal theories on contract, into pluralistic waters integrating the normative patterning of business conduct whereby one norm does not have precedence over the other; rather each norm is inter-connected and measured according to context.[1291] Monist approaches, such as debates on whether contract is a promise, whether contract is consent or whether contract is dead, do not offer any clarification to the normative patterning that takes place during negotiations. Competing norms need not have hierarchies, rather they must co-operate together to achieve the common goals desired by TBN parties, thus Hogg offers solutions.

[1289] Lawrence M. Solan, "Contract as Agreement", 83 Notre Dame L. Rev. 353, 2007-2008 . Solan expounds: "Broad theories of contract law are intentional in nature, whether based upon the rights of the individual as an autonomous actor, the benefits to society of encouraging people to engage in bargained-for transactions, or the justice due those who have relied on the promises and representations of others."at 353.

[1290] *Supra* note 46. (Contract is consent) Barnett argues: "Like any rule of law, however, limiting even *prima facie* contractual enforcement to those commitments that are accompanied by some formal of informal manifestation of intention to be legally bound will lead to some cases of over- and under-enforcement from the standpoint of the underlying principles of will, reliance, fairness, restitution, and effiency. On the one hand, if limited to highly formalized manifestations of consent, it will fail to capture all promises to which parties have actually consented. On the other hand, if expended to include highly contextual indicia of consent such as those just discussed, it may lead to the enforcement of some commitments that should be left enforced...So contract, property, and torts- along with other subjects such as restitution- can be viewed as providing the legal boundaries that define the scope of individual liberty and distinguish rightful from wrongful conduct." at 657.

[1291] Leon Trakman, "Pluralism in Contract Law", 58 Buff. L. Rev. 1031, 2010. Trakman confirms: "Pluralist theories of contracting do not endorse a "super" value, but instead acknowledge a plurality of values that are commensurable or incommensurable with one another according to the contractual context." at 1033.

In the event of adjudication of unresolved disputes, the patterning of behavior that necessitates trust translates to a foundation of *reliance*, a commodity that is crucial to determining how negotiation obligations are created and ranked.[1292] Classical contract doctrine enforces the strict stipulations within the contract, but is unable to follow all semiotics exchanged between TBN parties. We posit that contracts are merely a stage within the negotiation processes necessarily producing gaps either because the parties, at the time of the *formation* of the contract, did not anticipate obstacles in the performance of the contract or because circumstances surrounding the continuance of the project have changed and parties must re-negotiate their terms or the project will fail.[1293] In these cases, TBN parties do not wish to have their intentions reconstituted by implied consent when they could so readily make their own choices. Norms of negotiations (efficiency, autonomy, and certainty) do not conflict with dignity, cooperation and honesty which is where law can provide guidance. Business parties do not like surprises, particularly surprises that may strip the benefits of the deal itself, and therefore law must proceed with practicality and caution. We posit that the answer lies in the consolidation of the patterning of negotiation norms within the application of a normative co-operative legal theory of negotiations based on Hogg's co-operative will theory of contracts accompanied by a juridical gyroscopic orientation of TBN, a practical solution meant as a medium that can offer substantiation.

[1292] *Ibid*. Trakman distinguishes between subjective wills of the parties and whether the expression was sufficient to display party intention: "A pluralist court may reach the same determination, but only after considering such relational factors as the trust and confidence placed by the contracting parties in each other and such socio-cultural factors as their respective reputations and goodwill in the trade...A pluralist court goes further by considering plural values beyond the subjective wills of the parties. It conceivably starts by observing that the parties did not manifest subjective wills; that their subjective wills were incompletely expressed; or that they had different subjective wills." at 1041 and 1042.

[1293] *Ibid*. Trakman refers to long-term relational contracts: "Relational contracts involve ongoing dealings between parties including the impact of periodic changes in their contractual relationships, such as arise from modifications over time and space in the nature of the goods and the quantity, price, and terms of delivery. Such relational contracts typically include parties engaged in long-term supply agreements, such as an oil company and its distributors." at 1063.

Section 3: Proposal of the Distillation of Hogg's Co-operative Will Theory of Contracts to TBN

It is the very debate in the common law, as to whether contracts should be promises or whether contracts should be agreements, that has lead to a potential solution for a TBN legal negotiation theory. While Kostritsky and Hogg both offered solutions to the debate, Hogg's theory offers a methodology that is predictable and steadfast towards the creation of a legal negotiation theory for TBN. With Hogg's approval, we have attempted to distill his theory for this application.

1. Consolidating negotiation norms and the application of a legal negotiation theory based on Hogg's co-operative will theory ["HCWT"]

We expect that Hogg's co-operative will theory of contracts will lead to a better understanding of the elements required to formulate a normative co-operative LNT of TBN based on Hogg's theory ["HCWT"]. Hogg's theoretical background originates from a hybrid jurisdiction, thereby giving him insight to outline the competing theories of contract, including contract as a promise, contract as an agreement, contract based upon relationship, contract based on reliance,[1294] contract based on assumption[1295] of legal obligations by the parties, contract as transfer of rights[1296] and contracts based on a relationship between the parties.[1297] Hogg examines the pros and cons of what he considers feasible contract theory and rejects the latter three theories.

[1294] Contract based on reliance bears similarities to promise without having to adhere to the common law doctrine of consideration. *Supra* note 11. Hogg claims that contract as reliance "focus[es] upon the effect produced by party conduct and the equity of having regard to such effect."at 26. Hogg refers to Restatement (Second) of Contracts § 1 (1981): "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[1295] *Ibid*. Contract as an assumption of legally binding obligations assumes that parties' free will is substituted by exterior superimposing obligations at 27. Hogg cautions that this theory is too broad and does not explain the nature of the obligations that are assumed by the parties.

[1296] *Ibid*. As transfer of rights, contract theory, according to Hogg, cannot fully explain the concept of contract "as a whole." Hogg considers Barnett's consent-based approach to contracts the most viable in this context. Hogg suggests that "Barnett's consent-based theory of contract, elements of both transfer and reliance theories are used to explain features of the law without being used to explain the normative force of contract law in general." at 28. Hogg considers that contracts involving a transfer of rights may apply to contracts of sale but not necessarily for service contracts. He considers that "borrowing ideas and language from one theory of contract and embedding them in another" must be performed with caution.This aspect may join contract with interfaces of the property doctrine. Contracts based upon a relationship between the parties, otherwise referred to as "relational contract theory," fathered by Ian Macneil, presume that commercial normativity is practiced in the interaction of the parties who are performing an exchange.

[1297] *Ibid*. Hogg at 17.

Hogg emphasizes that the combination of these three theories into a single "co-operative will theory provides an important continued emphasis upon the values of personal liberty and responsibility." Furthermore, Hogg's theory promotes freedom of contract "tempered by increasing external control and regulation of such freedom."[1298] This reconciles the tensions that we have observed between party autonomy and the imposition of certain standards of conduct between contracting parties. Hogg's contribution clarifies and reconciles tensions that we have observed in the current regulation of negotiations.

Whether we consider the normativity of freedom *to* contract as economic or autonomous (or both), competing theories of contract have connections between them that may be reconciled into a "harmonized, cross-national contract law."[1299] Freedom to contract signifies that the parties are free to create their own arrangements. But negotiations do not always result in a contract. TBN characteristically cater to preliminary or partial agreements and agreements to agree later; in other words, inter-connecting agreements used between TBN parties who cannot have all the details for a complete contract, due to the very nature of the processes of negotiation. Parties may, nevertheless, have made certain arrangements, undertakings or promises between themselves.

We observed under theory of general obligations that legal obligations applicable to TBN parties are divided into consensual obligations and non-consensual obligations that are imposed by law. Between consensual and non-consensual obligations lie potential formations of legal obligations imposed on contracting parties, namely implied contracts that assume super-imposed intentions of the parties. Hogg explains that on a consensual basis the co-operative will theory "rejects highly fictional attempts to explain things such as implied into classes of contract as deriving from the presumed

[1298] *Ibid*. Hogg at 33.
[1299] *Ibid*. Hogg at 16.

intention of the parties".[1300] This rebuts the attack on will-based theory which "undermines the idea of the will as having any useful function to play in contract theory."[1301] At the same time, Hogg recognizes the social responsibility that contracting parties have with one another and argues that his theory "recognizes the importance and legitimacy of tempering personal contractual freedom by reference to external societal norms such as good faith."[1302] Hogg's co-operative will theory of contracts incorporates the promise as sanctity of *sunt pact servanda*, agreement that appeals to the mercantile aspects of contract and relational elements that contribute to the normative functioning of the contracting parties based on the voluntary will exercised by the parties whereby parties intend to assume obligations between themselves in a relationship.[1303]

This vision of autonomy is similar to Hogg's "twin pillars": "agreement and intention to be bound."[1304] The contract delineates the supreme expression of the parties' obligation in which consent is sufficient under QCL.[1305] Agreement and intention remain evidentiary more complicated under CCL. Consider the will theory as "free choice", as opposed to simply power that one party may have over the other.[1306]

TBN are inherently relational and dependent on the normative characteristics of reciprocity, flexibility and solidarity; innate in long-term negotiations. Furthermore, negotiating parties do form promises with one another and commit to agreements. A certain harmonization between the socio-

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[1300] *Ibid*. Hogg at 34.

[1301] *Ibid*. Hogg at 34.

[1302] *Ibid* at 34. Hogg concludes that: "Freedom of contract is properly restrained, in the name of community values and societal well-being, through other restraining devices such as inequality of bargaining power and abuse of a dominant position. The good faith principle manifests itself in various specific ways, such as in a duty to negotiate in good faith." at 38.

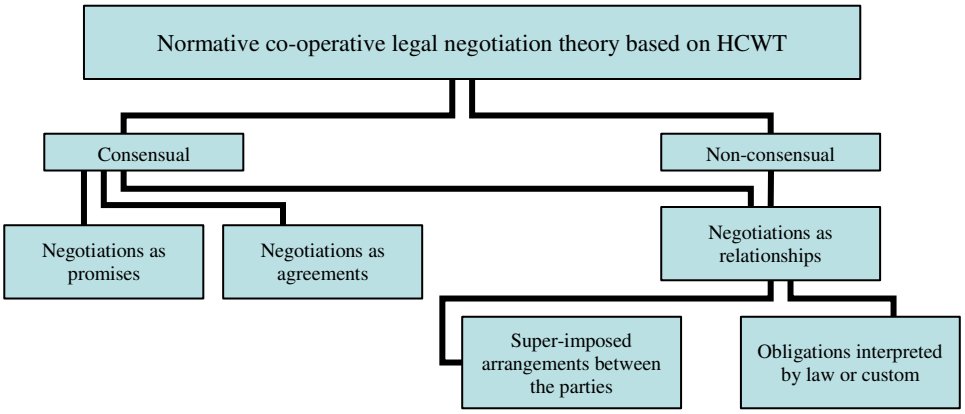
[1303] *Ibid* at 31. Hogg interjected that "Whilst relational theory may be useful in reminding us that many contracts are part of a wider relationship between parties which may throw light upon the contract in question, as a general theory of contract it will not do." at 30.

[1304] *Ibid*. Hogg refers to Stair: "Since the publication in 1681 of Stair's magisterial *Institutions of the Law of Scotland*, Scottish legal thought has held a largely unchallenged view that acontract is based upon an agreement of the parties intended by them to give rise toobligations binding at law. The twin pillars of agreement and intention to be bound –or, as Stair somewhat differently put the intentional element, a manifestation of'engagement', such being conduct going beyond mere 'desire' or 'resolution' –provided a theory of contract which has proved both uncontroversial and stabilizing." [footnotes removed] at 1.

[1305] *Supra* note 38. Baudouin/Jobin clarify: "Dans un système juridique fondé sur la liberté contractuelle, pour conclure un contrat, aucune formalité particulière ne doit être nécessaire, puisque la seule expression de la volonté humaine, c'est-à-dire le consentement, est suffisant. Ces idées ressortent clairement de l'article 1385 du Code civil." at 142 and 143.

[1306] *Supra* note 540. Rakoff explains freedoms of contract: "that it is a voluntary, lawful and enforceable (or not) support of the "will theory." at 477.

economic matrix of commercial trade and law must take place to pursue successful negotiations. Along the path of the processes of negotiations, TBN parties develop a relationship together; a certain amity encompassing understandings between them. We previously discussed examples of these implied obligations such as the preservation of confidentiality of trade secrets;[1307] proper disclosure of material facts;[1308] and cooperation in good faith towards a mutually rewarding goal[1309] that continue through the contractual stages of the relationship.



The law has categorized these obligations under contractual and extra-contractual sources[1310] and as pre-contractual liability. Hondius explains that, "Once a contract has ensued; precontractual dealings may still be relevant for the interpretation of the contract, for an answer to the question whether or not the contract may be rescinded because of misrepresentation, duress and undue influence, mistake, etc."[1311] Menkel-Meadow reminds us that during interpretation of a contract, "[i]t may be more useful in any contract case to think of the parties' needs in terms of what originally

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[1307] *Supra* note 267. *Lac Minerals*. *See also* note 46. Honduis at 21.

[1308] *See* 2. in Section 1 of Chapter 1, Part II. *See also supra* note 684. Arbitration award 00-04-1997 (8264) Court: ICC International Court of Arbitration, Paris. USA v. Algerian Co. (ALG).

[1309] *See* 2.in Section 1 of Chapter 1, Part I.

[1310] *See* Section 3 of Chapter 1, Part I and Section 1 of Chapter 2, Part I.

[1311] *Supra* note 46. Hondius at 25. Model Rules of the European Commission have also recognized that interpretation of contract may require investigation of circumstances during prior negotiations and negotiations ensuing after the creation of the formal contract.For example, according to Art. II 8:102 DCFR "…in particular, to: (a) ***the circumstances in which it [the contract] was concluded, including the preliminary negotiations***; (b) the ***conduct of the parties, even subsequent to the conclusion of the contract*****,** (c) the interpretation which has already been given by the parties to terms of expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves; (d) the meaning commonly given to such terms or expressions in the branch of activity concern and the interpretation such terms or expressions may already have received; (e) the nature and purpose of the contract; (f) usages; and (g) good faith and fair dealing.[our emphasis].

brought them together - the purpose of their relationship."[1312] The purpose of their relationship, of course, is based on mutuality; the fact that they have an economic advantage together that they did not have separately.[1313]

Negotiation agreements can also be identified under the rubric of *freedom to agree later*.[1314] They are deliberately incomplete[1315] due to the very nature of negotiations and, in practical terms, parties may not have thought of this procedural element in their relationship. The parties are still on a road trip; they know the approximate direction they are going together but are not privy to the state and condition of the road. There may be detours that have to be taken and further considerations to address,[1316] making classical doctrine of contract unbefitting to negotiations.

1.1 Negotiations based on promises

Hogg's co-operative will theory of contracts "conceives of the will as the faculty of assuming obligations deriving a normative force from a source beyond the parties themselves, and one therefore which can accommodate and explain external regulation of contractual content."[1317] Hogg concedes that "no theory can…explain where exactly the boundary properly lies between freedom of contract and…[an] external restraint [which] remains, in all legal systems, a matter of an on-going debate."[1318] We posit that, in practice however, these boundaries could be revealed.[1319]

[1312] *Supra* note 53 Menkel-Meadow at 771. Menkel-Meadow defends this argument with the Brown and Snead case, a hypothetical case used for training purposes. See explanations at 772-775.

[1313] *Ibid* at 809 and 810.

[1314] *See* 3. in Section 1 of Chapter 2, Part I. *See also supra* note 538. Ben-Sharer.

[1315] *Supra* note 928. Scott at 1641. Scott explains that contracts are incomplete because of future uncertainties future or because the parties intentionally "decline…[to leave] terms in question unspecified." at 1642.

[1316] Emilian Ciongaru, "Theory of Imprevision, A Legal Mechanism for Restoring of the Contractual Justice", ScienceDirect, 149 (2010) 174-179. Ciongaru explains the procedure: "As a result of the unpredictable event occurrence, the concerned party will initiate the contract renegotiation and adaptation to the new circumstances." at 176. Fraught with an elevated quantum of self-interests on each side while parties must return to the early stages of the bargaining table and subject themselves to another round due to economic hardship or force majeure, for example.

[1317] *Supra* note 11. Hogg at 36.

[1318] *Ibid*. Hogg at 38.

[1319] *See* Section 3 of Chapter 2, Part II.

We have discovered that under CCL, a promise exchanged for another promise is binding under contract doctrine.[1320] We have also noted that a promise made by one party to another who reasonably relied on that promise can be enforced by law even though no contract is formed, through the remedy of promissory estoppel.[1321] This fictitious manner to qualify what the contracting parties are *doing* straddles between sources of obligations derived from consent and other sources of obligation imposed by law, since reliance on a promise effectively replaces the consent required under a contract between the parties.[1322] The CCL attitude focuses on the objective reasonableness that the promise could be relied on whereas under civil law the same set of circumstances might be interpreted as "tacit" acceptance.[1323]

Under CCL, if the parties have exchanged a promise for a promise during negotiations, it could be argued that the parties have formulated an agreement, but the agreement may fail to have the features required for recognition as a valid contract. If the parties have exchanged confidential information, or if one party has enriched itself at the poverty of another legal obligations can be identified.[1324] If the parties have not fully disclosed information that should have been exposed in order to provide the opposing party with sufficient information to make a valid decision or if a party has misrepresented information on which a party could reasonably be expected to rely on, legal remedies may be applied.[1325] Legal obligations may be enforced if a party has not acted in good faith and an opposing party has suffered damages, pre-contractual liability may be imposed by law.[1326] A danger lies in the imposition of an implied contract, which the parties may or may not have intended.

[1320] *See supra* note 9 CCII. Swan, Chapter 3, Casebook at 5. Under QCL we witnessed this aspect as a "meeting of the minds".

[1321] *See supra* note 51. *Bhasin*.

[1322] *Supra* note 15. Hogg explains that the promissory theory emphasizes voluntary acceptance of commitment at 8.

[1323] In effect, tacit acceptance is no less fictious than promissory estoppel since we only deem what the parties are doing.

[1324] *See supra* note 267. *Lac Minerals*. *See also supra* note 378. Péloquin at 187 and 188; *Supra* note 9. Swan at 317 para. §2.266.

[1325] *See supra* note 418. *Comeau* in which a right of first refusal had been granted to a third party in parallel negotiations; *supra* note 440. Peloquin. *See also supra* note 47. Yam *Seng*; *supra* note 12. Yee at 195.

[1326] *Supra* note 451. *Walton*. *See also supra* note 46. Hondius; and supra note 940. *Anderson*.

Presumptions of law threaten uncertainty to TBN parties who are left unsure of who will be left without a chair when the music stops.

Promises are innate during the processes of negotiations. Parties make promises to do something, (such as investigate obstacles that may hinder their mutual goals), or to forbear from doing something (such as not to entertain negotiations with a third party while the relationship subsists). Parties make promises to keep confidential secrets; parties make promises to disclose information adequately so that the opposing party can make a viable decision. While these promises may not be mirrors that look like an offer and acceptance, they are agreements; albeit tacit or expressed in various forms of semiotics that are often not recognized by law. A "reconfigured promissory theory" accepts that the "normative force of the relationship…give[s] rise to obligations…assumed by the parties but moderated and supplemented by community values embodied in common law rules and legislative provisions."[1327] Therefore, "[a] promise on this view is simply a manifestation of consent to the imposition of obligations by the legal system."[1328] In other words, a contract based upon promise emphasizes the voluntariness of undertakings whereby a promise subjects parties to obligations, sanctioned by the legislature or custom.

1.2 Negotiations based on agreements

To consider negotiations based on agreements requires an alternative view and a reconsideration of the role of contracts as "tangible negotiations". Negotiations and agreements are both writing tools and, when sold as a pair, look strikingly similar. Contrasting their characteristics leads to a general understanding of the similarities and differences between contracts and negotiations and how subtle the differences first appear.

[1327] *Supra* note 11. Hogg at 19.
[1328] *Ibid*. Hogg at 19.

The difficulty to prove the manifestation of the will to be legally bound is due to the intangibility of the movements of the negotiating parties. If we had tools to *see* what is being exchanged by negotiating parties, we would have the ability to distinguish between promises that form concrete obligations, and those promises that do not. Negotiations are not like an indelible ink pen, rather more like a pencil where promises may exist and then become extinguished in light of new circumstances; in other words, that may be erased, like a pencil, and rewritten. However, the erased words may be a foundation for the newly formulated writing or, the parties may choose to discard them as irrelevant. Since the matter may have been erased, this part of the negotiations never enters a court room, either due to prohibition under the rules of parole evidence or because there is no document to elucidate historic events that have transpired between the parties. The fact that the parties erased arrangements also eliminates certain assumptions as a process of elimination. These discarded promises or agreements, if they could be visualized, could provide adjudicators with a better understanding of the TBN relationship.

We will raise our position a notch higher by suggesting that although negotiations can be *writing* tools they are more generally *communication* tools used by the parties to express themselves to one another in the quest to set out a mutual understanding of rights and obligations to one another. Tangible communications, such as agreements, contracts and various other forms of writing can be seen by a third-party observer. Intangible negotiations, however, cannot easily be identified. We have discovered through other disciplines that semiotic communications such as non-verbal exchange and body language, gestures or facial expressions nevertheless form understandings between the parties.[1329]

[1329] *Supra* note 15. Ghauri. These factors are often identified often in marketing. *See* Antonis C. Simintiras and Andrew H. Thomas, "Cross-cultural sales negotiations-A literature review and research propositions", International Marketing Review, Vol. 15(1), 1998, 10-28 at 19. *See also supra* note 72. Hall's Silent Language.

Determining the similarities and differences between tangible negotiations and contracts as tools of communications are important steps in determining how they fit in the scheme of party autonomy. We have identified five similarities between the two:

- they are *voluntary*;
- the parties have autonomy during the *formation*, *performance* and *extinction of* agreements;
- there is a mutual *intention* to legally bind the parties;
- a *relationship* is in process of building, requiring reliance in trust;
- the parties bear a responsibility of *good faith* to retain the required trust, at very least during the *performance* of contracts.

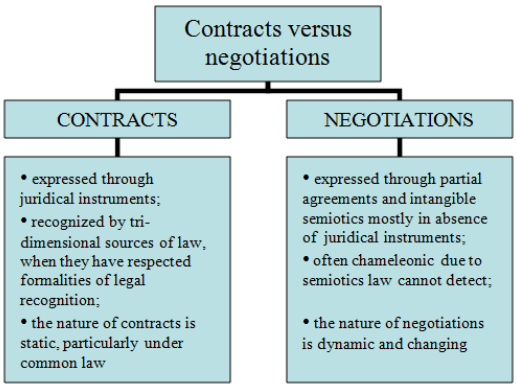
The term *voluntary* was discussed in legal negotiation theories under negotiations as transactional mechanisms.[1330] *Voluntary* was also discussed under the rubric of freedom of contract.[1331] *Voluntary* formed the basis for the discussion of party autonomy and the will theory. Summarily, *voluntary* refers to the free choices that parties arrange together, without coercion or undue influence.[1332] Party *autonomy* during the formation, performance and renegotiation of contracts is a recognized fundamental right of freedom.[1333]

The mutual *intention* to bind the parties has been discussed within contractual doctrine[1334] and during our comparative analysis.[1335] We observed that the CCL requires a contract to mirror the parties' intentions in an offer and acceptance accompanied by consideration. Under the QLC, parties are assessed by a "meeting of the minds". Hogg's twin pillars[1336] promote that parties to a contract must have the legal *intention* to be bound to an *agreement*. When parties are in the processes of forming a deal, there are cues and negotiation communications that indicate party intention to one

[1330] *See* 1. in Section 2 of Chapter 1, Part II.
[1331] *See* Section 1 of Chapter 1, Part II.
[1332] *See* 4. in Section 3 of Chapter 2, Part I.
[1333] *See* 1. In Section 1 of Chapter 2, Part I.
[1334] *See* Section 1 of Chapter 2, Part I.
[1335] *See* Section 1 of Chapter 1, Part II.
[1336] *Supra* note 11. Hogg at 15.

another to enable them to close the reservation zone.[1337] This intention, when tangible, is tantamount to an agreement. Whether or not an agreement is considered legally binding depends on the intention of negotiating parties to be legally bound. Semiotics that fall short of recognition by law requires translation to illuminate law on how to understand the commitment exchanged between TBN parties.

Both long term contracts and negotiations result out of a *relationship* that is in the process of building. In each case, reliance on the contract or arrangements agreed to during negotiations is ubiquitous in building the trust necessitated between the parties. The contract *is* the security that provides parties with this same trust, whereas negotiations produce reliance on promises exchanged during negotiations that are more difficult to detect.



While exercising parties' rights to self-govern, a responsibility to honour *fair conduct* or *good faith* super-imposes the freedoms of contract. To attain the trust required between negotiating and contracting parties, the concept of good faith convoys this freedom. Good faith should not be considered an interference or limitation of party autonomy, rather a compliment to the freedom of negotiating and contracting parties, assumed by the internal workings of party autonomy.

While there are similarities between contracts and negotiations, the disparity between them is primarily threefold. To begin, contracts are juridical instruments having a solid history since the rise of Sovereignty. The purpose of a contract is to document final decisions of negotiating parties.

[1337] *Supra* note 1192. Korobkin (Bargaining).

Negotiations have never been subject to the development of juridical instruments. There are currently, no mechanisms of trade to track the communications and exchanges occurring during negotiations. This creates uncertainty as to what the parties have actually intended between them and lacks transparency.

Contracts face the challenge of recognition by domestic laws, but if they are recognized they are ensured full Sovereign protection. However, since negotiations remain chameleonic, there is no formal recognition or general rule and domestic laws have only found remedies under exceptions, created "piecemeal" by law. The primary cause of this predicament is that, currently, there is no way to trace what negotiating parties are communicating and arranging between them, causing unpredictability.

The current status of contracts is static whereas negotiations are dynamic. There is a need for both vehicles of communication to remain dynamic in TBN as flexibility is required, even after a contract is formed, while parties must adapt to upcoming changes during the formation of the contract and following the formation of the contract. To remain dynamic, party autonomy must have more than a strong impact on negotiations; party autonomy is essential to the well-being of the global market and the ability of TBN to self-regulate.

Transnational laws and party autonomy have a broader, pluralistic manner to assess party intention than domestic laws and they collaborate to balance the forces of *pacta sunt servanda* and the concept of good faith in industry standards. There is no theoretical difficulty for transnational laws and party autonomy to accept juridical tracking tools, such as our proposed BON, insofar as they are securitized. It is domestic laws that face the largest challenge as the legal systems are not sufficiently flexible to vision communications and agreements exchanged between TBN, unless a contract can be recognized.

The popular presumption that norms of negotiations bear no consequences should be reassessed. TBN do not function on the basis of the principle of freedom *from* contract[1338] unless the parties have stipulated otherwise. Promises and agreements must be made tangible during TBN. Although negotiating parties often do not take the time to document their agreements, when they do it is a deliberate act to mark their undertakings to one another. In other words, party autonomy is the freedom for negotiating parties to allocate the risks in foreseeable circumstances that may arise between them and enumerate obligations expected from one party to another. Domestic laws recognize validly entered into contracts insofar as they are specifically expressed. An additional element of *consideration* is required under common law to form a binding contract, which serves as the objective and tangible element to replace a subjective reasoning.[1339]

Along with all these elements, a contract must pass the test of certainty[1340] since certainty is what protects expectation.[1341] Domestic norms ensure that proper behaviour blend with the horizontal "manifestation of consent to the imposition of obligations"[1342] by domestic laws. We posit that if all negotiation semiotics were tangible, it would lead to an expansion in contract theory, which we have investigated and determined that HCWT would be the proper model, due to the tri-dimensional aspects of Hogg's theory that can potentially accommodate normative values of TBN and includes relational aspects inherent to TBN. Business parties require concise and speedy solutions to document their business arrangements.

[1338] *Supra* note 125. Macdonald (Illuminating) at 1134: Macdonald comments on how domestic norms are created.

[1339] *Supra* note 42. Lake/Draetta discern: "There is…no equivalent of the common law doctrine of consideration in French law, nor…in the law of other civil law countries. It is also not a requirement for the validity of a contract that its parties intend to make it." [de Moor, Contract and Agreement in French and English Law, 6 Oxford J.L. Stud. 275, 278 (1986)] at 42.

[1340] *Ibid*. Lake/Draetta refer to *Insurance Co. of North America v. United States*, 159 F. 2d (4th Circ 1947); *Cohen v. Johnson*, 91 F. Supp. 231 (M.D. Pa. 1950): "Offers must contain enough details of the proposed contract so that acceptance can result in a complete agreement. In determining whether an offer has been made, or whether the parties are still in negotiation, the courts look to definiteness of expression, trade usage, and surrounding circumstances." at 27.

[1341] *Hadley* v. *Baxendale* (1868), L.R. 3 C.P. 499. Mr. Justice Willes considers that although damages must be reasonably foreseeable at the time of the making of the contract, expectation damages would return the parties in the position of what would have happened if the contract had been performed at 508.

[1342] *Supra* note 11. Hogg at 19. *See also* Fleur Johns, "Performing Party Autonomy", Law & Contemporary Problems, Summer, 2008, Vol 71(3). Fleur Johns explains the dilemma of party choice: "This hazard-riddled deal landscape is terraced, in party, in terms of "what the law requires"…permissible action under relevant national and international laws…The deal is also demarcated…in terms of "what the market requires." at 264.

1.3 Negotiations based on relationships

Relational theory offers solutions to pre-contractual stages of negotiations, playing a role for a greater emphasis on good faith and trust.[1343] TBN relationships are not static and therefore, the content matter in an agreement requires wider interpretation than a literal writing.[1344] Classical contract doctrine is unable to follow the dynamic communications exchanged between TBN parties during the processes of negotiations. Furthermore, business parties assume certain commercial or industry norms that form a quasi-agreement or a "pre-existing relationship" that aids the interpretation of the exchange.[1345] These commercial, normative aspects of the TBN relationship favour identifying what has been understood during negotiations. Relational theory also anticipates solutions at a "pre-contractual stage".[1346]

To understand negotiations as relationships, we must take another glimpse at the business perspective. We recall that Ghauri described four characteristics of business negotiations that are essential qualities to the establishment of a business relationship. These characteristics are considered "problem-solving",[1347] as opposed to bargaining, comprised of *open disclosure* of information between the parties, the need to *strive to find solutions* that rise to the expectations of both parties, that objectives may be mutual but also conflicting (and therefore parties must attempt to *establish commonalities* between them), and that the parties must endeavor to *listen and understand the concerns of another*.[1348] These aspects contribute to how the parties establish trust.

We also recollect that Lewicki added yet another element to the relationship:

[1343] *Supra* note 11. Hogg at 29.

[1344] *See supra* note 1291. Trakman; *See also supra* note 9 CCII. Swan on interpretating a contract: "When interpreting a contract, the court must determine whether the parties' agreement is contained in the written words expressed on the pages of the contract or on "some other stuff, different pages or even oral statements." at 36.

[1345] *Supra* note 11. Hogg at 29.

[1346] *Ibid*. Hogg at 29.

[1347] *Supra* note 15. Ghauri argues they are the opposite to the concept of distributive bargaining, at 4.

[1348] *Ibid*. Ghauri enumerates:"Open information flow between the parties…in order to find a match between the two; A search for a solution that meets the objectives of both parties; Parties understand that they do have common as well as conflicting objectives and that they have to find a way to achieve, as much as possible, common and complementary objectives that are acceptable to both sides."and…both parties sincerely and truly try to understand each other's point of view." at 4.

> "In negotiation, both parties need the other...and...each is dependent upon the other. This situation of mutual dependency is called *interdependence*...When we are independent of another person we can, if we choose, have a relatively detached, indifferent, uninvolved outlook. When we are dependent on another, we have to accept and accommodate the demands of another...When we are interdependent, however, we have an opportunity to influence the other party and many options are open..."[1349]

To a certain extent, each of the techniques: integrative and distributive rely on cooperation between the parties to properly explore options available to the parties.[1350]According to Lewicki, there is always a question of monetary limits to which the parties will not exceed (or descend) regarding price. However, as the relationship is dependent on whether parties wish to negotiate with each other, there is a subjective content to negotiating.[1351] He questions how trust can be created between the parties and determines two influential factors:

1) the perception of the outcome; and
2) the perception of the process.[1352]

Both factors require that the parties form trust in the business relationship to ensure a satisfactory outcome.[1353] Lewicki concurs with regard to the perception of the process, a dance of discussions and concessions, which requires *open disclosure*, *striving to find solutions*, *establishing commonalities and listening* and *understanding the concerns* of the other parties. These elements affect the negotiation process[1354] and the atmosphere the parties wish to create[1355] using various

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[1349] *Supra* note 59. Lewicki (Interdependence) at 24.

[1350] *Ibid*. Lewicki refers to (1962) Deutsh to define integrative techniques which he argues must maintain a certain cooperation as a "*promotive interdependence* or nonzero-sum" whereby the parties have formulated a certain trust between themselves and divided the tasks so that they can work in tandem." At the same time, he demonstrates conversely that: "When the goals of two or more people are interconnected so that only one can achieve the goal...'there is a negative correlation between their goal attainments'…" at 25.

[1351] *Ibid*. Lewicki describes this content as: "how we feel about negotiating with this person, and what we feel to be an acceptable price or resistance point." at 26.

[1352] *Ibid*. Lewicki expounds: "two efforts in negotiation help to create this trust and belief-one is based on perceptions of outcomes and the other on perceptions of the process." at 32. In other words, an interdependent relationship is solved by creating trust where one party makes a concession and the other party responds .

[1353] *Ibid*. Lewicki adds: "This process which requires trust and security for each party, is critical to successful interdependent relationships. This trust can be developed by including the other party in the negotiation process and ensuring that her needs are met as well as your own. Following a fair process will contribute to feelings of satisfaction and success to both parties." at 33.

[1354] *Ibid*. Lewicki provides a better understanding of negotiations: "Negotiation is a process of offer and counteroffer, of discussion and concession, through which the parties reach a point that both understand is the best (for them) that can be achieved. Although this process if the heart of negotiation, it cannot be understood or successfully carried out without a knowledge of how a wide array of other factors affect the process." at 47.

techniques. The negotiation process is complex, entailing the setting of an agenda for the parties to communicate, processing information and choosing negotiation approaches towards the development of a relationship to enhance both parties.

Although positions of conflict and strategy are important features to business parties during the process of negotiation, the primary goals lie in establishing that the parties can progress towards a mutual satisfactory relationship (perception of the process) with common goals (perception of the outcome). The progress is essential to attain the common goals or purpose of negotiations and sometimes entails compromise: giving up of some of the short-term goals for long term ones. If there are no short term or long term goals of the parties, the relationship will fail and negotiations will cease.

TBN parties consider these perceptions as early in the relationship as possible to avoid investments of time and funds, and any danger of legal liability. Once the parties are committed to the project, there may be considerable symbiotic obligations within the relationship, some of which will depend on performance by the opposing party.

These expectations are complex, resulting from the customary nature of TBN.[1356] An investment in the relationship is necessary because of the dynamics of TBN.[1357] Patterns of integrative bargaining have been developed through techniques of negotiations which include parties' expectations and are formulated into strategies and tactics in the business world. Each stage of negotiation necessitates the use of, or combination thereof, positions of conflict to continue the

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[1355] *Ibid*, "The outcomes of one party are linked to those of the other party by the structure of the bargaining relationship. How outcomes are linked (or perceived to be linked) will have a fundamental influence on how negotiations proceed. at 46. [our underline] Strategies by negotiators must ask whether they wish to create a competitive environment or a cooperative one and set the goals.

[1356] *Supra* note 59. Cova (Project Negotiations).

[1357] *Ibid*, Cova remarks: "…faced with particularly irregular purchasing patterns...[the effects of economic discontinuity can be overcome] by developing strong social and relational bonds." at 253. Cova continues: "This linkage mix corresponds to a relational position in the network of both business and non-business actors forming the social context embedding the project. It's a necessary prerequisite for project business in order to create trust and gain information." at 256.

negotiations to the next stage to ultimately achieve mutually satisfying goals.[1358] Varying techniques are utilized initially to ascertain whether they will continue their business relationship together, dependent on respect for the cultural values[1359] of the parties. There is only one pie and it must be divided between the parties in virtue of their expectations and proficiency.

Since negotiations are a breeding ground for opportunism, fairness must be maintained while seeking ways in which the parties can divide the pie.[1360] Egocentrism can interfere with a party's judgment of what is fair.[1361] More importantly, egocentrism blinds a party's awareness of their own behaviour.[1362] Thompson claims that "people care not only about the size of their slice, but the process used to get there."[1363] The factor of fairness increases cooperation between the business parties, thus enhancing their mutual goal and increasing the chance of resolving disputes or renegotiating at a later date.

Opportunism is not the only threat to maintaining standards of behavior between TBN parties. Puffery, a form of marketing strategy which is sometimes used during negotiations,[1364] also walks a thin line between promise and exaggeration and between misrepresentation and boasting. The use of this technique is dependent on the power-dependence issues between the parties where one party may

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[1358] *Supra* note 59. Lewicki claims that:"Interdependent relationships are characterized by interlocking goals-both parties need each other to accomplish their goals...[a] mix of personal and group goals is typical of interdependent situations." at 24.

[1359] *Supra* note 15. Ghauri refers not only to societal cultural values but various other corporate cultures. at 13.

[1360] *Supra* note 237.Thompson.

[1361] *Ibid*. Thompson describes the impact: "The major problem with egocentric judgement is that is makes negotiations more difficult to resolve..." at 57.

[1362] *Ibid.* According to Thompson, "Most situations are ambiguous enough that people can construe them in a fashion that favors their own interests. One unfortunate consequence is that people develop different perceptions of fairness even when they are presented with the same evidence." at 58. [our underline]

[1363] *Ibid* at 53. Thompson explains that "In addition to evaluating the fairness of outcomes, people evaluate the fairness of the procedures by which those outcomes are determined. People's evaluations of the fairness of procedures determine their satisfaction and willingness to comply with outcomes." [our underline] "This increases cooperation.On a primary basis, he maintains that there are numerous ways of dividing the pie fairly. Interdisciplinary studies have detected that negotiators are faced with three basic fairness principles: "1-Equity rule, or blind justice, prescribes equal shares for all. Outcomes are distributed without regard to inputs, and everyone benefits (or suffers) equally." at 46; 2-Equity rule, or proportionality of contributions principle, prescribes that distribution should be proportional to a person's contribution." Thompson's example is the free market system; and 3-Need's based rule, or welfare-based allocation, states that benefits should be proportional to need." Thompson, based on need, refers to the social welfare system. However, Thompson cautions that "rules of fairness are highly context dependent". at 47.

[1364] Puffery is defined in the BusinessDictionary.com as: "Advertising or sales presentation relying on exaggerations, opinions, and superlatives, with little or not credible evidence to support its vague claims. Puffery may be tolerated to an extent so long as it does not amount to misrepresentation (false claim of possessing certain positive attributes or of not possessing certain negative attributes."
http://www.businessdictionary.com/definition/puffery.html. *See also* Avinash Malshe, Jamal A. Al-Khatib, and John J. Sailors, "Business-to-Business Negotiations: The Role of Relativsim, Deceit, and Opportunism, Journal of Business to Business Marketing, 17:2, 173-207, http://dx.doi.org/10.1080/10517120902762518.

use his power over the opposing party or an opposing party seeks to gain power over his opponent using methods of exaggeration. Much depends on the choice of the parties regarding the kind of relationship parties are willing to maintain.

A simple example of puffery is when a statement may be simply an exaggeration versus a statement that is considered *objectively unreasonable* or *subjectively inducing* reliance. Ayres/Klass point out that puffery does not show a promisor's intentions or probability of performance of his undertakings which is why, traditionally, there has been no basis for a promissory fraud claim.[1365] The denial of legal protection can be witnessed in *Leonard* v. *Pepsico Inc*.[1366] where the Court found that the statement was of "joking quality" versus the contractual obligation found in *Carlill* v. *Carbolic Smoke Ball Company*[1367] where the reward was considered sufficient consideration to show that the statement was not considered mere puffery.[1368]

Although, *mere puffery* or business marketing ploys have not attracted legal debate,[1369] Preston claims the historic basis for non-intervention of the law results from tortious transformation of law[1370] which emphasized deception rather than falsity for reasons of evidence.[1371] He argues that puffery should be considered an illegal act due to the possible repercussions to a potential buyer but directs his comments primarily to slogans which might influence consumers to buy.[1372]

[1365] *Ibid* at 517.

[1366] 88 F. Supp. 2d 116, 118-21 (S.D.N.Y. 1999), aff'd, 210 F. 3d 88, 89 (2d Cir. 2000) (per curiam).

[1367] *Supra* note 90.

[1368] *Supra* note 42. Ayres/ Klass.

[1369] Ivan L. Preston, *The Great American Blow-Up: Puffery in Advertising and Selling*, London, England, University of Wisconsin Press, 1931, Revised 1996. *See* jurisprudence referred to by Preston at page 7: 2 Day (Conn.) 128 (1805).

[1370] *See ibid*. Preston claims: "A long, long time ago, the law of the marketplace adopted a rule of thumb to help it decide which seller's claims were legal and which were not. The rule brought some good results, but is also produced a bad effect…puffery…falsity is not always illegal."at 5.Misrepresentations which were not fraudulent were also not considered unlawful but Preston argues that the fraud barrier became challenged in 1663 with the case of *Elkins v. Tresham* where the court held that misrepresentation of the quantum of rent was equivalent to fraud when a Seller is advertising a building for sale.Preston refers to William L. Prosser & W. Page Keeton, Prosser & Keeton on Torts, 5th ed. 7238, 755 (1984) and then comments: "It is far easier to detect falsity than to detect deception. Falsity is objective; we can find it by looking at nonhuman objects. We can check to see whether the product for sale matches the stories told about it…Deception is different; it is subjective which produces considerable room for doubt." at 6.

[1371] *Ibid*. Preston refers to William L. Prosser & W. Page Keeton, Prosser & Keeton on Torts, 5th ed. 7238, 755 (1984) and then comments: "It is far easier to detect falsity than to detect deception. Falsity is objective; we can find it by looking at nonhuman objects. We can check to see whether the product for sale matches the stories told about it…Deception is different; it is subjective which produces considerable room for doubt." at 6.

[1372] *Ibid*. Preston at 13. Conversley, Lord Hershell in *Derrin v. Peek* cites: "All valid precedents declared that fraud could not exist where there was honest belief, no matter how foolish it might be: "A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he

The division between puffing and misrepresentation is only one example of some of the axiological considerations that can threaten the trust in business relationships. The legal line has been drawn by determining whether or not the representation was specific to a product or service, which is an element of misrepresentation, or whether the advertising was stated in general terms. General terms are not considered sufficient to induce a buyer to purchase a product.[1373]

We posit that it should be a matter of party choice and transparency. Should parties choose to conduct their relationship tolerating puffery, the buyer takes the risk that law will not protect him. However, if another standard of behavior, such as one of mutual good faith, or a higher degree of good faith undertaken by the seller, then puffery should not be permitted unless it has been specifically admitted expressly into the relationship; otherwise it is misleading to the opposing party. The reason for this default is the presumed intentions of the parties from a business perspective whereby TBN are a relationship aspired with, so a certain reliance on that trust is expected by the promisee and therefore should be protected by law.

There are two instances where the law has been known to intervene to enforce a certain standard of conduct:

- Insincere promises; and
- Consent to be legally bound by a certain standard of conduct.

Insincere promises: What are the repercussions of insincere promises? There are instances where the law will sanction insincere promises and impose remedies in "legal liability for insincere

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makes a representation on which another is to act, but he is not, in my opinion, fraudulent…" See footnote 15 citing Lord Hershell in *Derrin*] "The exemption of opinion and value statements, thus of puffery, began almost four centuries ago. [footnote 3] In *Harvey v. Young*, an English case of 1602 [footnote 4] …the claim [failed because it] did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion…" at 69.

[1373] *Castrol Inc. v. Pennzoil Co*. 987 F. 2d 939: "Puffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language. Such sales talk, or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer. The puffing rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific." cited at http://www.duhaime.org/LegalDictionar/P/Puffery.aspx is the legal definition of puffery: "Advertising which states in general terms that one product or service is superior and which does not otherwise imply any specific representation in regards to the product or service."

promising."[1374] Justification for legal sanctioning of insincere promises is that, in doing so, law promotes "the credible transfer of information about the promisor's intentions. Such information can tell a promisee whether it is in his interest to enter into the contract, with whom he should contract, and how much he should invest in reliance."[1375] Once again, law must rely on transparency to visualize promises that are insincere. It is considered that most people would cheat if they could get away with it so if parties were aware that they were recording promises, they would be less likely to attempt the indiscretion of insincere promises.

The interpretation of the promise is essential to establishing the promisor's intent at the time of the promise, but once it can be proved that the promisor did not have the intention to perform there can be a "basis of an action for promissory fraud even where there is no action for breach."[1376]

Extensive research was performed by Barnett, who was heavily influenced by two empirical researches charting promissory estoppel cases: Hillman,[1377] uncovered that twenty-five per cent of denied promissory estoppel claims were lacking reliance (Barnett interpreted this as detrimental reliance on a promise) and DeLong[1378] found that detrimental reliance was a necessary factor for a successful promissory estoppel claim. Barnett posits that "…theorist[s]…have advocated basing recovery on reasonable, justified, or foreseeable reliance. But…what exactly (or even approximately) constitutes the circumstances that make reliance reasonable, justified, or foreseeable so as to render the promise enforceable."[1379]

[1374] *Supra* note 42. Ayres/Klass at 532.

[1375] *Ibid* at 532.

[1376] *Ibid* at 339. Ayres/Klass draw this conclusion particularly insofar as the promise relate to option contracts, precontractual representations and illusory promises.

[1377] *Supra* note 42. Barnett (Is Reliance Still Dead). Barnett refers to Robert A. Hillman, "Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study", 98 Colum. L. Rev. 580, 600 (1998) at 4.

[1378] *Ibid* at 5. Barnett refers to DeLong, "The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22", 1997 Wis. L. Rev. 943.

[1379] *Ibid* at 7. Barnett identified two types of reliance: performance reliance and enforcement reliance. Performance reliance suggests only that a reasonable belief of reliance be identified whereas enforcement reliance requires a manifestation of intent to be bound thereby requiring proof of whether the bargain was relied on. Barnett questions whether on a normative level promissory estoppel action should be limited to cases in which detrimental reliance can be proved at 6.

Although Barnett changed his mind in later years, initially he reversed the burden of proof in commercial reliance: "A promise is enforceable when made in furtherance of an economic activity." Later, he realized that regulation schemes bear a "risk of over enforcement."[1380] He maintains that "[t]ort obligations are imposed upon the parties by the law regardless of their consent",[1381] yet concludes that a distinction is necessary for the preservation of freedom of contract,[1382] thus supporting the necessity of transparency.

Consent to be legally bound by a certain standard of conduct: Law may intervene when the parties have been expressly consented in a valid contract to be legally bound by a certain standard of conduct. However, parties can make choices with regard to the level of standard of conduct acceptable in their relationships insofar as they have not crossed the boundaries of a minimum standard of fairness.

There are commentators who maintain that "[n]o process can be self-sufficient in creating its own ethic. Truthfulness and fairness are values that derive their meaning from human experience and ideals…Thus far, efforts to improve bargaining ethics have been an empty vessel…[but] If left unattended, the danger is that they and the countless others who use negotiation will perpetuate not only the process but also its unethical practices."[1383]

In light of how much disclosure is necessary, the law has intervened to ensure that parties have adequate information to make a proper decision.[1384]

[1380] *Ibid* at 8.

[1381] *Supra* note 42. Barnett at 10.

[1382] *Ibid* at 11. "It is dangerous to individual parties to leave the loaded gun of section 90 [Restatement section] lying casually around for some judicial Oscar Madison to pick up and misuse…this is to protect the same freedom that contract law generally protects: the ability of parties to consent to binding obligations giving rise to a right of others to rely on those obligations." *See also* Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 53-57; 65-67; 101-02, 140-41; 154-55 (1998).

[1383] *Supra* note 1. Holmes Norton at 577.

[1384] *Ibid*. Holmes Norton clarifies:"Minimal truthfulness is necessary for a valid agreement, but absolute candor is not. The process demands truthfulness about the original price…but not about the ultimate settlement terms on which they might be sold…fairness is necessary for a valid agreement, but the use of distasteful pressure tactics between roughly equal parties is not unfair."at 576. However, Holmes Norton refers to Goldberg, Hillman and Mallor: "Recently, however, there have been attempts to use unconscionability where the parties have roughly equal status." at 378. *See also supra* note 434. Péloquin at 187 and 188. *See contra* Kathleen M. O'Connor and Peter J. Carnevale, "A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue", Pers Soc Psychol Bull 1997 23:504, DOI: 10.1177/0146167297235006.

> "Doest drafting ethical "rules" cut with too blunt a knife…Should ethics codes aim high for encouragement ("best practices"), the mean or "norm" of practice ("good practices), or for the bottom or bad practices that should be prohibited, condemned and disciplined ("worst practices")?" [1385]

Normative patterning of business negotiations through industry standards and merchant custom mutates and can be altered, within certain boundaries, by party choice if tools were available to record the intensity of the chosen standards, insofar as mandatory, bottom line standards remain unscathed. Therefore, standards of conduct within the business relationship, including whether puffery is tolerated, could be chosen through BON in an institutionalized setting. Using HCWT, party autonomy "provides an important continued emphasis upon the values of personal liberty and responsibility"[1386] poising the importance of contractual freedom with "external societal norms such as good faith, equity, non-oppression and reasonableness",[1387] quintessential for the development of a legal negotiation theory applicable to TBN.

2. Application of Hogg's Co-operative Will Theory of Contracts to the normative patterning of TBN

The application of Hogg's Co-operative Will Theory of Contracts to TBN includes a manner to record what TBN parties have consented to, based on Hogg's twin pillars: the freedom to consent to bind themselves to promises, agreements and the standard of conduct anticipated in their business relationship that is accompanied by a certain standard of fairness. Necessarily, the application of HCWT must be sensitive to the normative patterning of TBN. Regulation of TBN will remain inconsistent and *ad hoc* if it continues to be considered mostly under the "shadow of the law". We venture to evince negotiations as *sui generis*, quintessentially requiring a distinct set of rules to match

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[1385] *See* Carrie Menkel-Meadow, "Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts", 14 Harv. Negot. L. Rev. 195, 2009 at 200. Menkel-Meadow concludes; "…these great variations in human wrongdoing and right-seeking, is that clearly one size or one process does not and cannot fit all….The "appropriateness" of the process depends on the numbers of parties, whether they are in continuing or one-shot or ending relationships, whether they are disputing scarce or divisible or sharable resources, whether they want to resolve their disputes privately among themselves or….[whether they] involve the government or important public policy issues." at 228.

[1386] *Supra* note 11. Hogg at 33.

[1387] *Ibid*. Hogg at 34.

their true character. In an evolving global market, we can ill afford to be imprecise. A square peg in a round hole gains no more insight than a round peg in a square hole; doctrines of contract and tort, or a combination of the two, characterized during the adjudication of negotiations thwart the true characteristics of negotiations that beg a characteristic of their own.[1388]

2.1 Capturing the normative patterning of TBN communications

TBN communications are semiotic communications exchanged between TBN parties, based upon a certain understanding of merchant customs within an industry trade. These standards, as well as risk allocation, can be influenced by party choice and be "relaxed" insofar as a minimum standard is not breached, or expanded to increase standards of conduct.

Standards of conduct in TBN derive from two sources: internally, through party consent or implied within the fabric of the relationship between the parties, and externally, on the basis of merchant custom or law.

We have reviewed external standards of conduct imposed by law and custom[1389] and have gained further insight of the internal makings of party autonomy through business perspectives, as addressed by authors such as Ghauri, Lewicki and Cova[1390] who delineate how trust is created within business relationships. Trust is a commodity that is cherished, therefore deserving of protection through axiological standards inherent in the freedom of party autonomy. Trust necessitates a certain standard of conduct in order to guard this trust.[1391] Consequently, there is a minimum standard of conduct *internally* implied by the nature of the TBN relationship itself.[1392]

[1388] *Supra* note 629. Stephan queries: "With the transformation in international law's role have come fundamental changes in the way we think about its sources and methods. The move toward privatization seems logical and in some sense inevitable…The problem becomes not just changing the rules by which we play but changing the rules for determining what the rules are." at 1663. *See also supra* note 77. Zumbansen: "Transnational law is thus teaching us, while still in the process of emerging, something about is own necessity and the hard-to-follow architecture of global law and global governance." at 414.

[1389] *See* 2. in Section 1 of Chapter 1, Part II.

[1390] *Supra* note 15. Ghauri/Usunier; *supra* note 59. Lewicki (Interdependence) (Unethical Bargaining Tactics) (Interpersonal Trust Developmen); *supra* note 59. Cova (Project Negotiations).

[1391] The recognition of problem-solving approaches in negotiations, expanding the pie before the ultimate divisionIn TBN (which are sophisticated and complex, and rarely conducted through parties who remain strangers) the *purpose* of negotiations is to strike a mutual goal, beneficial to both parties,

This trust and cooperation incurs rights and obligations between the parties; some of which are inferred, and others stated, but not necessarily in a manner that the law recognizes. If law is to regulate TBN, it must maintain the flexibility of the negotiating processes and heed the *function* of negotiations which, according to the business perspective, is connected to party conduct. Business parties do not invest lightly in transnational negotiations; they create legal associations based on trust and cooperation.

The parties are also free to delineate their own scope and intensity of standards of conduct insofar as the minimum internal and external sources of these standards are met. Where the law can contribute is by identifying a manner for TBN parties to record these standards of communications and conduct to illuminate law to be able to grasp the innuendos of the communications exchanged between TBN, and record the intentions understood between the parties.

TBN have developed super imposed standards of conduct, similarly to what has been described as good faith implied by virtue of the parties' relationship.[1393] TBN parties prefer to regulate their own affairs, and business commentators acknowledge that behavioral standards are necessary to promote trust.

The intention to be bound in TBN transactions is the engine that generates movement towards the mutual goal whereas industry standards function to reduce the tensions between the self-interests of the parties by assuming a certain behavior. Poor conduct can take place in either competitive or problem-solving negotiations, although legal negotiation theory argues that bad conduct is more

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where parties are better in the association than without. We have queried: when does the law have an interest in intervening in transnational negotiations: If the bargain is fair and the conduct during negotiations is appropriate, the law has no interest. If the bargain is unfair and the conduct during negotiations is appropriate, the law generally has no interest. (barring certain exceptions) If the bargain is mutually satisfactory but the conduct during negotiations is inappropriate does the law have an interest? If the bargain is unfair and the conduct during negotiations is inappropriate, the law has an interest. Law should be interested in the conduct of parties during negotiations. If we classify negotiations as frivolous gestures that bear no consequences on the parties until a contract is finalized then negotiations could not be recognized in law. *See supra* note 179. Menkel-Meadow's integrated negotiating: "one prefers the cake and the other the icing" at 771. *See also supra* note 179. Lowenthal.

[1392] *See* 2.5.1 of Section 1 of Chapter 1, Part II.

[1393] *See* 2.5.2 in Section 1 of Chapter 1, Part II.

prevalent in competitive environments[1394] since it is considered that parties are more motivated to protect their own self-interests. In other words, the approach taken by the parties influences the behavior because of the intensity of parties' self-interests. Problem solving approaches suppose a mutual goal, thereby reducing the intensity of the self-interests and, presumably, poor conduct.[1395]

To be effective before proposing any kind of legal regulation, we must gather a better understanding of the business perspective of negotiations and how negotiations take place and their sub-processes.[1396] Oduntan declares that it is a myth to believe "that the study of the laws of International Business Transactions [IBT] is strictly a legal affair...devoid of political, sociological and psychological considerations. IBT as a field…is as dependent on socio-legal realities as any other field of legal ordering."[1397] Inherent in party behavior during negotiations, context is of great importance, "promoting a good decision-making process" a relevant element of negotiations.[1398] The mixture of defending self-interests while striving for a mutually enhancing position joins the parties together.[1399]

Certain conduct has been overlooked by law during business negotiations. Puffery,[1400] for example, is often considered a form of marketing strategy used during negotiations. Insofar as it is not considered misrepresentation in law, it is acceptable. However, how does this compare to a minimum standard of good faith in TBN? Measurement of good faith has been described by Crépeau

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[1394] *Supra* note 53. Menkel-Meadow at 775.

[1395] One danger lies in a situation where a party beguiles problem-solving techniques where he is truly only attempting to entice the opposing party's collaboration. Law has sanctioned this behavior by categorizing such actions as "misrepresentation". *See C.R.F. Holdings v. Fundy Chemical International*, [1982] 2 W.W.R. 385.; *Sidhu Estate v. Bains*, [1996] 10 W.W.R. 590 in CCL. The QCL would approach the matter on the basis of breach of good faith under Article 6 C.c.Q. or as a delictual offence.

[1396] *Supra* note 125. Macdonald (Illuminating) at 1118. *See also supra* note 77. Zumbansen (Piercing). Zumbansen urges: "[to address the function of transnational law and explore the role of the actors]…This implies at the minimum an interdisciplinary research agenda…Trying to recognise and to explore more exactly which concepts of law and society lex mercatoria is based on, opens the legal debate to insights from sociology, history and political science…" at 428.

[1397] *Supra* note 189. Oduntan at 91.

[1398] *Supra* note 208. Brown/ Caton Campbell/ Seminare Docherty/ Welsh at 854.

[1399] *Supra* note 346. Nadler reports: "Frequently, negotiations involve mixed-motive conflicts in which negotiators are motivated to cooperate just enough to ensure a settlement is reached, but at the same time, each negotiator is motivated to compete with each other to claim the greatest possible bargaining surplus for themselves." at 876. *See also supra* note 237. Thompson.

[1400] Puffery is defined in the BusinessDictionary.comas: "Advertising or sales presentation relying on exaggerations, opinions, and superlatives, with little or not credible evidence to support its vague claims. Puffery may be tolerated to an extent so long as it does not amount to misrepresentation (false claim of possessing certain positive attributes or of not possessing certain negative attributes."http://www.businessdictionary.com/definition/puffery.html

emphasizes that the meaning of the term "good faith" is contingent on context.[1401] Mr. Justice Leggatt addresses two aspects of good faith:

> "In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards."[1402]…"Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen."[1403]

How can honesty and fidelity contribute to the measurement of good faith? Mr. Justice Leggatt hints at the answer as he turns to address industry norms of conduct, or industry standards, to ascertain the degree of honesty, *fidelity* and *cooperation* required in TBN, necessitating the duty of good faith to consist of more than simple honesty in cross-border trade. In the world of negotiations where puffing and bluffing can be tolerated insofar as a party has not crossed the line of misrepresentation or fraud, we must consider the degrees in which these tactics are sustained.

2.2 Exposure of TBN parties' semiotic communications

Semiotic communications directly relate to how business negotiating parties make arrangements with one another, to which a party may rely on. When TBN parties negotiate, they exchange information regarding their own self-interests and the opposing party's interests to attain common goals. To achieve these goals, divergent self-interests must be reconciled into understandings and agreements between the parties.

Social behavioral commentators have developed theories on how parties communicate with one another to reach an agreement and why negotiations fail. De Dreu (et al) has developed a theory

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[1401] *Supra* note 1023. Crépeau.

[1402] *Supra* note 47. Yam Seng at para. [138].

[1403] *Ibid*. Yam Seng at para. [139]. [Then he refers to English case law on the interpretation of contracts in *Rainy Sky SA v. Kookmin Bank* [2001] 1 WLR 2900 and *Lloyds TSB Foundation for Scotland v. Lloyds Banking Group Plc* [2013] UKSC 3 at [23], [45] and [54]. He continues to explain in this paragraph that "cooperation in the performance of the contract has been implied: see *Mackay v. Dick* (1881) 6 App Cas 251, 263 and the cases referred to in Chitty on Contracts (31st Ed. Vol 1 at paras 13-012 – 13-014."].[our underlines].

merging Pruitt & Rubin's dual-concern theory, which focuses on motivation of the parties, and Bazerman &Neal's theory, based on cognition and rationality.[1404] A combination of the two theories enables the processing of valuable information to entice cooperation between the parties since the "exchange of accurate information, the deliberate and systematic processing of information that is or becomes available during negotiations, the willingness to learn and to adapt preexisting but incomplete cognitive understanding of the task, and the willingness to make trade-offs between unimportant and important issues."[1405] According to De Dreu, the behavioral processes during negotiations are "driven by the interaction between social motivation [the preference for a particular distribution of outcomes] and epistemic motivation [the desire to develop an accurate understanding of the negotiation problem]".[1406] Hall and Hofstede have contributed to an understanding of TBN social motivation by categorizing individual and social motivation based on culture and personality of the negotiators.[1407] How information is perceived directly affects "the effects of social motivation on strategic choice and negotiated agreement."[1408]

Trust and cooperation are signaled through semiotics,[1409] symbols that transfer communications from one party to the other to attain synchronization of the parties' interests. Some semiotics become expressed in an agreement or contract[1410] while others remain remote. Customary semiotics exchanged between business parties are identified by behavioral scientists as sequences within a normative framework which must be studied under etic and emic divisions to ascertain whether they have attained the appropriate standards of usage under law and therefore relate to the

[1404] *Supra* note 300. De Dreu.
[1405] *Ibid* at 928.
[1406] *Ibid*. De Dreu at 928.
[1407] *See supra* notes 72 and 73.
[1408] *Supra* note 300. De Dreu at 928.
[1409] *Supra* note 48 and 352. Druzin and Menezes.
[1410] *Supra* note 352 at 929.

normative aspects of negotiations.[1411] Perception, meaning how negotiators make decisions and conclusions between themselves, is based on "epistemic motivation"[1412] Epistemic motivation is described as "[i]ndividuals with low epistemic motivation are more likely to base their concession on heuristic cues, including irrelevant anchor information or stereotypic cues about their opponent[1413] whereas "[h]igh levels of epistemic motivation may lead people to engage in a more evenhanded consideration of the available information, thus considering both cooperative and competitive pieces of information."[1414] De Dreu summarizes:

> "When epistemic motivation is low, prosocially motivated negotiators are more likely than proself negotiators to engage in effortless, cooperative concession making, leading to relatively mediocre outcomes. But when epistemic motivation is high, prosocially, motivated negotiators engage in more problem solving, develop more trust, and reach more mutually beneficial agreements than proself negotiators."[1415]

Therefore, the review of signs, cues, signals, or semiotics exchanged between negotiating parties directly induces strategies and tactics chosen between the business parties, and consequently, the features and parameters of any agreement. Furthermore, negotiation communications are a repercussion of normative behavior. Semiotics can result from either customary and industry standards or from past understandings between the parties that are recognized by business parties but so subtle that they can be easily overlooked by spectators.[1416] This practice is signaled through symbols that transfer communication from one party to the other in an attempt to synchronize their mutual interests.[1417] Some industry standards and merchant customs are still in the making. Some

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[1411] *See supra* note 195. Adair/Brett and Adair. *See also supra* note 208. Docherty and Docherty/Campbell. *Supra* note 9 CCII. Swan at 68.
[1412] *Supra* note 300. De Dreu at 929.
[1413] *Ibid*. De Dreu at 929.
[1414] *Ibid*. De Dreu at 930.
[1415] *Ibid*. De Dreu at 941 and 942.
[1416] *See supra* note 48. Druzin. It is synonymous to children teasing each other; one child pointing a finger one-eighth of an inch away from the other's face claiming that she is not touching him. *See also supra* note 352. Leeson comments on cooperation and conflict: "Signaling through this shared practice allows heterogeneous traders to overcome the problems of uncertainty and informational asymmetries posed by their social distance." at 895.
[1417] *Ibid*. Druzin.

agreements are intangible in the eyes of the law as silent semiotics, understood between business parties, and therefore dynamic until these social norms can be recognized as legal norms.[1418]

Semiotics must be understood by law in order to comprehend the *silent* communications that take place between TBN parties in order to establish what semiotics mean to set standards of these communications. Lowenthal engineers the normative aspects of negotiation:[1419]

> "Therefore, the accepted conventions of negotiation operate as informal external rules, placing limits on the extent to which a negotiator may successfully employ competitive or collaborative tactics, and giving each party entering negotiation a fair sense of the rules by which another party will be playing."[1420]

The "notion of institution norms and the role of institutional context in normative application" has been compared to the sports industry to distinguish rules that are created within a normative context.[1421] Relational approaches portray contracts as co-dependent on the parties' long-term understanding and that contracts are merely "aggregates of these relations, [in which] only some of [the understandings in the relationship] are articulated." These relationships are based on contextual norms which must be interpreted bearing in mind trade standards that subsist as "unwritten" principles that apply as much as the codified rules [of law]"[1422]

Current legal understanding of the negotiation processes does not offer adjudicators an understanding of these semiotic intentions of the parties, let alone how those intentions are communicated between the parties and those intentions that are assumed by virtue of the relationship itself. Consequently, the characteristics of party understandings and commitments lead to faulty

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[1418] *Supra* note 352. Leeson sums up merchant semiotics: "The necessity of engaging in the customs and practices of outsiders to signal credibility and enable intergroup exchange was thus widely known and accepted by traders." at 895.

[1419] *Supra* note 179. Lowenthal comments: "A misunderstanding of the norms of retail sales negotiation in either country may result in a disadvantageous result for the tourist… The expectations of negotiations concerning accepted practices in transactions, as much as the payoff structure of the negotiation, influence a negotiator's appropriate choice of alternative strategies… They trust one another and accept statements concerning the other party's needs or resources as being truthful… The ancient rule of *caveat emptor* in many sales situations is based on norms of the business world concerning the meaning of an "arms length transaction". The seller's concealment of information in such a value system is understood to be a reflection of the bargaining process and consequently is an acceptable practice." at 98 and 99.

[1420] *Ibid*. Lowenthal at 99.

[1421] *See supra* note 110. Yovel at 39.

[1422] *Ibid*. Yovel at 42.

characterization of what the parties have actually decided. We will take a closer look at how intentions are communicated during TBN and, consequently how arrangements are established between TBN parties.

2.3 How is party intention communicated during TBN?

Law will not recognize arrangements made between TBN parties unless party intention to be legally bound has been communicated and evidenced in a form that can be recognized by law. Other disciplines have identified a semiotic approach of how intentions are communicated is based on culture and legal culture.[1423] Culture is a broad word to describe a "backdrop" in context of a particular community. In turn, the global trade community is divided according to contexts: sale of goods, investments and securities, trademarks and other intellectual property, and the like. Our journey into behavioral perspectives has devolved that merchant culture is impregnated with a "system of signs".[1424]

Arrangements between TBN parties are often verbal or incomplete. We have observed that law will not recognize a consensual promise or agreement without evidence of party intention to be legally bound. Often the form of these communications takes place can be through non-verbal cues, signals and semiotics. Oral communications can be made by telephone, Skype or face-to-face communications. Commencement of writings and partial agreements are prevalent in TBN, including the use of internet e-mails, are not necessarily considered binding in law. Only contracts have had the certitude of recognition by domestic laws, albeit they are subject to interpretation, if they are not very specifically and unambiguously expressed.

[1423] *Supra* note 352. Menezes de Carvalho at 3. Menezes refers to Geerz to explain the sub process: "[…] culture never represents a universal group, but only a subgroup with a certain organization. It never encompasses everthing, until it reaches a level with an own consistency. Culture can only be conceived as a part, as a closed area against the backdrops of non-culture" Lotman and Uspenskii (1981) at 37." at 6.

[1424] *Ibid*. Menzes at 7. This culture is an expression that "plays the role of structurally organizing the world surrounding the subject."

What we have learned through other disciplinary understandings is that there is a certain behavior adopted by TBN parties that is interdependent on a cooperative spirited relationship that promotes trust.[1425] Cultural frameworks stemming from the empirical research of commentators such as Hall and Hofstede have defined dimensions that aid in determining patterns of behavior prevalent from one culture to the next and how these cultures intermingle during TBN.[1426] These cultural frameworks influence the choices of strategies and tactics and how they are perceived by another negotiating party and are therefore significant to the study of the concept of expectations of the parties and their realization of mutual goals.

Halls' silent languages are meant to display the invisible nature of cultural communications, including the languages of time and space, that directly impact the social connections in the negotiation relationship. Hall contends that an understanding of these silent languages can aid business negotiators to develop relationships with one another. Agreements between TBN parties may be silent, such as the trust that is given to a handshake which is considered as binding as a written contract, backed by reputational social norms. Hall reiterates that verbal expression is not sufficient in many cultures of the world.[1427] Even verbal communications must be interpreted in accordance with context to create a "frame of reference – a way of sorting out what is significant and relevant."[1428]

The language of agreements can be particularly abstruse in TBN as assumptions will vary from one culture to the next on what understanding or what set of principles the agreement relies on.

[1425] *Supra* note 15. Ghauri.

[1426] *See supra* notes 72 and 73.

[1427] *Supra* note 72. Hall explains: "Conversation distance between two people is learned early in life by copying elders. Its controlling patterns operate almost totally unconsciously." at 91.

[1428] *Ibid*. Hall at 88. Hall adds three more silent languages: the language of things, how different cultures use their material possession for expression at 92; the language of friendship which differs from culture to culture, and the language of agreements. According to Hall, the language of agreements may be "one or a combination of three types": "Rules that are spelled out technically as law or regulation; moral practices mutually agreed on and taught to the young as a set of principles; and informal customs to which everyone conforms without being able to state the exact rules." at 93.

When oral communications take place that are not face-to-face, there is a greater potential risk of misunderstanding, due to the inability to capture these silent languages.

The purpose of face-to-face communications between TBN parties is for parties to "work together to find a solution to a joint problem."[1429] Since diverse cultures have varying patterns of communications and that some words connote different meanings to some cultures from other cultures "yes" may be "maybe" and "perhaps" may mean "no".[1430] How could parties express when they have struck an agreement? This question is precisely why it is imperative to strive for a standard of communications during TBN. In the Western hemisphere, agreements and contracts serve to provide a forum of investigation by the parties of what comprises their mutual agreements.

We have reviewed the threats suffered by business arrangements that fail to achieve contractual recognition and the problems that TBN parties face when their agreements are interpreted by a third-party adjudicator. Negotiations do not generally serve to interpret contracts in CCL, precluded by the parole evidence rule.[1431] There is a similar concern when general obligations are applied to TBN parties and pre-contractual liability.[1432] Hondius points out various exceptions where courts have developed liability both in the common law and civil law jurisdictions.[1433] Exceptions are dangerous, since there is no manner to anticipate their application.

Since TBN cross jurisdictional boundaries, language and cultural barriers can interfere with the true understandings or commitments exchanged between the parties, a standard of communications should be set to avoid misunderstandings. To learn from behavioral scientists how

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[1429] *Supra* note 15. Ghauri at 11.

[1430] *Ibid*. Ghauri at 14.

[1431] *Supra* note 12. Hondius refers to Farnsworth to describe the common law general rule: "The parol evidence rule suggests that precontractual dealings will in general be of no or of little influence." at 7.

[1432] *Ibid* at 7 and 8.

[1433] *Ibid* at 11-14: In the common law under estoppel, restitution and trade usage. Also in reliance and unjust enrichment. Grouping French civil law jurisdictions in another category which regard precontractual liability only on a delictual level and German-oriented jurisdictions who generally prefer the doctrine of c.i.c. which applies a contractual doctrine. In a nutshell, Hondius recognizes that precontractual decisions are more complex than "decisions that are usually analysed in the contract law-and-economics literature." at 8.

business parties around the globe negotiate, we propose to devise trade mechanisms that offer symbolic transfers of information and arrangements that engage business parties legally when confirmed between themselves. Prior to this practical application, we will discuss how legal theories could contribute towards the better regulation of TBN.

3. How can legal theories contribute to the functioning of TBN and dispute resolution? Edge pieces towards a normative cooperative legal negotiation theory of TBN

For a legal theory to contribute a methodology for the proper functioning and dispute resolution of TBN, it must understand the processes of negotiation, how TBN parties communicate with each other and what arrangements they intend to have legally binding. We have examined the processes of negotiation under business and behavior scientist's perspectives to ascertain that there is a patterning of human behavior that has developed over time and that legal theory must address how to follow this normative patterning. This includes understanding how TBN parties communicate with one another.

Legal scholarship should be offering foreseeable and steadfast theories that can be utilized in practice by law in action.[1434] Therefore, a LNT of TBN must be contributory towards the settlement of disputes, offering courts and arbitration circles a methodology to proceed with either specific principles or a theory that can enhance current principles in a practical application. Consequently, legal scholarship needs to consider the necessity for a LNT of TBN with a foundation that can aid the regulation of TBN disputes. To develop the edge pieces of a legal negotiation theory, we have identified three major factors of consideration to be integrated into a LNT of TBN:

[1434] *See supra* note 1182. Kreitner. See also Daniel Druckman, "Negotiation and Identity: Implications for Negotiation Theory", *International Negotiation* **6:** 281-291, 2001; Richard A. Falk, "The Adequacy of Contemporary Theories of International Law- Gaps in Legal Thinking", 50 Va. L. Rev., 231, 1964.

- ❖ re-characterization of the concept of negotiations as promises, agreements and relationships, using HCWT;
- ❖ recognition of the amity in TBN relationships as a continuum and the basis of party autonomy as its own juridical order; and
- ❖ setting flexible standards of TBN parties' communications and conduct through party choice by following the normative pattering of business negotiations.

3.1 Re-characterization of negotiations

Re-characterization of negotiations includes the recognition that there are three essential, ongoing functions during the processes of negotiation. There are promises and agreements exchanged during the processes of negotiation, (represented by negotiation steps that are proposed and confirmed through negotiation positions)[1435] and a relationship in the process of building (represented by choices made within negotiation stages).[1436] Promises are exchanged and relied on, inherent to the processes of negotiations. We will recall that parties make promises to one another during negotiations that give rise to obligations.[1437] Some examples of these promises include a promise to keep confidential trade secrets, a promise to disclose adequate information or a promise to investigate obstacles that may counter the mutual goal.[1438]

We have also noted that, on a practical level, promises are often not recognized as contracts unless the promise is exchanged for another promise.[1439] Legal theory has elucidated five potential objections to the theory of contract based upon promise, all of which Hogg has refuted,[1440] leaving no good reason why a contract cannot be a promise. A contract can also be an agreement or consent. We have reflected on the theory of contract based upon agreement and the criticisms of the theory of

[1435] *See* 1.2.2 and 1.2.3 in Section 2 of Chapter 1, Part I.
[1436] *See* 1.2.1 in Section 2 of Chapter 1, Part I.
[1437] *Supra* note 11. Hogg at 19.
[1438] *See* 1.2 of Section 1 of Chapter 1, Part II.
[1439] *Supra* note 379. Waddams.
[1440] *See supra* note 11. In particular, Hogg at 20.

contract based upon agreement, to which Hogg has responded. Hogg counters each of these criticisms, standing upon the firm foundation of his "twin pillars".[1441]

In practice, there is a divide between common law jurisdictions and civil law jurisdictions on what is required to validate an agreement and how to determine party intention, so we proposed an alternative view of negotiations to be reconsidered. The fact that negotiations are mini, inter-connected agreements of a particular matter at any given time, the role of contracts can only serve if these agreements can be exposed in tangible form and fall into the recognition by law of valid contracts. However, we mined through current legal regulation of negotiations[1442] only to conclude[1443] that there is great uncertainty as to whether a negotiation agreement will be recognized by domestic laws or not, let alone a promise.

We reviewed similarities and differences between tangible negotiations and contracts and how they fit within the scope of party autonomy.[1444] We concluded that contracts and negotiations resulting out of TBN have, in common, the fact that a relationship is building.[1445] During the construction of the relationship the parties exchange promises which a party could justifiable rely on and form agreements which must be proved in law to have the intention to be legally bound. Hogg includes contracts based upon relationship as the third factor within the amalgamation of his co-operative will theory of contacts. We exposed that the development of a TBN relationship is not static and therefore classical contract doctrine is unable to follow all the exchanges ongoing in the TBN relationship.[1446] Classical contract doctrine does not take into consideration the normative elements of

[1441] *Ibid*. Hogg at 15. Hogg's twin pillars are comprised of party intention and agreement.
[1442] Chapter 2, Part I.
[1443] *See* Section 1 of Chapter 1, Part II.
[1444] *See* Section 1 of Chapter 2, Part I.
[1445] *See* 1.2 in Section 3 of Chapter 1, Part II.
[1446] *See* 1.2 in Section 3 of Chapter 1, Part II.

the TBN relationship, which are based on efficiency, autonomy and certainty[1447] and involve a duality of competitive and "problem-solving" approaches,[1448] trust[1449] and "interdependence".[1450]

To develop trust, we analyzed the two influential factors identified by Lewicki: the perception of the outcome and the perception of the process,[1451] which balances the tensions between the parties' interests and enhances the chances of attaining mutually satisfactory goals. Expectations of the parties are featured during TBN to delineate between short term and long term goals thus early perception of the kind of relationship the parties are developing is essential to avoid investments of time, money and unforeseeable legal liability. Patterns of negotiations reveal how the parties exchange positions of conflict to rise to the next stage.[1452] While exchanging positions of conflict, TBN parties use varying techniques that are dependent upon, amongst other things, a wide variety of cultural values of the parties.[1453] We have learned, through the works of Hall[1454] and Hofstede[1455] that culture is much wider than simply national customs. It includes at least six pairs of cultural considerations, calculated in accordance with the jurisdictional cultures the TBN parties are negotiating from.[1456] Hofstede has located a probable formula of patterning based on the cultural background of the parties polarized in terms of "low context" and "high context" features.[1457]

Cooperation is a necessary factor to combat opportunism. Opportunism is considered a threat on a business perspective that interferes with successful negotiations and influences standards of

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[1447] *Supra* note 11.
[1448] *Supra* note 49. Usunier.
[1449] *See supra* note 15. Ghauri at 4.
[1450] *See supra* note 59. Lewicki at 24.
[1451] *Ibid*. Lewicki at 26.
[1452] *Ibid*. Lewicki at 24.
[1453] *Supra* note 15. Ghauri at 13.
[1454] *Supra* note 72. Hall.
[1455] *Supra* note 73. Hofstede.
[1456] *See* discussion in Section 2 of Chapter 1, Part I.
[1457] *See* 2.1 in Section 2 of Chapter 1, Part I.

behavior between TBN parties.[1458] Law has an interest in social phenomenon. Negotiations are an innate part of human activity and therefore law should have an interest for two reasons: to guide conduct between TBN parties without unduly interfering in their activity and to protect the normative requirements of TBN parties.[1459] But, if law is to have more than an opaque view we need empirical evidence to perceive the processes of negotiations and outcome of negotiations that influence party conduct. The lack of quantitative data leads us to believe that the creation of monitored trade mechanisms will serve both business parties by providing transparency between negotiating parties and evidence to adjudicators who are called upon to settle disputes. Law can guide standardized communications and conduct through party choice, acceptable under the three sources of law.[1460]

To provide party choice, law must be able to follow the normative behavioral patterning in the event of a dispute, whereby parties are free to agree on the level of good faith they wish for their relationship, directly impacting the allocation of risk between the parties and, as a result, which party must perform due diligence.

3.2 Recognition of the amity in TBN as a continuum

The TBN relationship between negotiating parties is a continuum. It begins when the negotiation dance can be identified and continues until the business relationship comes to an end. The relationship continues along a dynamic path, traveling through various stages of negotiations. Once the negotiation dance has begun, there are possible legal ramifications between negotiating parties, consequences of which (amongst other factors) are contingent on the intensity of the relationship; in other words, how close the parties are to reaching their mutual goals.

Law cannot comprehend the extent of the business relationship, so how is law supposed to find adequate remedies? Even so, the aptitude displayed by some adjudicators to recognize the outcome of

[1458] *See supra* note 237. Thompson at 57 and 58.
[1459] Section 2 of Chapter 1, Part I.
[1460] *See* 1. In Section 1 of Chapter 1, Part II

an imbalanced relationship has prompted the discretion card to provide a remedy to an injured party, creating exceptions rather than general rules. Regrettably, this very fact has caused uncertainty and unpredictability; the two very things the law aims to provide by seeking harmonization in our global world.

3.3 Setting standards of TBN parties' communications and conduct through party choice

Delineating the line that TBN must not cross and determining the boundaries of the legal ballroom is the first step towards setting flexible standards of TBN communications and conduct. To date, law has had little success in finding a method in which to determine the parties' commitments during TBN. Nevertheless, certain standards have been applied by domestic courts and international arbitrators. Semiotics is not a concept easily illuminated in law, but these signals are not a new phenomenon. In fact, Oduntan remarks that: "[e]ventually merchants driven by economic goals began to speak in a common language."[1461]

If law could guide these standards of communications in a transparent fashion, TBN parties would have more freedom to design their own arrangements in a manner that both business and law could properly understand. Assumptions and presumptions resulting from silent communications that are misunderstood between parties from different cultures, need a manner of communicating and confirming communications that would fade these assumptions and presumptions away. Standardized symbols of communications would aid the understanding of party intention and the way parties conduct themselves during TBN. Matters, such as the capacity of the parties are more difficult to verify and validate internationally. An institutional legal centre could provide this verification process to ensure the security of TBN deals; a necessary attribute during negotiations.

[1461] *Supra* note 189. Oduntan at 93.

"The structure of negotiations presents a basic ethical tension" between gaining of a means and dealing with a person."[1462] The road that the negotiation parties travel is continuously fraught with tensions between self-interests (adversarial) and striving towards a common goal on the other (requiring problem-solving). The most important feature of fairness is awareness: parties must know and understand the playing field: the rules of their game;[1463] the rules of their relationship.

Conclusion: A new legal theory of negotiations regarding TBN requires re-characterization of the concept of negotiations as promises, agreements and relationships, using HCWT. Furthermore, recognition of the amity in TBN relationships as a continuum and the basis of party autonomy as its own juridical order; and setting flexible standards of TBN parties' communications and conduct through party choice by following the normative pattering of business negotiations. A legal negotiation theory of TBN begins with the recognition of party autonomy as its own juridical order, recognizing TBN as providing the terms for promises, agreements and relationships, based on party choice thus, promoting party autonomy.

To regulate, law must develop a legal theory of negotiations. Michaels has commented on the "poverty of theoretical discussions, calling for a "legal theory of party autonomy with a foundation."[1464] We posit that a new theory of negotiations has a foundation based on the application of HCWT.

A fresh alternative view of negotiations as a continuum is essential for law to vanquish current stagnation and rise to the velocity, complexity and sophistication of e-commerce. TBN are like an umbrella that shades semiotics of the processes of negotiations. This calls for re-characterization

[1462] *Supra* note 179. Cohen at 119.

[1463] *Ibid*. Cohen invokes: "Others may invoke concepts like consent: "The parties all know how the game of negotiation is played. It's a dog-eat-dog activity, but when one enters the arena, one consents to the rules." at 118. Cohen concludes his article: "What is wrong to do to another person is not excused by the act of negotiation." at 119.

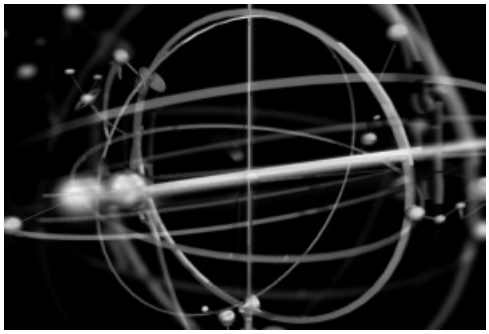
[1464] *Supra* note 80. Michaels at 3.

whereby law can embrace the socio-economic characteristics of negotiations and identify the patterns of behavior that have developed into legal norms.

With the application of HCWT to negotiations, the anatomy of business obligations can be dissected by, firstly, assessing when negotiations have begun. Secondly, recognition that once negotiations have commenced law could recognize the promises and agreements that are often partial or incomplete using the plurality of legal concepts found in Hogg's theory. Viewing negotiations as a promise, an agreement and a relationship will aid in the standardization of negotiation communications, the recognition of standards of conduct expected of TBN parties and a manner to aid adjudicators in determining the scope and intensity of legal obligations during negotiations generally.

CHAPTER 2: HOW THE GYROSCOPE SPINS

A Practical Application: How a Juridical Gyroscopic Orientation Can Ameliorate the Legal Regulation of TBN



http://hdfootagepro.com/videos/gyroscopie

"...human affairs wou'd be conducted much more for mutual advantage, were there certain symbols or signs instituted, by which we might give each other security of our conduct in any particular incident."[1465]

"Laws ought to be adjusted to the habits of society, and not to aim at remoulding them...Custom, and what is called common sense, regulate the great mass of human transactions."[1466]

The axis of our metaphorical gyroscope is designed to reconcile tensions, stabilizing regulatory sources of law. The gyroscope is "[a] device consisting of a wheel or disk mounted so that it can spin rapidly about an axis that is itself free to alter in direction. The orientation of the axis is not affected by tilting of the mounting; gyroscopes can be used to provide stability…"[1467]

In the context of TBN, the metaphoric vision of the gyroscope is a way for all sources of law to support the degree of party autonomy required during TBN using new trade mechanisms, which we have termed "bills of negotiation" [BON]. BON offer freedom for the parties to make arrangements, promises and agreements, recorded in a manner that all sources of law can recognize as legally binding. These mechanisms offer flexibility to party autonomy, promoting it as a juridical order in TBN that "provides stability". The gyroscopic scope is accompanied with a manner to choose levels of acceptable standards of conduct within the business relationship that honours both internal standards and external standards established by law, by custom and by the parties themselves.

[1465] *Supra* note 1256. Markovits refers to Hume`s quote at 1333. [our underline].
[1466] *Supra* note 16. Christopher Woodsat 424.
[1467] Oxford distionaries http://www.oxforddictionaries.com/fr/definition/anglais_americain/gyroscope.

Section 1: The Proposal of New Trade Mechanisms termed BON

The threats due to faulty characterization of negotiation and insufficient specific laws regarding negotiations only validate that there is no "quick fix" to furnishing specific *sui generis* rules for TBN parties. Our mission in this thesis started on a practical level to find a solution to accommodate the conundrum of how to regulate TBN. Having identified a need for new trade mechanisms that could be registered privately between the parties, monitored and secured for future use, we began our quest to analyze trade mechanisms that have worked in practice over many years and have become accepted by most of the modern world.

1. The inspiration of the proposal of BON

The origin of the concept of BON was inspired by my father, who was a chemist. His last contribution prior to retirement was the completion of a catalogue to outline uniform truck symbols across Canada. These symbols distinguish the goods in carriage to officials that regulate trucks with symbols. Likewise, the BON are expected to act as symbols to transparently guide TBN parties. These symbols will be chosen, marked, monitored and registered in a securitized administrative BON Centre in accordance with international business requirements. The symbols are expected to reflect "business language" exchanged between parties negotiating from different geographic jurisdictions that will become adopted by TBN parties across the nations, requiring minimum linguistic or cultural interpretation.

Like bills of lading that reference INCOTERMS, these symbols will allocate risk but also determine division of labour between TBN parties and record promises and agreements that are decided and revised during the TBN relationship. They will record what kind of relationship TBN parties wish to have with one another. They will demarcate the stages of negotiations (when the parties enter into a new negotiation stage) remind parties not to be remiss of the positions of

negotiations through relationship BON and offer choices to TBN parties of various levels of standards within the relationship they desire to develop. Promise BON and Agreement BON could be available each step of the way as TBN parties form arrangements in which they wish to be legally bound (or not). A BON Centre could institutionalize the setting and cater to the growing global needs of TBN.

There is a need for more security for TBN parties during negotiations. As a practicing notary under QCL, my mission has been to securitize contracts. A notary is responsible to certify the identify of the parties to ensure that the parties have the authority and ability to contract. A notary must record promises and agreements to expose the legal obligations that the TBN parties wish to be legally bound so that they can be recognized by law. A notary must offer consultation and guidance, including solutions and options along the contractual path that includes formation, performance and extinction of a contract. A notary is responsible to hold security deposits in escrow to ensure the buyer receives his goods and that the seller will be paid following delivery of the goods. TBN parties require a no fuss method to proceed down the path of negotiations in a speedy and expeditious manner. TBN parties can also benefit from a fast track arbitration system that can provide a solution to unresolved disputes. These securitizing elements are what we propose in our new trade mechanisms.

BON will be initially launched in the Western hemisphere,[1468] supported by a legal negotiation theory based on HCWT. They are intended to deliver autonomy to TBN parties through choices that will begin with when negotiations begin and mark when the parties have crossed to another stage of negotiations (and therefore the intensity of the relationship.)[1469] Horizontal BON will aid the parties with choices to enable them to review their own interests, each other's interests and determine their mutual goals. Vertical BON will follow each step of the negotiation path. With vertical BON, the

[1468] Our next project will focus on the introduction of BON through the gates of Japan and beyond.
[1469] *See supra* note 497.

parties will access three levels of BON. Relationship BON will defer to the nature of the relationship between the parties and their expectations regarding conduct during negotiations, including the choice of level of good faith. Promise BON solidify unilateral undertakings that have been arranged between the parties, such as the promise to obtain licensing to sell,[1470] or any other promise meant to be relied on during the negotiation processes. Agreement BON are directed to clarify bilateral commitments that have been agreed upon between the parties requiring performance by one or more of the parties. BON will rest on a foundation of good faith which will have levels of choice, such as utmost good faith that guarantees the sellers' statements and product information, standards of good faith expected by a certain trade community, and relaxed good faith that condones misrepresentation but offers no guarantees to any exaggeration or boasting to promote one's goods. The inspiration of BON has been motivated by bills of lading due to their compact, laconic form.

2. The background of trade mechanisms in international dealings

Mechanisms of trade have developed in international trade to facilitate transactions and increase security to business parties,[1471] such as bills of lading (developed to allow the transfer of goods to take place to the rightful buyer in absence of the seller's presence), guarantee instruments, such as letters of credit (that substituted cash deposits and secure payment to the beneficiary, upon shipment of the goods to the buyer (generally a seller of international goods),[1472] and INCOTERMS that can now be attached to bills of lading for risk allocation purposes.

The bill of lading was designed to document the goods on a ship and transfer said goods to the purchaser. The letter of credit enables the transfer of said goods, defined as "a notice addressed by its issuer to a beneficiary, setting out an undertaking to honour a specified demand for payment that may

[1470] *Supra* note 47. Yam Seng.

[1471] International laws strive to harmonize trade mechanisms for the facilitation of the global market.

[1472] Paul Todd, *Bills of Lading and Bankers' Documentary Credits*, Lloyd's of London Press Ltd., London, England, 1990. Paul Todd enunciates that:"[The seller] would be taking a great risk in going to the trouble and expense of obtaining (possibly even manufacturing) and consigning goods without some assurance that he will eventually be paid for them." at 3. Todd further cites Lord Justice Devlin in *Midland Bank Ltd. v Seymour* [1955] 2 Lloyd's Rep 147, 165: "Well, of course, basically the confirmed credit is designed to give the seller the security he wants before he ships goods." at 3.

be made by the beneficiary."[1473] The letter of credit, unlike its counterpart independent guarantee, entails "dealing with the normal carrying out of export transaction."[1474] Letters of credit are usually irrevocable since a revocable credit does not offer security to the beneficiary because it may be modified or even cancelled by the guarantor without notice to the beneficiary whereas an irrevocable letter of credit, save the transferable credit exception, cannot be cancelled or amended without the agreement of the beneficiary.[1475]

A cost reduction ensues in electronic transfers since there is less double handling and a reduction of re-keying errors.[1476] Issuing credits and transferring information regarding a letter of credit is already electronic. The UCP 500 foresees this possibility[1477] and the eUCP was designed to further supplement and standardize electronic letters of credit rules. Woods points out that: "[c]entralized recording systems provide alternate methods to physical transfer"[1478] with negotiable instruments. He suggests that either we "exclude negotiable instruments from the scope of writing and signature legislation" or use the Electronic Transactions Act [ETA] control approach.[1479]

INCOTERMS are another example of a trade mechanisms, symbols that can be chosen by the parties as rules for any mode of transport.[1480] These instruments, developed out of business necessity,

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[1473] L. Sarna, *Letters of Credit The Law and Current Practice*,Carswell,Toronto 1986 at 126.

[1474] Nobert Horn and E. Wymeersch, *The Law of International Trade Finance*, Volume 6, Edition Nobert Horn, 1989, Kluwer Law and Taxations Publishers, Netherlands at 1 Article 6(c) UCP 500: "In the absence of such indication the Credit shall be deemed to be irrevocable."

[1475] Article 9(d) UCP 500: "Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary."

[1476] *Supra* note 16. Woods explains some advantages: "Electronic presentment also eliminates the cumbersome and unnecessary process of physical presentment." at 453.

[1477] Article 12 UCP 500.

[1478] *Supra* note 16. Woods at 454.

[1479] *Ibid.* Woods refers to David Whittaker: "In essence, [section 115] provides a statutory alternative to delivery, indorsement and possession, the three physical attributes of a negotiation. It is intended as a 'bridging' section, providing immediate relief from the writing requirement of Article 3, but with the expectation that NCCUSL will take up more extensive review of payment systems rules and their application in the near future." at 455.

[1480] EXW Ex Works "Ex Works" means that the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e.,works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable. FCA Free Carrier: "Free Carrier" means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point. CPT Carriage Paid To "Carriage Paid To" means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination. CIP Carriage And Insurance Paid To "Carriage and Insurance Paid to" means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for an pay the costs of carriage necessary to bring the goods to the named place of

thrived once it could be proved that they could provide transparency and uniformity to international trade. Letters of credit and INCOTERMS did not suffer the same anguish of recognition as bills of lading due to the ability to recognize party autonomy in these instruments.

Law was resistant to recognize bills of lading in the first instance. Historically, where a seller did not have his own transportation for goods to travel overseas, and if the seller could not accompany the goods, he would obtain a tangible item, a memorandum of the shipping bargain from the carrier. Disputes arose between the shippers and the ships' masters about exactly which goods had been delivered on board and it became necessary to enact statutes to require that a clerk be present along with the ship master, shipper and to witness to record the goods into a log. By 1397, the bill of lading began in a primitive form as a copy of the log entries entered by the clerk. "The courts were slow to

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destination. 'The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements." DAT Delivered At Terminal "Delivered at Terminal" means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. "Terminal" includes a place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination. DAP Delivered At Place "Delivered at Place" means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place. DDP Delivered Duty Paid "Delivered Duty Paid" means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities. RULES FOR SEA AND INLAND WATERWAY TRANSPORT as Free Alongside Ship "Free Alongside Ship" means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards.

- FOB Free On Board

"Free On Board" means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

- CFR Cost and Freight

"Cost and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.

- CIF Cost, Insurance and Freight

"Cost, Insurance and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.

'The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements."

recognize the bill of lading as a legal document."[1481] The bill of lading, eventually, replaced the need for the clerk and became evidence that the goods were delivered to the ship master.[1482]

To harmonize the use of bills of lading and balance the allocation of risks between the seller, carrier and buyer, *Hague Rules*[1483] were convened in 1931. Today the CCL still applies Hague-Visby Rules through domestic legal ratification by virtue of the *Bill of Lading Act*[1484] (BLA) and the *Marine Liability Act* (MLA).[1485] Under QCL, the C.c.Q. governs carriage of property.[1486] Interestingly, a bill of lading is not negotiable under QCL unless specified in a contract or provided, otherwise, by law.[1487] Attempts to modernize rules relating to bills of lading have not been universally embraced,[1488] and the latest challenge has been advanced by the Rotterdam Rules[1489] of 2008 which appears to have promoted the concept of e-BL.[1490]

The characteristics, role and purpose of bills of lading: There are three characteristics of a bill of lading that articulate the role and purpose of bills of lading. The bill of lading serves as a **receipt**[1491] of goods by the carrier to the shipper, proof of the **existence of a carriage contract** and **constructive possession** of the goods in transit.

[1481] C. McLaughlin, "The evolution of the Ocean Bill of Lading" (1936) 35 Yale Law Journal, 548 at 553.

[1482] *Supra* note 1467. Todd declares:"The documents which developed to resolve the obvious conflict between the interests of buyer and seller, and to provide adequate security for the bank, was the bill of lading"6.

[1483] *International Convention for the Uniform of Certain Rules Relating to Bills of Lading* 25 August 1924, 120 UNTS 155 (June 2, 1931). The Hague Rules were later amended in 1979 through the *Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading as Modified by the Amending Protocol* of 23 Febraury 1968 [Hague-Visby Rules].

[1484] R.S.C., 1985, c. B-5 (BLA 1985).

[1485] S.C. 2001, c. 6. *See* Section 43. CCL, therefore, still requires a paper bill of lading for the buyer to acquire rights of title against the carrier unless, at the time of each transfer, a new contract has been formed (thus new consideration). There are also specific statutes under CCL, including the *Carriage of Goods By Water Act*, SC 1993, c.21 and the *Bill of Lading Act* R.S.C., 1985, c.B-5 (BLA 1985).

[1486] Articles 2040 *et s*.

[1487] Article 2043. C.c.Q. If the bill of lading is negotiable, it is "effected by endorsement and delivery, or by mere delivery if the bill is made to bearer." Quebec distinguishes between carriage of property and specific rules regarding carriage of property by water in Article 2059 C.c.Q. *et s*.

[1488] *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 UNTS 3 (November 1, 1992) [Hamburg Rules].

[1489] *The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 11 December 2008, 63 UNTS 122 [Rotterdam Rules].

[1490] Although there is mention to written form of a bill of lading as "endorsed", the Rules elude to an "electronic Transport record" as though it has the same acceptance as paper records. See Articles 1(9), 1 (10)(b), 1(11), 1(18), 1(21), 1(22) and 1(23) as well as Article 6(2)(b), Article 10, Article 25(4), Article 35, and Articles 39(1) and 39(2)(a). Signatures are dealt with under Article 38 which require that the e-records identify the signatory in relation to the e-BL as well as the authorization by the carrier of the transport records. (Article 38(2)).

[1491] The carrier is obligated to issue a bill of lading upon demand by the shipper under Article Article 15(1).

As a ***receipt***, the ideal bill of lading is one which is marked "shipped" (rather than merely "received for shipment") and a "clean" shipped bill of lading represents more than a simple receipt, rather a type of guarantee to the eventual buyer. The receipt includes evidence of the quantity, weight, condition and identification of the goods for shipment, along with the date the carrier received the goods, the date the goods are loaded on the ship, identification of the ship and the port of discharge of the goods. Essentially, the receipt signifies that the seller has completed his obligations to the buyer regarding the contract of sale and the carrier attests that the goods loaded are in apparent good order.[1492] Secondly, the bill of lading serves as ***evidence of a carrier contract***, often contained in the contract of sale of goods itself. If a bill of lading is "shipped" and "clean", it confers contractual rights of the contract of carriage to the buyer or endorsee.[1493] The most complex characteristic of the bill of lading, which is also its largest attribute, is that it represents **constructive possession** of the goods for the buyer or endorsee,[1494] so that title can transfer during transit.

Disadvantages of the paper form of bills of lading prompted attempts to dematerialize it to e-commerce [e-BL] due to its disadvantages. Paper form was considered too lengthy a process, as the ship could conceivably arrive before the documents, increasing demurrage expenses and storage costs. Two great advantages of transmission by electronic data include speed and administrative cost reduction. The speed in which documents can be processed translates into transaction costs. Should a ship arrive with goods prior to the arrival of documents costs of demurrage or storage costs could have been avoided by use of electronic means. Secondly, there is a cost reduction in electronic

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[1492] Roy Goode, *Commercial Law*, Third Edition, Middlesex, UK, Lexis Nexis and Penguin Editions, 2004. Goode expounds:"The bill of lading also serves as a receipt by the carrier. It is prima facie evidence in favour of the shipper, and conclusive evidence in favour of the consignee or indorsee, that the goods were received on board in the number or quantity or of the weight stated."at 904.

[1493] *Diamond Alkali Export Corp v. Fl. Bourgeois* [1921] 3 K.B. 443.

[1494] *Supra* note 1472. Todd. Todd refers to*Lickbarrow* v. *Mason*,"...whether a document is a document of title is a question of fact, depending on the custom of merchants..."at 76. Todd contendts that whether a bill of lading is a document of title depends on custom and only because the shipped bill of lading has triggered the Bill of Lading Act, it has become a document of title because at common law, the custom of merchants has recognised this fact for the last two centuries. Duties and liabilities of the carrier are described in Article III of the Hague-Visby Rules.The carrier is liable for the value of the goods so he is obligated to deliver the goods only to the holder of the original bill of lading.

transfers since there is less double handling and a reduction of re-keying errors.[1495] What we can learn from e-BL is that success is only attained when dematerialization is connected to a registration system that uses asymmetric cryptology.

The United Nations, through working groups appointed by UNCITRAL has encouraged national customs to accept documentation in electronic form by instituting the *Model Law for Electronic Commerce*. The study showed two important conclusions. Firstly, that there should be no problem producing computer records as evidence even though they are not originals. Secondly, those documents required in some jurisdictions to be in writing or manually signed before witnesses form an obstacle to the acceptance of electronic data processing.[1496] Electronic commerce is not without uncertainties. Not all parties in every jurisdiction have the appropriate technology to transmit electronically and therefore require a conversion process to authenticate the electronically transmitted documents.

In practical terms, e-BL cannot easily replicate a "*writing*" as electronic "*writings*" have no physical attributes and no "original" and therefore raise a doubt as to whether an e-BL can be a negotiable document of title. Secondly, can constructive possession be transferred without the requirement of a manual signature to validate the authenticity of the transfer? Formalities, such as writings and signatures, are an integral part of our legal system, as they serve to provide evidence and authenticity to documents which are produced between parties. Contracts which have used electronic transmissions where formal requirements, including the requirement of manual signatures, fail to be

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[1495] *Supra* note 16. Woods explains some advantages: "Electronic presentment also eliminates the cumbersome and unnecessary process of physical presentment." at 453. Issuing credits and transferring information regarding a letter of credit is already electronic. The UCP 500 foresees this possibility at Article 12 UCP 500 and the eUCP was designed to further supplement and standardize electronic letters of credit rules. Woods points out that: "Centralized recording systems provide alternate methods to physical transfer" at 454. Woods suggests that either we "exclude negotiable instruments from the scope of writing and signature legislation" or use the Electronic Transactions Act [ETA] control approach. Woods refers to David Whittaker: "In essence, [section 115] provides a statutory alternative to delivery, indorsement and possession, the three physical attributes of a negotiation. It is intended as a 'bridging' section, providing immediate relief from the writing requirement of Article 3, but with the expectation that NCCUSL will take up more extensive review of payment systems rules and their application in the near future." at 455.

[1496] J. Winn, "Electronic Credit Transactions, Legal Aspects" found in Horn, N. Edition of *Legal Issues in Electronic Banking*, Kluwer Law International, Netherlands, 2002, at 260.

recognized as valid in local laws since a contract is considered evidential and, as a result, may not be enforceable between the parties. On the other hand, the "best evidence rules" are changing. "...Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence..." [1497]

Along with writing requirements, many contracts have signature requirements. A signature serves to identify its author and shows that the author recognizes the document as his legal intention, for which the signature serves to authenticate the document.[1498] Historically the physical and legal characteristics of a signature, included: "any kind of mark is acceptable provided it is affixed by the person or by some person authorised by the person intended to be bound."[1499] The signature of a bill of lading is integral to its legal integrity since the primary function of the bill of lading is its negotiability, and to attain negotiability the bill must be signed to complete the transfer.[1500]

Whether electronic data can satisfy the requirements of a formal writing is dependent on the type of writing required by domestic laws and, although many jurisdictions have adopted *Electronic Signature Legislation*,[1501] there are exceptions within these developed jurisdictions.[1502] The function

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[1497] Christopher Nicoll, "Should Computers be Trusted? Hearsay and Authentication with Special Reference to Electronic Commerce" [1999] JBL July issue 332. Nicoll refers to Lord Justice Ackner at 339. Reference is also made to *Blackstone's Commentaries on the Law of England,* (The Legal Classics Library (1983) Book II, Ch 20, 305).

[1498] This affirmation exists in 2827 C.c.Q.: "A signature is the affixing by a person, to a writing, of his name or the distinctive mark which he regularly uses to signify his intention."

[1499] Georgia Warren, "Overview of Electronic Commerce Law", International Journal of Electronic Commerce Law & Practice, Volume 1, Issue 2, November 2000. Warren: "we are assured by all our ancient historians that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write."; Martin Hogg, "Secrecy and Signatures-Turning the Legal Spotlight on Encryption and Electronic Signatures", in Edwards, Lilian/Waelde, Charlotte's edition *of Law & the Internet*, Hart Publishing, Oxford, England, 2000, Hogg: "An electronic signature may be described as a string of electronic data used to identify the sender of a data message, in much the same way as a handwritten signature-a collection of letters scribbled in a particular way-identifies an individual. The effectiveness of an electronic signature requires that it be produceable by the sender alone and that any attempt to alter it be incompatible with the integrity of the signature." at 41. In fact, under Canadian laws, the *Personal Information Protection and Electronic Documents Act* of 2005, S.C. 2000, c. 5 [PIPEDA]. deems that an electronic signature most have one or more letters or symbols etc. associated with the document. *See also* the *Canadian Uniform Electronic Evidence Act* (UEEA) regarding admissibility of electronic documents in court, which Quebec has not ratified it but are subject to it on criminal matters. The object of authenticity in electronic documents is to replicate the records and representations of the parties accurately.

[1500] W.H. Van Boom, "Certain legal aspects of electronic bills of lading" (1997) 32 European Transport Law 9. Although the Hague-Visby Rules require a formal writing, the Hamburg Rules, which however are not widely used, state in Article 14(3) that "the signature on the bill of lading may be in handwriting ...or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued." at 15.Van Boom suggests that the Hague-Visby Rules need modification as their rules do not include extensions to the word "writing". He concludes that "modern technology" must "allow...the same (or even a higher) level of reliability." at 15. Van boom advises that jurists should approach the problem from a functional perspective rather than its definition or orientation.

[1501] Thomas Hoeren, "Transaction Safety in Electronic Banking. Legal Aspects" found in Norbert Horn, Edition of *Legal Issues in Electronic Banking* Kluwer Law International, Netherlands, 2002, Hoeren concludes: "..the valid conclusion of contracts on the Internet should not fail because of form requirements made by the national law." at 97.

of electronic signatures resembles that of manual signatures and, arguably, should be verified as easily as manual signatures.[1503]

Some of the difficulties with de-materialization include the apprehension of the Banks to issue letters of credit on the basis that e-BL lack security in electronics. Furthermore, they present legal uncertainty as to whether they will be considered legislatively valid and able to transmit constructive possession. To accomplish e-BL, the carrier would need to be informed of the identity of the ultimate receiver of the cargo, to whom he would deliver the goods. The requirement for an original document would have to be replaced with some other mechanism.[1504] That could assure the carrier that he has received reliable and updated information as to the identity of the person who is entitled to the goods when they reach their destination and "provide some security against fraud."[1505] The international response has been one of "standardisation of documentation".[1506] Practical solutions have been tried

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[1502] *Supra* note 16. Woods. Exclusions appear to include, primarily, the signature of Wills and signatures with regard to real property. Woods used interesting hypothetical scenarios, which describe in a nutshell why we are sceptical of electronic documentation and signatures: "Husband and Wife are a close couple who have no secrets between them, including computer passwords. Assume Wife dies intestate and Husband, who know Wife's computer passwords, drafts and "signs" a document that is purportedly Wife's will. Alternatively, suppose Husband drafted a will on his home computer devising his property in a manner with which Wife does not agree. Wife could simply log onto the computer under Husband's name and alter the will. Or the situation may be that the couple are domestic partners. One partner dies intestate and the other, knowing he cannot take under the state's intestacy scheme, creates a false will. Such scenarios are endless." at 431.

[1503] *See* for example the eUCP, Article e3(a)(iv) accepts defines "sign" which includes an electronic signature in order to establish that modern technology is accepted and Article 7 of the UNCITRAL MODEL LAW recognises that : "(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if (a) method is used to identify that person and to indicate that the person's approval of the information contained in the data message; and(b) that method is as reliable as was appropriate for the purpose for which the date message was generated or communicated, in the light of all the circumstances, including any relevant agreement." Christopher Reed, I. Walden, I and L. Edgar, *Cross-Border Electronic Banking*, 2000 The Centre for Commercial Law Studies and the I.T. Law Unit, London. "There are no form requirements for letters of credit. Many jurisdictions require guarantees to be writing or evidence in writing, but as the obligation under a letter of credit is a principal obligation of the bank...these requirements will not apply." at 102.

[1504] *Supra* note 1472. Todd is skeptical: "The requirement for delivery to be against production of an original documents is wholly inappropriate in the electronic age; a computer print-out can never be an original document, but is a copy of the information in the computer's own electronic record at the time when it is made. Another difficulty is that electronic documents will not be regarded as documents of title without proof of custom, and customs take a long time to establish: legislation may well be the only solution to the particular problem." at 121. Todd reflects that Electronic Data Interchange (E.D.I) could replace the paper bill of lading, Todd hypothesizes, "We must presume, then, that E.D.I. is increasing in importance, and that it will eventually become the norm in international trade transactions."at 121. *See also* A. Johnson, "Electronic Letters of Credit. The Limits of the Present Initiatives" found in Horn, N. Edition of *Legal Issues in Electronic Banking*, Kluwer Law International, Netherlands, 2002. Johnson concurrs: "The electronic trade letter of credit transaction will only work successfully if somehow the characteristics of the physical documents normally associated with such a transaction- and in particular, the bill of lading- can be replicated in electronic form" at 272. *Supra* note 1500. Van Boom submits that only custom can justify true integration of the e-BL. Van Boom explains: "It is common knowledge that commerce does not thrive under uncertainty. One can however comfort one-self with the thought that the bill of lading was for many centuries governed by *lex mercatoria*. If mercantile custom throws itself upon unifying the law of the paperless bill of lading for the next decade or so, the nationally determined differences in legal structure might well change into uniform trade custom. *Then*, the time is right for drafting a treaty."at 24.

[1505] *Supra* note 1503. Reed expounds that: "Any electronic bill of lading must… replicate the bill's functions as a document of title...It also needs to provide some security against fraud."at 73.

[1506] *Ibid* at 74.

by the implementation of SeaDocs[1507] and CMI,[1508] which have failed. Although the first characteristic of a paper bill of lading (receipt) was replicated, the remaining two foundational characteristics were not satisfied. Furthermore, in favour of flexibility, there was a lack of assurance of security against fraud.[1509]

One of the most formidable concerns in e-commerce is assuring that messages may be read confidentially, and that the encryption technology used is able to check the source of the message as well as whether it has been altered in any way also addresses problems of fraud. Hogg addresses this concern:

> "Of the subjects covered in this book, that which is perhaps the most controversial at the present time is cryptography, the technology underpinning both encryption and electronic signatures."[1510]

Asymmetric cryptography is considered more secure because only the private key fits with the public key to form the asymmetric pair. Secrecy by the user of the private key is, naturally,

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[1507] SeaDocs Registry Limited ("**SeaDocs**") was a London cooperative venture between Chase Manhattan Bank and Intertanko which undertook to telecommunicate the negotiation of a bill of lading as a depository and custodian of the bill of lading.A central Registry was used and a carrier would issue the bill of lading and then remove it from circulation by depositing it with SeaDocs who itself prepared an e-BL so that no further paper was required. An electronic private key was issued by SeaDocs to the shipper who then notified SeaDocs electronically when the bill of lading was to be negotiated. The shipper would send a part of his key ("PIN") to the buyer and then the message would be sent to SeaDocs who tested the message for authenticity. In turn, SeaDocs would, communicate with the buyer. The buyer was only accepted if the "PIN" which the shipper had previously given to him then SeaDocs would register the buyer into its Registry. Each time a buyer negotiated the e-BL, the same process would take place between him and the new endorsee. SeaDocs was responsible to advise the ship master of any change of buyers and of the code of the final buyer. The final buyer would be issued the final bill of lading to obtain the goods from the carrier. The "PIN" was regarded to have transferred right to the goods in an equivalent manner to that of the paper bill of lading but banks were uncomfortable with the fact that one of their competitors controlled the registry and therefore the system failed.

[1508] Another variation was proposed by The Comité Maritime International published its Rules for Electronic Bills of Lading in 1990 (**CMI**), yet another centralised depository system whose purpose was to distribute messages and report transfers of e-BL which published *Rules for Electronic Bills of Lading* in 1990 in an attempt to accomplish what Sea Docs could not. The CMI system was an open system, meaning one which is available to anyone in the world without authorisation or membership and without needing a pass code. An open system is more flexible than a closed system, but less secure as it utilizes only a private key rather than an asymmetric system which uses both a private key and a public key.When parties agreed to use electronic data, the shipper would deliver the goods to the carrier who issued an electronic notice to the shipper (The "receipt message" was to indicate the description of the goods, date and place of receipt and terms of carriage). When the goods were transferred to another holder, the carrier would need to cancel the key and issue a new one. CMI would act as the registry.CMI's system failed because carrier liabilities were not defined and only the original shipper could sue the carrier, therefore, **evidence of a carrier contract** could not be fulfilled since contractual rights were not transferred.Furthermore it was questionable as to whether the seller had any protection under the CMI system if the buyer had not paid for the goods but had accepted the right of control of the goods. Naturally, the CMI rules did not provide **constructive possession** and, therefore, did not fulfil the bill of lading's third characteristic. Therefore, the banks were not sure of the security of the system as well as the security of the private key procedure.

[1509] *Supra* note 1503. Reed at 81.

[1510] *Supra* note 1499 at 37. Hogg is somewhat more optimistic about the possibility of eliminating additional issues regarding fraud: "Attempts to alter electronic signatures are easily detectable and the document's authenticity would then be doubted; attempts to decrypt an encrypted document should prove impossible if a secure enough encryption program has been used." at 38.

imperative.[1511] How the cryptography support service should be maintained must be dealt with. For example, in Part I of the *Electronic Communications Act 2000* messages must be read confidentially and the encryption technology used able to check the source of the message as well as whether it has been altered in any way to address problems of fraud.

A third variation of bills of lading was proposed. Bolero began in 1999 and has continued to operate through S.W.I.F.T. and Transport Mutual Insurance Association, which, unlike the CMI project, incorporated "trusted third parties" to complete authentication and registration requirements. Bolero was set up to resolve the two missing characteristics of a paper bill of lading (***evidence of a carrier contract*** and ***constructive possession***). Firstly, it replicates the ***receipt*** given by the ship master or carrier when he receives goods, and then the receipt is sent to the Bolero database. ***Evidence of the contract of carriage***[1512] is accomplished through novation as Bolero deems that each new holder is "novated" and therefore the holder acquires enforceable contractual rights against the carrier.[1513] Negotiation and ***constructive possession*** of the goods, has been replicated using central title registry showing the transfers to each new holder.[1514]

Bolero is yet another system that continues to serve international trade today.[1515] Bolero takes the responsibility to authenticate messages between its members by using an asymmetric security

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[1511] *Ibid*. Hogg suggests that: "Cryptography, simply put, is the 'science of codes and cyphters', and involves the application to electronic data of a mathematical algorithm, the encryption 'key', in order to render the data indecipherable by anyone not having access to the appropriate decryption 'key'. There are two principal types of cryptography in use, private or symmetric key cryptography, and public or asymmetric key cryptography." Hogg at 39. *See also* Electronic Transactions Acts have provided rules of law for the purpose of recognition of electronic signatures.

[1512] *Supra* note 1500. van Boom at 12. [our emphasis] *Supra* note 1472. Todd at 81, Todd cites *Kum v Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439 as precedence to demonstrate that a non-negotiable instrument cannot be a document of title in any circumstances. *See contra supra* note 1492. Goode finds negotiability in e-BL irrelevant: "The bill of lading constitutes an acknowledgement by the carrier that the goods will be held for whoever is the current holder of the bill of lading. The holder thus has constructive possession and can transfer this by delivery of the bill of lading with any necessary indorsement. The bill of lading should therefore be seen as a control document by which constructive possession is transferred rather than as a document by which title is passed." 7at 214.

[1513] *Supra* note 1503. Reed declares: "Any dematerialisation would have to fix the carrier with equivalent liabilities and defences. For the most part, this can be done by contract, as long as the carrier, holder of the electronic bill of lading and (if a different person) the true owner of the goods, are parties to the contract." at 76. Reed continues his thought: "By providing a contractual nexus between all interested parties, it is possible to provide each holder with contractual rights against the carrier, thereby rendering the carrier liable for misdelivery or, if appropriate, damage to the goods." at 77.

[1514] Unlike CMI, the carrier is not advised of each transfer to subsequent traders, rather the carrier is given the identity of the ultimate receiver of the goods at the port of discharge.

[1515] *See* R. Caplehom, R. "Bolero-net-the Global Electronic Commerce Solution for International Trade", Butterworths Journal of International Banking and Financial Law, 1999:421. Bolero is a closed system and members must subscribe to the Bolero RuleBook; standardized contractual rights and duties deemed between the parties, and a central registry system controlled by a "trusted third party". Another similar system is **@GlobalTrade** was initiated in

system of two keys which are mathematically connected, one private and one public, to perform the encryption necessary to secure messages between the parties. The private keys belonging to the members and carriers must remain secret to protect the transaction against fraud.[1516] The public key is held by Bolero, the central authority, who creates the pair of keys and who verifies by use of the public key, firstly, to assure that the message was sent by the authenticated sender and, secondly, to ascertain that the message has not been changed during transmission by an intervening third party.

There are two main queries that remain regarding Bolero bills of lading. Firstly, although Bolero has secured communication technology required as well as access to internet, it does not provide a switch between the Bolero e-BL and paper bill of ladings.[1517] Secondly, the third characteristic prominent to the bill of lading is constructive possession. Nevertheless, it is not clear that a paperless bill can reproduce a negotiable document of title. The question is especially relevant to Banks who are insecure with the fact that a Bolero e-BL may not be sufficient security under the payment of a letter of credit.[1518] International standards have not yet been established regarding e-BL. Bolero as a global system, as it relies on the participation of private agreements between contracting parties who are members and abide by Bolero rules.

Another database has been operating since 2010, namely ESS-Databridge Services and Users Agreement (DSUA), offering services to its members. However, this system is not as effective as

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the late 2000 by CCE Web Corp Co whose purpose is to provide services to financial institutions by using a trade chain over internet to allow the parties to transact. The system is an open system, but does not utilize electronic bills of lading; rather, it uses non-negotiable way-bills (ESW) as its main transport document. Its claim is that the "eLC Card", which it has established, as a convenient and secure irrevocable letter of credit. The use of modern, updated cryptographic technology to secure transmissions and digital signatures for authentication are used. Like Bolero, it has its own rule book which recognizes compliance with UCP 500 and the eUCP. It functions through a Documentary Clearance Centre which verifies the compliance of the transactions between the parties. The buyer must obtain a credit line with @GlobalTrade and then register with @GlobalTrade. He then applies for an e-documentary credit. All banking is done electronically through S.W.I.F.T. The advantages sought by the e-BL are available with @GlobalTrade as the payment is speedy and eliminates paper waste. The processing fees are lower and, like Bolero, it uses a trusted third party in order to authenticate messages. It also has a tracking system for goods, documents and payments which have been made through the system. Its Documentary Clearance Centre (DDC) functions like a major international bank. Therefore, the processing of letter of credits, their issuance, transfer or assignment of proceeds is checked for authenticity and the documents are verified for compliance prior to payment to the Beneficiary.

[1516] Bolero Rulebook Article 2.2.4. places the burden of secrecy on its members.

[1517] *Ibid*. Article 3.7.

[1518] *Supra* note 1503. Reed quotes Mallon and Tomlinson, 'Bolero: Electronic "bills of lading" and electronic contracts of sale [1998] ITLQ 257 at 264, "Bolero is also confident that a pledge can, in principle, be created by an electronic bill of lading." at 75.

Bolero as it has failed to provide a title registry.[1519] It does have the added advantage that the e-BL produce a replica of a paper bill of lading on the computer screen[1520] and can be converted to paper for customs.

Jurists will find solutions to the evolving electronic commerce and find standardized solutions for letters of credit and their accompanying documents through patience and observance of the progression of electronic transmissions and technology. "The area of cryptography, like all areas of information technology, is fast moving, and law reform is always at least three steps behind."[1521]

3. Symmetry between bills of lading and BON and what we can learn from the launch of e-bills of lading

The first obvious symmetry between bills of lading and BON is that they are both mechanisms that can aid international sale of goods. BON can benefit from the development of the security of the Bolero system that provides asymmetric cryptology and a registration system. Secondly, bills of lading and BON are both forms of communication. Traditionally, bills of lading were set up in paper form and have struggled for recognition under electronic forms (e-BL). BONs will commence in e-commerce form. Thirdly, a bill of lading is evidence of a contract. BON will provide evidence of a promise, agreement and continuing relationship, equivalent to a contract.

Although BON and bills of lading have important similarities, their purpose and function are not the same. Bills of lading are receipts for shipping purposes, evidence of a carriage contract and constructive possession.[1522] This part of the international sale of goods is generally contained within a contract of sale or appended in a contract of carriage. In other words, the parties are in a contractual relationship and this contractual relationship is subject to the participation of a third-party contractor.

[1519] *See* Miran Marusic, "A Gateway to Electronic Transport Documentation in International Trade: The Rotterdam Rules in Perspective (L.L.M. Thesis, Lund University Faculty of Law, 2012 at 50.

[1520] *Ibid* at 51.

[1521] *Supra* note 1486. Hogg at 5.

[1522] In principle, the BON are flexible, dynamic and in keeping with party autonomy. Should the parties agree to have their arrangements transferable to a third party, they could become **negotiable**, but will then face the same concerns in e-commerce that e-BL have subdued. Naturally, any third-party transferee must review the BON that have been exchanged between the parties prior to acceptance of the transfer.

The purpose of BON is to provide a means to identify those promises and agreements that TBN parties consider legally binding, as well as the scope and intensity of the standards of conduct they expect during the business relationship. Therefore, the function of BON is to record the arrangements expressed by the parties: semiotics, conduct, verbal agreements, agreements, contracts, warranties, risk allocation and a level of good faith.

BON are not receipts of goods and do not involve third parties who are not party to the negotiations, rather remain internal to the negotiation parties. BON are not documents of title or any type of evidence of constructive possession of goods. They are meant as a tracking system to enable parties to propose and confirm the decisions and intentions the parties have made, track them and register them. Nevertheless, we can learn from the failures that have occurred during the setting up of e-BL to provide security to BON.[1523]

The fundamental foundation of BON is party autonomy. With the use of tools to guide their activities from one step to the next, the parties will have the opportunity to express themselves within the standards of communications and standards of conduct that are universally accepted.

To accomplish BON as trade mechanisms necessary for international trade, we will outline three threats that BON will neutralize:

- Transparency of obligations will assure certainty and expose specific party intention;
- Extinguish the subjectivity/objectivity debate between jurisdictions; and

[1523] Andrew D. Murray, *Law & the Internet, a framework for electronic commerce*, Edited by Edwards, Lilian & Charlotte Waelde, Hart Publishings, Oxford, England, 2000. Murray submits: "Many everyday contracts are devoid of formalities, and as such, may be concluded in writing or orally, electronically or physically. These informal contracts, which are the vast majority of all contracts including most contracts of sale and lease, can safely be concluded over the Internet."at 19..[1523] Both SeaDocs and CMI failed for security reasons. Furthermore, CMI failed to provide a trustworthy administrator that was neutral to the parties and banks. Bolero does have a registration system and asymmetric cryptology, but it does not easily convert paper documents to e-documents. ESS has demonstrated an easiness to replicate paper documents and a conversion process from e-documents to paper documents. BON have the ability, like bills of lading, to attach INCOTERMS to the bills. However, BON can also attach other documents, such as commencement of writings, preliminary agreements, contracts, plans, licensing and any other pertinent information to the TBN relationship. They may refer to specific treaties and conventions that the parties wish to be bound to. All of these elements undergo a registration process that will be monitored at the BON Centre. The register will mark those issues that the parties have dealt with, even if later they are rejected, and those issues that parties consider part of their deal. The BON system will not only provide facility to TBN parties, but will illuminate law with what the parties have been *doing* throughout the entire negotiation processes and provide empirical research for the future development in this area of law. Although e-BL continue to face difficulties, primarily if they are negotiable, the problems that they have encountered enable BON to circumvent some of the challenges prior to their creation, by learning from the failures of e-BL. Further questions that arise with regard to contracts formed on internet concern the time and place in which the contract is formed. Reed promotes the need for recognition of electronic data: Only when formal requirements of writing are required by local legislation is there a problem of recognition of an internet contract. Reed contends: "... there will certainly be a need for new types of sale and carriage contract, and documentary credits also and that the existing legal framework is not ideal for electronic communication" at 87.

- ❖ Elimination of the rock, paper, and scissors of conflict laws through cooperation.

❖ **Transparency of obligations will assure certainty and expose specific party intention**

In Chapter 2 of Part I, we outlined the practical stumbling blocks that adjudicators, and TBN parties alike, face during the processes of negotiation and dispute resolution. One of the biggest challenges for adjudicators to settle unresolved disputes lies in the determination of the parties' intentions.[1524] The law can see that TBN parties are negotiating but, like a "ghost, law cannot grasp,"[1525] law cannot dissect many of the parties' communications. Currently, law cannot clench when the parties have *begun* the negotiation dance and how long it lasts nor apprehend party intention of whether TBN parties bound themselves to legal obligations. If law could vision these movements, it would be in a better position to guide negotiating parties and regulate effectively.

❖ **Extinguish the subjectivity/objectivity debate**

The largest divide between domestic legal systems, lies in how adjudicators determine the parties' intentions. We have established that CCL prefer objective standards when parties have not clearly expressed their intentions in a valid contract whereas QCL are willing to accept subjective standards of the parties' intentions. Nevertheless, even civil law adjudicators cannot fill gaps of subjective intentions where no evidence is tangible.[1526] In fact, we have presented during our comparative analysis that whether an objective or subjective test be used, both jurisdictions accept *specifically expressed* agreements between the parties (insofar as they have contractual validity). Therefore, we aim to rectify this debate by a means to mark TBN communications and intentions with mini, bilateral and interconnected "contracts" that can be recognized by law.

[1524] *See supra* note 38 at 450; *See also* note 432 and 434. *Multipix*, *Tradezone*, *Denzell*, *Parkland*.
[1525] *Supra* note 739 at 1134. Brower II.
[1526] *See* 3.2 in Section 1 of Chapter 2, Part I.

❖ **Elimination of the rock, paper and scissors of conflict laws towards interdependency and cooperation**

To eliminate the conflict of rock, paper, scissors requires reconciliation of the tri-dimensional sources of law through cooperation regarding the standards of communication and conduct of TBN parties. If party autonomy can function as its own juridical order, conflict of laws will be mostly eliminated, and party autonomy can operate within its own boundaries of law. BON will also open the scope to what the law can envision, thereby providing the law with a certainty of what the parties have intended and agreed upon. In other words, the semiotics not visible today will become transparent in the future.

Conclusion: There is no time like the present; change is necessary to secure global trade. However, we confess that we have spent many sleepless nights pondering these thoughts and that it may take some time for law to catch up. Although it is too early for a treaty, convention or domestic legislation, we aspire that one day TBN will be accepted as a global legal culture and up or down loaded into the appropriate legal vessel.[1527]

[1527] Roderick A. Macdonald, "Understanding Regulation by Regulations", in I. Bernier and A. Lajoie (eds), *Regulations, Crown Corporations and Administrative Tribunals*, Toronto, University of Toronto Press, 1985, 81-154. Macdonald presents a view of regulations under domestic laws:
"The true measure of state activity must be its impact on the behavior of citizens and corporations. It follows that any substantive theses about the growth of regulation (and whether we have too much of it) can be formulated only after output data have been examined: one must assess whether a given regulatory initiative has any real effect." at 83 and 84. According to Macdonald, regulation may be "direct", which he considers economic[1527] or it may be "indirect", which he dubs social. Macdonald dubs indirect "where government controls attributes of a good or service, methods of production, contractual conditions, or information disclosure." at 86. Macdonald addresses the "concept of market failure…to comprise five distinct aspects. These are natural monopoly (where an industry can remain efficient only if there is one producer); destructive competition (where the industry is inherently so competitive that it must be stablized through regulation); externalities/spillovers (where the social costs provoked by private activity exceed reasonable levels or can be excluded from production costs); inadequate provision of information (where one contracting party lacks sufficient information to make an efficient market choice); and improper use of common natural resources (where exploitation by one or a few individuals may amount to expropriation of the interest of others or to inefficient use of the resource)." at 86 and 87. He describes the "nature of delegated legislation" as having "three functional characteristics: in origin, it is typically authorized by statute; in content, it has a general, normative scope; and in its effect, it has the force of law." at 91. The meaning of "regulation" which has been classically understood as a "form of state economic activity". at 100. However, in TBN, a plurality of sources of law exists and therefore the meaning of the term "regulation" must be widened. *Pacta sunt servanda* is a principle of transnational law upholding the ability of the parties to form their own agreements. Macdonald advocates: "that law can arise…from explicit norm-creating activity [as well as] implicit…Successful regulation need not rely on only the carrot or the stick. The most obvious means of imposing an attitudinal sanction is publicity…To varying degrees, attitudinal sanctions attain their regulatory goals precisely because they are not perceived as sanctions…they produce patterns of behavior that cannot be defined by specific standards of achievement. They induce regulated parties to "think or behave appropriately." at 107 and 108. Macdonald refers to "the most important type of conditioned regulation of business enterprise is the "free market" myth. Adam Smith's "invisible hand" metaphor aptly captures the fact that private interest can be put to public use." at 108. Macdonald remarks that even classical commentators "acknowledge the importance of attitudinal sanctions…The call for voluntary regulation, consensus standards, notice and comment requirements, informal contracts and pleas bargaining is an acute example of an attitudinal sanction in operation." at 109. In sum, Macdonald proposes a working definition of regulation that "will rest on the fundamental assumptions about the state, law and economic behavior." at 109. Effectively, what

A legal negotiation theory based on HCWT is essential to the better workings of the BON and must be combined with normative business patterning. Since normative business patterning is dynamic, particularly in the sophistication of e-commerce, we expect that the BON will offer an empirical tracking system of this normative patterning and solace to the caveats of our current legal regulatory systems, providing certainty and security to the global community.

Section 2: How Law Could Contribute to the Legal Regulation of Obligations during TBN with more Precision

Currently, a great uncertainty lies in whether agreements consented to between TBN parties pass the tests of validity of contract necessary for legal recognition, on the one hand, while extra-contractual legal obligations outside of party consent may be imposed by law, on the other hand. Other disciplines have revealed a patterning of behavior between negotiating parties in which law has an interest. Although legal negotiation theory expands our knowledge of the functioning of negotiations, law has not fully grasped the patterns of behavior, so law cannot explain the juridical consequences faced by negotiating parties other than popular linear concepts. Furthermore, legal

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this means is that we cannot reform regulation until we understand it. Domestically, introducing an increased regulatory system to monitor negotiations is not a phenomenon that is high on the arisen. Necessarily, party autonomy will have to be the leader and domestic sources of law may follow. Policy decisions on a government level take time and Parliaments would need to assess the legitimacy of regulating negotiations. On a transnational level, commentators such as Macdonald maintain that "the modern market economy appears itself as a regulatory creation [and that] parliamentary legislation is not seen as the only legitimate means of social ordering by government." at 136. Field explores the character of law and its impact on economic development. *See* Alexander James Field, "Do Legal Systems Matter?" Explorations in Economic History 28, 1-35 (1991). Although his approach is based on law and economics, he admits that "because of its respect for precedent, the legal system tends to be fundamentally conservative" at 6 advocating that law is slow to change. When he turns to contract and commercial law, turning specifically to the American UCC he mocks that: "These rules are analogous in many although not all respects to those governing the games of football or soccer, rules that provide, in questionable cases, unambiguous resolution of whether a run or a goal has been scored. The rule may sometimes appear arbitrary, but in the long run one is as likely to benefit as to harm an economic unit, and its functional importance is to let the game, from which all benefit, continue." at 22. Naturally, as a law and economics commentator his interest is in the effects of regulation, but the point we must draw is that regulatory sources outside of party autonomy must support and enforce party autonomy by allowing the negotiation dance to continue within the confines of the dance ballroom. Field concludes that the "challenge here is not to devote more energy to developing general theories of legal variation. Rather it is to explore an additional and neglected channel through which such variation influences the economic environment." at 31. We propose that law in action must put her foot forward to accommodate the economic environment in view of the changes taking place in social structures and the velocity of international trade. According to Macdonald, social structures are slowly being challenged by the "withering of family and church [causing] interpersonal relationships [to be] channeled through both voluntary and obligatory associations." at 137 and 138. Macdonald identifies five "trends in social structure – from institutions for pursuing common ends to institutions enhancing reciprocity; from competing obligatory associations to a single non-voluntary community; from a morality of aspiration to a morality of duty; from informal, customary exchange relationships to formal and discrete contracts; and from a view of progress as the achievement of specific solutions – are aspects of a fundamental shift in what may be called a society's organizing principles." at 139.

theory has not addressed how negotiations *are* regulated by law, whether negotiations *should* be regulated by law and how they *could* be regulated by law.

In a plurality of tri-dimensional regulatory sources of law, elusive concepts of negotiations and negotiating in good faith circulate within a sea of conflicting and colliding norms. Rather than providing the certainty that TBN parties require to preserve norms of efficiency and autonomy, law has offered few tools to use when challenged to resolve disputes between negotiating parties. Rather than submitting TBN parties to a game of chance, like rock, paper, scissors, we propose a manner to expose the caveats by using our voyage outside law to provide how law could strive towards unity in diversity through cooperation, reconciliation, by understanding the patterning of behavior assumed by TBN parties.

To contribute positively, law must provide juridical security;[1528] certainty and foreseeability by guiding parties to transparently record their communications during TBN to establish which arrangements they intend to be legally binding. To do so requires maintenance of the normative requirements that business parties anticipate, autonomy during their commercial dealings to preserve the efficiency and certainty in results of dispute resolution.

1. Providing certainty

To attain certainty in TBN transactions, there is a need for law to provide tools that can shed transparency of business negotiation obligations that record party intention with certainty, extinguish the subjectivity/objectivity debate between common law and civil law jurisdictions; and eliminate conflict of laws in a manner that promotes all sources of law to cooperate. Without these tools, adjudicating negotiations is like taking out a splinter with pliers. Currently adjudicators have

[1528] *See supra* note 11. Piazzon describes that the elements of juridical security comoprise accessibility, stability and foreseeability.

insufficient tools with which to characterize negotiation movements. Therefore, negotiation communications which are subtle and appear chameleonic are lost.[1529]

TBN do not enjoy unwanted surprises although they face obstacles during the negotiation processes regularly. They may make arrangements they consider legally binding, but some outside obstacle has rendered performance of obligations impossible or arduous. The certainty that we are referring to is the type of clarity that reassures TBN parties that the agreements, although incomplete that fall short of being a recognized contract, will be recognized by law. Transparency, within this certainty, is imperative to ward off misunderstandings and evidence the intention to be legally bound.

Could the party autonomy in TBN be isolated into its own juridical order, similar to self-regulated markets? Cotterrell discards the use of the technique of self-regulated institutionalized settings in globalization and queries whether there is another way to deal with the global market: perhaps through a new way of looking at things.[1530] If we consider that party autonomy can trump other regulatory systems[1531] insofar as the parties have evidenced their intentions to be bound and have not breached any mandatory laws, perhaps there is another way to deal with the global market.

TBN parties need to be able to confirm with one another what type of business relationship they expect to develop. Law allows parties to choose to "relax" the standard of good faith[1532] if parties do not cross lines of misrepresentation, fraud or illicit acts. In other words, sellers are permitted to puff and boast about their goods, but how a buyer distinguishes whether the seller is puffing and boasting or warranting their goods is currently intangible. A transparent symbol offered by one party

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[1529] *See* 2.2 in Section 2 of Chapter 1, Part I.

[1530] Roger Cotterrell,"What is Transnational Law?" Law & Social Inquiry, Vol. 37 (2), 500-524, Spring 2012. Cotterrell concludes that "reconceptualization of the idea of "law" may include looking to "soft law, in self-regulation, in informal regulation, "voluntary" standards, and social norms…" at 521 and 522.

[1531] *Supra* note 772 at 414. Lehmann advocates that "the ideal of personal autonomy [is built] as self-authorship". at footnote 536.

[1532] *See supra* note 51. Bhasin at para. [77].

and confirmed by the other would quickly delineate the kind of relationship they intend to develop between them.

The promotion of good faith has been the foundation and protection of trust in the parties' business relationship; it is the base of the amity between the parties that honours each party's self-interest and yet ties them together towards a common goal which is mutually satisfactory to the parties. Within acceptable levels of good faith parties could choose the scope and intensity of good faith that applies to their relationship. This would allow parties to opt for a relaxed good faith, a standard good faith, or an enhanced level of good faith that is acceptable to all sources of laws

2. Supporting autonomy

Business parties prefer to self-regulate and law has recognized that parties need to be autonomous during TBN and has, in the past, endeavored to provide that support. However, in more recent years, legal regulation has been inadvertently chipping away at the very autonomy TBN parties require, threatening to alter the TBN playing field.

We have observed various threats to the well being of TBN and the ability of business parties to self-regulate due to the uncertainty of how negotiations will be categorized by law and whether they have fallen between legal doctrinal cracks.[1533] In other words, whether the parties could be subject to precontractual liability or other extra-contractual remedies that could be imposed by law or whether a court might "find" an agreement between the parties by implying a contract that perhaps the parties did not really intend. In any contractual setting, including the formation, performance and extinction

[1533] *See* Section 3 of Chapter 1, Part I. *See also* David P. Weber, "Restricting the Freedom of Contract: A Fundamental Prohibition", 16 Yale Hum. Rts. & Dev. L.J. 51, 2013. Weber concludes, in support of party autonomy that: "History has shown that the ability to contract, to order ones affairs and to obtain contractually guaranteed payments in exchange for services or goods is fundamental to the ability of any individual to succeed in a market economy." at 102 and 103. *See also* Duane Windsor, "The Development of International Business Norms", *Business Ethics Quarterly*, Vol. 14, No. 4, Business Ethics in a Global Economy, Oct. 2004, 729-754 at 729. Windsor at 737: "No one publicly supports amoral business conduct or irresponsibility. Such language would be self-defeating in today's business environment. But such language is not necessary where appeal may be made to marketplace efficiency requirements or market necessities." at 737. On a business level, *see* Michael E. Porter, "Clusters and the New Economics of Competition", Harv. Bus. Rev, Nov-Dec 1998. Porter concludes: "Leaders of businesses, government, and institutions all have a stake – and a role to play- in the new economics of competition. Clusters reveal the mutual dependence and collective responsibility of all these entities for creating the conditions for productive competition." at 90.

of contract, there is a threat that the literal meaning of the words of an agreement may require interpretation by the courts due to other facts and circumstances that relate to the business relationship.

Even though TBN parties are sophisticated players, not all parties enjoy the same expertise or knowledge as other parties. That is the reason the parties have joined together in the first place. To avoid opportunism or excessive bargaining power, a more sophisticated player may take the opportunity to benefit from a less equal player. This is of interest to law.[1534]

To promote party autonomy entails providing the means for TBN parties to preserve meaningful communications and set behavioral standards during negotiations. To do so means to follow the negotiation dance. The law is not interested in every movement that the parties make, but it cannot prophesize currently which facts adjudicators will require to unravel the true intentions of the parties until the day the relationship breaks down.[1535] Then the facts and consideration must be analyzed and interpreted by law.[1536]

Although the parties are generally able to self-regulate, they are bound by certain standards that have been, in the past, termed "interference"(s). We have ascertained that these standards are derived from three primary sources, namely domestic laws imposed to protect public policy and preserve fairness;[1537] merchant custom law and industry standards;[1538] and by the parties themselves.[1539]

In the context of TBN, we must dig below the surface to the foundation that reconciles the regulatory sources of law together. We have learned through business perspective that this foundation

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[1534] *See supra* note 972. *Guay*.

[1535] *See supra* note 38. Baudouin/Jobin at 450 regarding elements that a court must consider when no specific expression is available.

[1536] *See* Section 1 of Chapter 1, Part II.

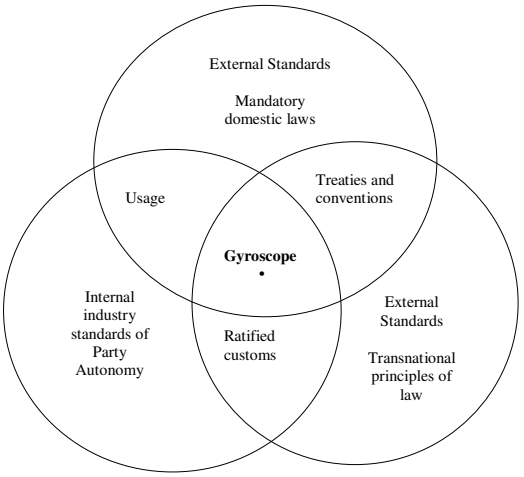
[1537] Under QCL, Article 6 C.c.Q applies the principle of good faith. The CCL has traditionally applied remedies of promissory estoppel, restitution or tort in place of a general good faith duty. This trend is changing with *Yam Seng* and *Bhasin*.

[1538] *See* 2.5.4 in Section 1, Chapter 1, Part II. *See also* Article 1.9 UNIDROIT Principles. *See*, in particular *supra* note 629. Stephan.

[1539] *See* 2.3 in Section 3 of Chapter 1, Part II.

is built upon interdependence and cooperation,[1540] the footsteps that support efficiency, certainty and autonomy, sustained, consequently by reciprocity, flexibility and solidarity. For the gyroscope to operate effectively, internal and external standards recognized by all regulatory systems must be respected. These standards include standards of communication that TBN parties can recognize and utilize with certainty to their meaning. These standards must include a minimum standard of good faith.[1541]

Axis of the gyroscope: party autonomy & good faith



• Represented by BON

At this venue, we propose the implementation of BON to act as the axis, free to alter the parties' directions, which shall be used in practice to establish standards of communications between business parties whereby they are free to choose within a sphere a certainty and security. BON will have the capacity to be exchanged, modified, or cancelled during the parties' relationship and recorded as issues that have been specifically accepted or rejected as *chose jugée* by the parties. These recorded movements between the parties will be a record of content and intensity of obligations intended by the parties and will contribute to future empirical data for legal analysis.

For the law to prepare to enforce BON, it must be evident when the parties intend to bind themselves to legal obligations and when they clearly do not. This may be expressed at any given time by exchanging the BON between the parties. The BON will be flexible and dynamic, so parties

[1540] *Supra* note 59. Lewicki. *See also supra* note 15. Ghauri.
[1541] *See* Section 3 of Chapter 2, of Part I.

may agree to exchange their BON for a superior or inferior BON, depending on the context of the exchange, the intensity and duration of the relationship and any mitigating circumstances.

As the negotiating parties dance around the legal ballroom, there are walls that they must avoid running into which would force the parties to fall to the floor. These walls can be seen as domestic laws that govern if the parties exceed the permitted scope of autonomy. Merchant customs are like the floor and the ceiling of the room in which the negotiation parties dance. The floor offers support to the parties as they continue their dance but the ceiling is often taken for granted, the parties hardly acknowledging its existence. Yet, the ceiling provides a security and delimitation to the parties' space. International arbitration provides the regulatory ceiling and supports the parties' freedom of negotiating. Then we turn to the dancers themselves. The parties dance within the structure of each dance, representing the stages of negotiation. As their first steps of flamenco turn into a ballet; a ballet into a jive or a jive into capoeira…the parties are attentive to their partners' steps as well as their own, which requires respect for one another's interests to promote trust.[1542] Sometimes, one of the partners will lead and the other one(s) will follow.[1543] Much of the dance is improvised even though there is a certain choreographic structure.[1544] The parties are free to dance, within the guidelines of each dance, as long as they don't bump into walls or leap high enough to hit the ceiling.

3. Bolstering efficiency

Efficiency is a primary focus of TBN parties and considered economically beneficial to the public interest.[1545] If the parties could not anticipate being better off together than apart, they would

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[1542] *See* 1. in Section 2 of Chapter 1, Part I.

[1543] *See* supra note 288. Saner's positions.

[1544] *See* Section 3.3 of Chapter 1, Part I. In particular *supra* note 22. Seminaire Docherty/Campbell.

[1545] The "invisible hand" referred to by economist, Adam Smith, in his 1776 book, *An Inquiry into the Nature and Causes of the Wealth of Nations* is a metaphor used to explain that parties chasing their own self-interests often benefit the whole of society inadvertently: "*...every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an* invisible hand *to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his*

not enter into a negotiating relationship. Efficiency not only includes monetary gain, but also the quality of the relationship and time efficiency. For parties to attain an efficient quality to their relationship entails building trust.[1546] Time efficiency is viewed from different cultural levels.[1547] Whereas Occidental negotiating parties tend to spend a lot of time socializing and building the relationship, Western negotiating parties prefer to enter into brass tactics.[1548]

Time is money and speed and efficiency are two valued commodities of business. Although business parties prefer to settle matters expeditiously, speed is not treasured in the same way in each cultural background. Whereas western ideology focuses on closing a "deal", occidental countries proceed with caution and time to ensure that the necessary trust required for the business relationship exists before moving forward. Recording negotiation communications in occidental countries would only be considered part of the ongoing relationship.

TBN cannot just focus on *a* contract since there are arrangements that must be made prior to the constitution of any contract. Parties must delineate which promises and agreements that they desire to be legally binding without waiting for a battery of lawyers to produce an agreement or the entire negotiation system would be disabled. Therefore, it is useful and necessary to establish a set of symbols that reflect the business relationship and follow normative business communications during the processes of negotiations. For example, what standard of behavior they expect between themselves during negotiations; whether they are entitled to conduct parallel negotiations or whether the negotiation goal the parties are striving to achieve can be transferred to another party. The beauty

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own interest, he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good." https://plus.maths.org/content/adam-smith-and-invisible-hand

[1546] *Supra* note 15. Ghauri. Linda L. Putnam, "Communication as Changing the Negotiation Game", Journal of Applied Communication Research Vo. 38:4, 325-335, November, 2010, DOI:10.1080/00909882.2010.513999; Linda L. Putnam and Tricia S. Jones, "Reciprocity in Negotiations: An Analysis of Bargaining Interaction", Communication Monographs, Vol. 49:3, 171-191, September 1982, DOI:10.1080/03637758209376080.

[1547] *Supra* note 72 at 88. Hall explains the unspoken languages: "The unspoken languages are informal; yet the rules governing their interpretation are surprisingly *ironbound*." There are cultural differences, however, in the interpretation of these languages. Halls uses examples, such as the language of time: a delay may mean a lack of interest in the United States, whereas in the Middle East time delays are contingent on the relationships whereby close relatives have priority over business. In Japan, time delays simpy mean that something is in the process of developing.

[1548] *Supra* note 70. Manrai

of symbols to record promises and agreements is proof that the TBN parties desire to have legally binding during the processes of negotiations. BON are fast and efficient; confirmed, or rejected and replaced by the opposing party; each of the recorded symbols may be removed with mutual assent.

Conclusion: The key to determining the contribution that law can make to the functioning and regulation of TBN is to provide a means for the parties to perform the negotiation dance with transparency and uniformity. The centre focus is thus on setting standards of communication and standards of conduct that are acceptable to all three sources of law, chosen by the parties themselves. The underlying commonality of this contribution; what joins the sources of law together would be a uniform approach to the concept of good faith.

Section 3: Regulation of Conduct within a Normative Co-operative Will Framework Acceptable to the Three Regulatory Sources of Law

Most importantly, business must continue as usual. We are not suggesting to change how TBN parties negotiate. We are simply proposing a manner to record the normative framework exchanged between TBN parties. Self regulation has proved to be successful in small communities that can impose social structures.[1549] Ancient merchant custom worked on the same basis until it became global and unharnessed. We sought to find a way in which private governance could prevail in a transnational, global setting to promote party autonomy.[1550] This private governance requires an authentic, secure setting (and therefore a registered tracking system) prevailed by accredited notaries and solicitors worldwide. While private governance is generally viewed to compensate where local governance has failed,[1551] local governance has a minimal impact on transnational affairs, necessitating mechanisms that can track and record party autonomy independently.

[1549] *See* 3. In Section 3 of Chapter 2, Part I.

[1550] *See*. Allan C. Hutchinson, "Michael and Me: A Postmodern Friendship", Osgoode Hall Law Journal, Vol. 33 no. 2, 1995. Hutchinson argues that limitation of freedom of contract leads to indeterminancy.

[1551] *See* Tracey M. Roberts, "Innovativons in Governance: A Functional Typology of Private Governance Institutions:, 22 Duke Envtl. L. & Policy F. 67, 2011-2012 regarding key structures required to provide private governance. Symeon C. Symedonides, "Contracts Subject to Non-State Norms", The

Our tracking system is meant to create an awareness between the parties themselves of the creation (or not) of legal obligations so that the juridical world can see transparently when called upon to adjudicate a dispute. Documentation of this nature will promote good faith and honesty, since standards of behaviour will be disclosed and confirmed between the parties. This will lead to certainty and security of party conduct and develop trust between TBN parties.[1552]

E-commerce increases the prospect of misunderstandings since often communications are not truly face-to-face and communication nuances are lost. Language and cultural barriers also lend to misunderstandings. Opportunism emerges out of innocent misunderstandings and suddenly the playing field is no longer level. Although e-commerce and de-materialization provide parties with extensive facility and speed, the dangers laden in these modern conveniences merit further securitization. What was considered a viable transnational business partner easily turns into disappointment if empty barrels are received by a buyer and the seller has magically disappeared. What law can offer is a manner to guide TBN and a forum in which TBN parties can record their promises, agreements and the nature of their relationship, including the level of good faith they will operate under.

The foundation of TBN is based on transparent autonomy that supports efficiency, autonomy, and certainty; the primary norms of TBN with the assistance of an institutionalized setting. While forming a TBN business relationship certain promises are made, that are relied upon by the opposing party. Since the parties are free to return a BON and exchange it for one that is more in keeping with a current situation, their relationship is "up-dated" every step of the negotiation path. The contents of the relationship are up-dated with simplistic symbols, taking but a few minutes for TBN parties to

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American Journal of Comparative Law, Vol. 54, American Law in the 21st Centruy, U.S. National Reports to the XVIIth International Congress of Comparative Law (Fall, 2006), 209-231, American Society of Comparative Law http://www.jstor.org/stable/20454537.

[1552] *See supra* note 1256. Markovits refers to Hume who considered "were there certain symbols or signs"…parties "might give each other security of [their] conduct in any particular incident." at 1333.

choose and confirm their steps in a private registry supervised by a BON agent. Each BON has a token monetary value attributed to the seller's account to satisfy the common law rule of consideration.

BON ensure that TBN parties can maintain an active role in keeping their arrangements autonomous and transparent and ensure respect and cooperation by all sources of law.[1553] BON will be developed through symbols guided by a membership book and consultation with a BON agent regarding the choices of BON and what that means to the parties. In time these symbols are expected to become readily understood, just as INCOTERMS have accomplished this goal.

Symbols will be developed that will aid the business parties, in a timely and efficient manner, to communicate with one another. BON can be attached to written instruments, such as charts, plans, lists, agreements etc. and even INCOTERMS themselves. Whenever a BON is presented by one party it must be confirmed by the opposing party to ensure that each party has fully understood the message relayed. In the event of an irresolvable dispute, the parties may submit their data base to arbitration at the BON Centre. If the parties have not chosen a BON, the membership itself will have default standards applicable during arbitration.

One of the beauties of the BON is that they can be expanded infinitely and upon demand and the parties remain conscious of their movements and choosing BON that truly reflect the parties' commitments to one another. Thus, communications will be transparent so that should a party disagree with the BON chosen by another party and placed on the private registry between the parties, an opposing party may counter the chosen BON with a different one that may more appropriately reflect the parties' intentions.

[1553] There is little room for filling gaps with implied contracts or legal fiction when the parties are delinating the level of conduct in their business relationships and where promises and agreements are specifically recorded.

Our journey has not come to an end. In fact, it is only the beginning of new, efficient and flexible manner for law to contribute through the development of trade mechanisms that are based upon party autonomy and party choice. BON will be divided into three parts: depth BON, horizontal BON and vertical BON.

Depth BON will be represented by colour symbols that follow negotiation stages, whereby the parties themselves demarcate when they have crossed a stage border.[1554] They will record when the parties consider that the negotiations have begun. Consequently, a red BON means that the parties are simply "window shopping" and that the intention of the parties is to exercise their freedom from contract and not incur legal ramifications. When the parties are ready to begin pre-negotiations, the red BON is taken off their registry and a green BON replaces the red BON. Once a green BON is chosen, the BON centre must perform the identification of the parties to the negotiations by ascertaining the legal capacity of the parties to contract and corporate status. The parties will choose and confirm other coloured BON as the negotiations intensify and negotiation stages mutate.

1. The private tracking registry system

BON OPERATIONS							
Window shopping	Pre-negotiations		Face-to-face negotiations		Contract	Post-contracts	Termination
*	Position **	BON	Reevaluation	of Position BON		Reevaluation of positions BON	
	Relationshi ***	BON	Relationship	BON		Relationship BON	
	Promise ***	BON	Promise	BON		*Promise BON*	
	Agreement ***	*BON*	Agreement	BON		Agreement BON	

***Depth BON** are colour symbols that follow **negotiation stages**, allowing the parties to demarcate when they have crossed a border.

- When pre-negotiations have begun and the parties are no longer window shopping
- When face-to-face negotiations begin
- When a contract is formed that integrates the content of previous negotiations into the contract
- When a contract is formed that supersedes all negotiations agreements
- Change of circumstances or deviation from the original contract

[1554] *Supra* note 15 at 13 and 14. Ghauri posits that parties know when they have crossed a border. In order to evidence this crossing, diagrams or symbols can be used. *See* John H. Connolly, "Diagrams as Components of Multimedia Discourse: A Semiotic Approach", in M. Anderson, P. Cheng, and V. Haarslev (Eds.): *Diagrams 2000*, LNAI 1889, 479-482, 2000, Springer-Verlag, Berlin Heidelberg 2000.

** **Horizontal BON** remind the parties of various **negotiation positions** they need to consider while advancing in a determined negotiation stage.

- Form of communications
- Object of negotiations
- Determining the parties to the negotiations
- Determining the interests of each party
- Determining mutual goals
- Determining the roles of each party
- Expounding on the intensity of the relationship.

*** **Vertical BON** follow **negotiation steps** and are divided into:

Eg: Relationship BON: Eg :	•Level of Good Faith	Eg: Agreement BON: Eg:	•The extent of the commitment
	•Negotiability/ Transferability		•Cooperation v. competition
	•Monogamous or polygamous relationship		•Renegotiation
Eg: Promise BON: Eg:	•Confidentiality		•Burden of proof
	•Degree of anticipated disclosure		•Disclosure and network
	•Investment (role and contribution)		•Multi-lateral connections
	•Security (deposit)		•Dispute resolution
	•Indemnity (securing an undertaking)		•attaching INCOTERMS
	•Financing		
	•Exchange (deliberated objects)		

Simultaneously, horizontal BON will represent negotiation positions or strategies and remind the parties of all the elements that they should consider as they cross each stage of negotiations, including the form and language they will use in their agreements. Strategies will determine the roles of each party and expound on the intensity of the relationship within a given stage. Reciprocally and concurrently, vertical BON will follow negotiation steps or tactics built on Hogg's HCWT that encompass promise BON, agreement BON and relationship BON demonstrating when promises and agreements are considered legally binding by the parties themselves and delineating the scope and intensity of the business relationship, including standards of conduct.

1.1 Depth BON: marking negotiation stages

BON serve to provide TBN parties with the freedom to alter direction, stabilized institutionally by the BON Centre that acts as the coordinator and facilitator. The descriptions of the BON are meant as examples and not an exhaustive list. Depth BON follow stages of negotiations, whereby the parties themselves delineate when the pre-negotiation stage begins, when the parties have crossed the borders to another stage,[1555] and when the business relationship has terminated.

[1555] Within the marking and registration of the stages of negotiations, the parties may contemplate other BON choices to follow the positions of the parties and uncover the parties' step-by-step intentions during the processes of negotiation.

The parties are supplied with their own private tracking registration system in the BON Centre to monitor the negotiation processes. Once the negotiations have commenced, each stage that the parties cross is acknowledged by a party and then confirmed by the other party(ies) as the negotiations intensify from one stage to another.[1556] Anticipated delays may also be recorded in the BON Centre and amended to aid the parties to move forward. Once a contract is in sight, a choice is made by the parties as to whether they desire to eradicate all previous negotiation communications and hold their contract as the only evidence of their true intentions[1557] or allow the previous negotiation movements to interpret their contract in the event of a dispute.[1558]

The purpose of Depth BON is to develop a system that can track where the parties can decide when window shopping is over, and negotiations begin. Upon initial commencement, both parties will apply to the BON Centre for a membership and initiate communications together. The parties will be awarded a red BON, signaling that the parties are not yet ready to negotiate, but that they are investigating the probability of whether they can come to terms with mutually satisfactory goals.

Window shopping (red)

To record that parties have chosen to exercise the freedom *from* contract, in other words that the parties do not yet wish to be bound by legal obligations, the red BON will indicate that the parties are simply investigating opportunities and that they have not begun the negotiating processes. This allows the parties to signal the understanding that they do not wish to create any legal ramifications.

[1556] *See* 2.3 in Section 3, Chapter 1, Part I. Unlike Dutch laws, it is the parties themselves that measure the intensity of the negotiations rather than domestic regulation.
[1557] *Supra* note 36. *Jumbo King*.
[1558] *See* Section 3, Chapter 1, Part I: negotiations as interpretative mechanisms.

At this stage, there can be no legal protection for the exchange of trade secrets and therefore there is a presumption that neither party has confidential information to protect; that there is no promise or agreement of any sort that will be recognized by law and that there is no commitment to go forward to the next stage of negotiations. The parties are simply investigating whether a business relationship is viable between them or not. The red BON prescribes if it has remained inactive over a one year period.

The red BON placed on the registry system between the TBN parties is removed from the parties' data base when one of two events have taken place:

1) The parties have decided to cease doing business together or the BON has prescribed, in which case the BON is removed and the file at the BON Centre is closed; or
2) The parties have begun the negotiation relationship and have replaced the red BON (the date of removal will be recorded) with a green BON, signifying the parties' intention to commence pre-negotiations.

- **Elimination of mere invitation (green): the negotiation processes begin**

Once the parties have ascertained that they are willing to enter negotiations together, they must confirm the removal of the red BON and agree to have it replaced with a green BON. Dates are recorded. This is a signal to both parties that they have decided to endeavor to build a business negotiating relationship and that the negotiation processes have begun.[1559] Metaphorically, pre-negotiations are the starting point negotiations whereby the parties are dancing a flamenco in an attempt to dazzle each other and prove why they are worthy of entering into a business relationship; a partnership that will strive to meet their mutual goals.

[1559] *See 2.* in Section 2 of Chapter 1, Part I. Specifically *supra* note 195. Adair: identification and characterization. *See also* in business *supra* note 49. Usunier.

At this stage, the parties start to *contemplate* a plan coordinating Horizontal BON and Vertical BON. The parties set the atmosphere[1560] and test each other's reservation points.[1561] The parties will determine the form and language of communications. The object of the exchange and anticipated mutual goals must be defined. The parties to the negotiations must be confirmed and each of the parties' interests determined. Roles of each party will be allocated, and the scope of the relationship may be defined. Each of these positions will move forward with negotiation steps, likely accompanied with conditions such as Financing BON, Indemnity BON or Investment BON. Each of these positions may include promises, such as those relating to exchanging trade secrets, the degree of anticipated disclosure and how the exchange will take place.

The parties examine obstacles that could enter the negotiation path, such as taxes and levies, transportation costs, political unrest and licenses required, whereby a party may take the responsibility to investigate how these obstacles can be overcome,[1562] Horizontal BON and Vertical BON are placed on the parties' registry to confirm strategies and tactics during the negotiation processes. The parties may be investing time and resources and risk allocation will need to be determined.[1563] Vertical Relationship BON follow negotiation steps that map out the type of business relationship the parties intend to build together. Along with Relationship BON, Promise BON are accessible for further expression to differentiate between a promise and mere puffery.[1564]

To determine the parties' roles in the venture, agreement BON may be chosen in contemplation of the extent of the commitment, negotiation approaches and who will bear the burden of proof in the event of non-performance of a BON. As the relationship intensifies within the pre-

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[1560] *See supra* note 15. Ghauri at 8.

[1561] *Supra* note 59. Lewicki at 32.

[1562] *See supra* note 47. *Yam Seng* on licensing: the seller failed to apply for the licensing for a long period of time. The BON would have transparently indicated to the buyer when the licencing was being sought.

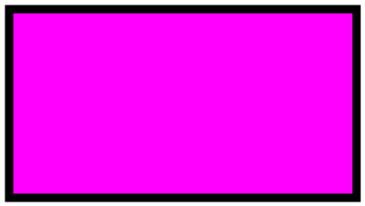
[1563] *See supra* note 30. Scott/Schwartz on pre-contractual liability.

[1564] *See* 2.3 in Section 3 of Chapter 1, Part II: discussion on puffery.

negotiations stage, the parties are encouraged to reassess the standard of good faith applicable to their relationship, ponder whether their business relationship will be monogamous and, if not, choose the polygamous BON, and whether they desire to open the BON to transferability to a third party. Vertical BON of a relational nature may need to be modified during this stage to compliment the Horizontal BON and increase the level of good faith expected between the parties as the intensity of negotiations increases.[1565]

During the term of the green BON, Position or Horizontal BON must be chosen to signal the need for the BON Centre to identify the parties' capacity and authority to contract. The parties are securitized since the identity and the capacity of the parties will be confirmed by the BON Centre, freeing the parties from an otherwise uncertain task. The parties may call upon the BON Centre to hold a security deposit and determine under what circumstances the deposit is to be disbursed to the seller or reimbursed to the buyer.

BON Centre mediation services are readily available so parties requiring consultation may better understand their own options and how to better coordinate with the interests of the opposing party towards a mutually satisfactory goal. Vertical BON may subsist or mutate through the next stages of BON.



Face-to-face negotiations (pink)

When the second border crossing is selected, (between pre-negotiations and face-to-face negotiations), the green BON is replaced with a pink BON. The parties will carry over Relationship BON, Promise BON and Agreement BON unless they choose to modify them. The parties are free to exchange the nature of the promises, agreements and choice of scope and intensity of their

[1565] As the negotiations intensify, so do the standards in which they are expected. See 3. in Section 1 of Chapter 1, Part I.

relationship at any time during the various stages of BON. Face-to-face negotiations need not be in a conference room as often TBN parties operate through video conference or alternative e-communications.[1566] Metaphorically, the parties have now entered a negotiation ballet in which they are attempting to symbiotically match each other's interests and reconcile differences.[1567]

All Horizontal BON should be in action at this point. Decisions on the form and language in which the parties are proceeding must be recorded. The object of negotiations should be clearly defined and the parties now ought to understand their own interests and those of the opposing party(ies). Mutual goals should be summarized and confirmed as mirrored between the parties. Parties must reassess the roles of each party and the scope and intensity of the business relationship.

The parties may also annex further communications, such as plans, charts, agreements, lists etc. The parties must establish the terms and conditions of the exchange[1568] and document the quality and quantity of the object. A photo or description may be attached to the object BON for clarity. The interests of the parties must be more fully explored at this stage[1569] and the parties can clarify and confirm each other's interests with the use of Vertical Interest BON.

We have learned that while parties negotiate, often their agreements will be partial or incomplete.[1570] That is due to the dynamic nature of negotiations and the fact the parties will document agreements as they agree on a particular matter.[1571] Using BON, the parties can complete mini agreements on a specific matter even though they are unable to complete a full contract. The parties are free to choose as many Vertical BON as circumstances permit. At this stage of

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[1566] *See supra* note 352. Semiotics in long distance communications. Pitfalls are that it is more difficult to interpret silent communications and gestures that may not be readily identified without actually being face-to-face in negotiations.
[1567] *See supra* note 49. Usunier.
[1568] Under domestic laws, both CCL and QCL need an object in order to consider that there be an agreement. That object could be a BON and could be exchanged for nominal consideration.
[1569] *See* 1. in Section 2 of Chapter 1, Part I regarding business perspectives.
[1570] *See* 1.3 in Section 1 of Chapter 2, Part I.
[1571] *See* 3. in Section 1 of Chapter 2, Part I: reasons for incomplete agreements.

negotiations, the TBN parties in the western hemisphere will be hoping to reach the contract stage, and are anticipating the circulation of draft contracts amongst each other.

- **Contract (blue)**

Once the parties have decided to draw up a firm contract outlining their business relationship, the pink BON is removed and replaced with a choice of blue BON. The jive has now begun, and the parties are in the full throws of concluding their negotiations into a contract.[1572] It must be determined whether the previous BON will form part of the contractual agreement or whether they have no bearing on what has been ultimately decided. The parties will choose a dark blue BON if they intend to integrate the previous BON into their contract.

Light blue BON can be chosen if the parties prefer to consider that their ultimate contract supersedes all previous negotiation promises and agreements.[1573]

- **Post-contract (orange)**

Once the parties have entered into a contract, there may be extended warranties. An orange BON with the letter "W" will indicate that there are outstanding warranties.

A further use for orange BON would be to signal that the parties are open to renegotiations when parties have stumbled into unforeseen obstacles or new circumstances have arisen. This means that the Horizontal and Vertical BON may require alteration to steer the parties' interests back together towards another mutually satisfaction position. Since each BON is accompanied with a

[1572] *See supra* note 15 at 22. Ghauri.
[1573] *Supra* note 36. *Jumbo King*.

token consideration, the contract is to be considered by the parties as an extension to the already existing contract and not a new contract.[1574]

- **The termination of the negotiation relationship (black)**

The termination of the negotiation relationship is not necessarily a dead end, but a mutual acknowledgement that the particular matter of business has come to an end. These same parties may take up the BON from red to black over again with repeat business. If there are understandings between the parties that will not change, the parties may leave the Relationship BON on their registry and any other applicable BON that they intend to use in the new venture.[1575]

1.2 Horizontal BON: tracking negotiation strategies (negotiation positions)

The purpose of Horizontal BON is to follow the normative patterning of TBN and prompt negotiating parties to document essential positions of discussion. These positions may change throughout the negotiations, so the parties are free to exchange one BON for another to update their business relationship. Both Horizontal and Vertical BON may be expanded as negotiating parties require new BON to describe their business arrangements in a dynamic and flexible manner. Horizontal BON document the form and language of communications.[1576] Object BON clearly delineate the object of negotiations.[1577] In the initial stage of negotiations, they will identify the parties to the negotiations and outline the interests of each party.[1578] At very least, a rough sketch of the mutual goals will be drawn, and amended as the negotiations intensify. Any roles that the parties

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[1574] This is intended to avoid circumstances such as *supra* note 412 *Stilke* in CCL.

[1575] Machteld W. De Hoon, "Effective Unilateral Ending of Complex Long-term Contracts", European Review of Private Law 4-2005 [469-490]; *See also supra* note 9 CCL **§1.25.2** at 150. Swan re: repeat business for CCL; *See supra* note 1093. *Sabourin* for QCL.

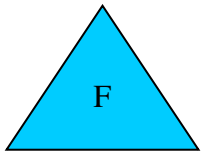
[1576] *See supra* note 352. Leeson et al regarding semiotic communications. *See also supra* notes 72 and 73. Hall and Hofstede.

[1577] The intention to to cater to domestic requirements that require that to be recognized by law, an agreement must have an object and the content must be unambiguous. *See* Section 1 of Chapter 2, Part I.

[1578] *See* 2. in Section 2 of Chapter 1, Part I: business perspectives that have reiterated the necessity of these considerations.

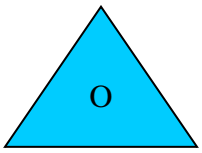
have determined they will assume can be outlined and annexed to the Role BON.[1579] This aids in the allocation of task management between the parties. The intensity of the business relationship may be measured at any given time and documented with Good Faith BON.[1580]

- **Investigation and decision on form of communications**



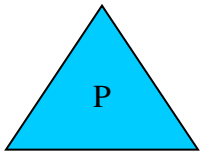
BON symbols remain one form of communications. The parties are free to decide on a *form* of communications and language that they desire to use when recording their communications. If negotiations are to be communicated purely through verbal exchanges, these verbal exchanges must be recorded BON when the parties intend them to be legally binding.[1581]

- **Establishing the object and content**



Once the parties have determined the object(s) of their exchange and the content or quality, they may annex a photo, a plan or description to the BON *object*.

- **Determination of the parties**



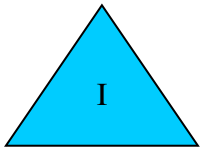
Often negotiations take place through agents or parties representing the legal or natural person who has the authority to make decisions. Once the parties have confirmed the identity of the parties to the negotiations, a "P" BON will be placed on the parties' private tracking system. Then, a BON agent will verify the domestic jurisdiction of each of the parties to certify that the parties have the capacity and legal authority to contract with one another. Furthermore, should a corporate entity be involved, the BON agent will ensure that the person is authorized to act, that the corporation is in good standing and obtain evidence of governmental certification.

[1579] *Ibid.*

[1580] *See* Section 1 of Chapter 1, Part II. The comparative analysis leads to the most niggling issues in law: how to interpret what scope and intensity the parties intended.

[1581] In order for law to recognize and enforce a promise or an agreement, parties must have intended their commitments to be legally binding. *See* Section 3 of Chapter 1, Part I.

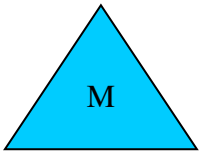
- **Understanding the interests of each party**



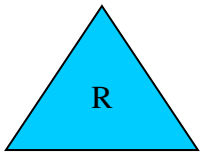
To facilitate TBN parties to obtain their mutual goals, Interest BON are designed to promote an understanding of a party's own interests and the interests of the other party(ies). BON agents will be available for consultation and mediation to facilitate this task.[1582] A party may draw an Interest BON when the party requires aid to confirm that the opposing party has clearly understood the interests of the requesting party.[1583] Interest BON are meant to circumvent misunderstandings or presumptions within the ongoing interdependence between the parties.[1584] Interest BON also open communications to capture the meaningful semiotics.

- **Establishing the mirrored mutual goals**

Once a party believes that the party(ies) have envisioned the same goals, the Mutual Goal BON can be drawn. This is to confirm that the same understanding was agreed upon by all parties to the negotiations.[1585] The BON Centre will encourage parties to attach specific goals in summary format so that each party can freely review that the goals are the same.



- **Determining the roles of each party**



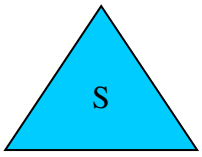
Determining the role of the parties and the tasks assigned to each party is essential. The parties have joined together in a business venture because they need each other. Each party has talents and resources that are shared together, forecasted that the parties are better off together.[1586] When using the role BON, it is preferable to document, in point form, what these roles

[1582] BON agents are necessary to complete the recognition of party autonomy as its own juridical order in TBN. *See* 4. in Section 3 of Chapter 2, Part I; *See also supra* note 824. Rocher.
[1583] *See* 1.1 in Section 2 of Chapter 1, Part I.
[1584] *See supra* note 59. Lewicki.
[1585] *See* Section 1 of Chapter 1, Part II: to avoid misunderstandings and promote transparency, enabling an adjudicator to decide on the proper remedy.
[1586] *See* 2.1 in Section 2 of Chapter 1, Part I.

are to be. A BON agent will be available to aid in documenting the roles in a clear and concise manner that the parties themselves can review and confirm.

- **Expounding the scope of the relationship**

The scope of the relationship is not always seen by all parties in the same light and therefore requires confirmation.[1587] To confirm that the parties envision the same scope, one party may draw a scope BON to position their relationship.



Parties must determine whether the standard of conduct they choose in their relationship includes honesty *or* honesty and cooperation *or* honesty, cooperation and fidelity.[1588] Scope BON may be used in tandem with Vertical Relationship BON to determine the intensity of good faith expected between the parties.

1.3 Vertical BON: following negotiation tactics (negotiation steps)

Vertical BON are divided into ***Relationship*** BON, ***Promise*** BON and ***Agreement*** BON, based upon the application of HCWT. Generally, the parties need to harness what kind of business relationship they are developing: the level of good faith (within the boundaries of the legal ballroom), whether parallel negotiations may take place while the parties are negotiating together and whether at any point during the negotiations, the whole matter can be transferred to a third party, with or without the consent of the opposing party. BON are not meant to be exhaustive, rather they represent examples of relational considerations that may also arise. Vertical BON represent the specifically expressed will of the parties to be legally bound to a certain type of relationship, to promises intended to be legally binding and agreements, albeit one matter at a time, that the parties consider to be legally binding.[1589] Since each BON represents one idea, if the parties desire to make two promises, for

[1587] *See* 2.2 and 2.3 in Section 2 of Chapter 1, Part I.
[1588] Since there is a division between CCL and QCL with regard to what constitutes good faith, the parties themselves should choose the scope of good faith.
[1589] *See supra* note 11. Hogg's "twin pillars".

example, then two Promise BON must be selected and registered between the parties. This avoids misunderstandings regarding what has been promised.

1.3.1 Relationship BON: developing the type of business relationship the parties choose

Relationship BON may be drawn and replaced within any stage of negotiations.[1590] We have discussed an array of reasons that aspects of a business relationships should be identified to transparently document the intensity of good faith that will be exercised between the TBN parties, whether parallel negotiations are permissible and whether the business venture is transferable to a third party.[1591]

- **Good Faith BON**

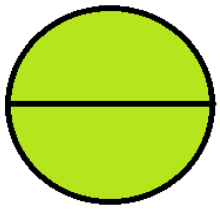
The parties are free to choose the intensity or level of good faith that will apply to their business relationship. We have offered three examples of levels of good faith: utmost good faith, standard good faith and "relaxed" good faith.

Utmost good faith symbolizes that the seller is warranting the statements regarding the seller's product; that the seller takes the risks that the product is, indeed, the very best quality for the quantum of the purchase price. In other words, the seller is making a legally binding promise to the buyer that the buyer is entitled to rely on. Accompanied with this BON could be a higher level of disclosure to enhance the business relationship, since the buyer, consequently, need not invest

[1590] Although each business relationship chosen by the parties may vary in intensity and general intensifies by passing stages of negotiations (*See supra* note 494 Japanese stairs), it is best if the parties themselves can determine exactly what standards they wish to apply to their business venture. BON guide the parties to make choices within the legal ballroom so that they do not fall in breach of law.

[1591] *See* Section 3 of Chapter 1, Part I.

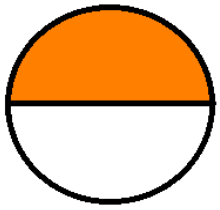
time and resources considering competing sellers in a similar market, a cost savings to a buyer.



Standard good faith is determined by industry standards of any particular trade.[1592] In other words, there is an assumption between the parties that their intention, due to their business relationship, is to respect the ordinary standards that are commonly accepted in their trade, or more generally that TGPL will be respected between the parties.[1593] They share the allocation of risks in the event of unforeseeable circumstances.

"Relaxed" good faith indicates that the parties have chosen to operate their relationship in a "relaxed" state, without encroaching on good faith obligations that are imposed by law.[1594] The seller is entitled to engage in puffery and may be boasting about his product.[1595] The buyer, consequently, takes the risks that the product may not actually be the wondrous product that the seller is boasting about and therefore must conduct himself accordingly and perform due diligence. This entails that the buyer must gather information on the product to ensure that he is aware of the competition in the market, incurring further investments of time and resource.

- **Negotiability BON**

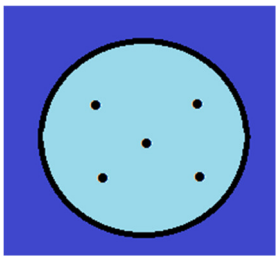


[1592] *See* merchant custom in 1.1 in Section 2 of Chapter 2, Part I and 3. *See* self-regulated industries in Section 3 of Ch nd usage in 2.5.4 in Section 1 of Chapter 1, Part II.

[1593] *Ibid*. *See* Zoe Ollerenshaw, "Managing Change in Uncertain Times: Relational View of Good Faith", in Larry A. ne Saintier, *Commercial Contract Law: Transatlantic Perspective*, CUP, 2013.

[1594] *See supra* note 51. Bhasin at para. [77].

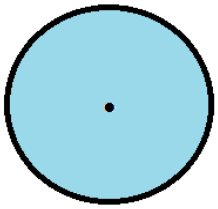
[1595] *See* how party intention is communicated during TBN in 2.3 in Section 3 of Chapter 1, Part II.



BON are presumed ***non-negotiable*** or non-transferable without specific party consent. However, should the parties choose the Negotiability BON, Negotiability BON will be placed on their tracking registry to allow transferability to a third party. If the parties have agreed to a Negotiable BON, the party who intends to leave the negotiation relationship must present the new party to the opposing party. The BON may be accompanied with a symbol "A" that assures that the opposing party must approve the transferee prior to the transfer unless there is just cause. In other words, a deal may be negotiated together that ultimately includes a different set of parties. An example of that occurrence could would be if an intermediate party who planned to ultimately sell to another buyer.

- **Monogamous/polygamous BON**

When parties admit ***polygamous*** BON they permit that parallel negotiations may be taking place between the opposing party and third parties and are in agreement with potential competition. A polygamous BON symbol must be placed on the parties' tracking system. The BON membership presumes the default presumption that the TBN business relationship is monogamous unless a polygamous BON has been chosen under BON administration.[1596]



Should the parties have chosen a polygamous BON and desire to modify their relationship to one of a ***monogamous*** nature, the polygamous BON must be removed from the registry and replaced with a monogamous BON to pledge that parties are no longer engaging in parallel negotiations with third parties.

[1596] *See supra* note 51. *Bhasin*. *See also Texaco* v. *Pennzoil Co*. (1987), 729 S.W. 2d 768 (Tex. Ct. App.), where parallel negotiations were remedied by the tort of economic interference of a contract.

1.3.2 Promise BON: cataloguing promises that parties intend to be legally binding

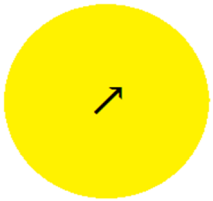
Promise BON are used when one party is undertaking a legally binding promise on which the opposing party is entitled to rely.[1597] Because it is specifically expressed and accepted between the parties, what would ordinarily be considered a unilateral promise of a specific act, or forbearance, becomes bilateral with the use of the BON.[1598]

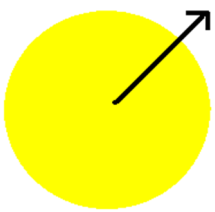
- **Confidentiality BON**

  Parties exchange trade secrets during negotiations. To ensure the quality of the confidentiality, BON evidence what is protected and sanctioned by law.[1599] The Confidentiality BON must be evidenced, and confirmed, through a Confidentiality BON. The Confidentiality BON must be accompanied with a description or photograph of the matters to remain confidential.

- **Disclosure BON**

Disclosure BON indicate the level of disclosure anticipated between the parties. There is a minimum standard of disclosure by law that parties cannot convene to override conventionally.[1600] The arrow will remain within the BON circle and can be accompanied with a short description. Disclosure may have levels of intensity.





If the parties choose a wider range of disclosure, the Disclosure BON will demonstrate an arrow outside

[1597] *See supra* note 47. Yam Seng.

[1598] See 1.1 in Section 3 of Chapter 1, Part II. This is to circumvent the dilemma under domestic laws dilemma with regard to whether or not a promise is binding.

[1599] Such as damages in tort, estoppel or unjust enrichment.

[1600] *See* Section 1 of Chapter 1, Part II.

the circle to indicate a greater amount of disclosure and cooperation anticipated in their business relationship. The record of the measurement of disclosure indicates to the opposing parties the degree of interdependence that is within the business relationship, and therefore, the extent of cooperation that can be expected by one party to the other.[1601] The measurement of disclosure is particularly crucial if the parties should fall into a need for dispute resolution, as this information aids an adjudicator to see what expectations the parties had to one another.[1602]

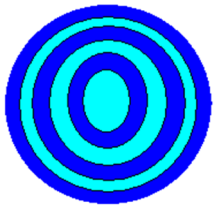
- **Investment BON**

Investment BON signify a legally binding promise by one party to look into certain matters requiring time and financial investment.[1603] The extent of the investment should accompany the Investment BON and how the investment is to be treated in the event that negotiations fail; in other words, whether the invested party is entitled to compensation by the opposing party if negotiations fail,[1604] or whether the investing party bears the full risk. The Investment BON should also be accompanied with a brief description of the nature of the investment and its purpose, such as searching for licensing, taxes or levies or a maximum monetary amount that the party is expected to contribute to carry the negotiations to the next stage.

[1601] *See supra* note 59. Lewicki.
[1602] *See* 2.5.3 in Section 1 of Chapter 1, Part II regarding disclosure.
[1603] *See supra* note 47. *Yam Seng*.
[1604] *See supra* note 30. Scott/Schwartz.

- **Security BON**

Security BON signal that the parties have agreed to a security deposit to be held at the BON Centre. When a party has committed to offer a Security BON and the quantum has been confirmed between the parties, the funds will be evidenced by a Security BON. This BON will include a short description of the length of time the Security BON is to be held and the purpose that the security BON will accomplish. A holding agreement should accompany the BON between the BON agent and the parties to conclude the circumstances of release of the BON.

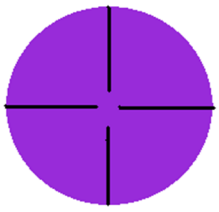


- **Indemnity BON**

A party who is willing to secure an undertaking to another party can choose to post an Indemnity BON, accepted as a guarantee by the opposing party. When confirmed and accepted by the opposing party, the Indemnity BON may be accompanied with a Security BON which serves to securitize the undertaking by providing a monetary amount owing if the party who has offered the commitment fails to perform. A brief description of the understanding and quantum of indemnity should accompany the BON.

- **Financing BON**

Financing BON place a condition on an undertaking of a party to obtain financing for a particular project, in a determined delay of time. Once financing is obtained, the Financing BON is marked with a "T" to signify that the condition has been fulfilled. It is possible that it could be marked with a "P" meaning only part of the condition has been fulfilled, leaving it up to the parties to renegotiate modalities. The Financing BON should be accompanied with a document that enunciates how much financing should be attained, a maximum interest rate and time of amortization of the financing as



well as a time limit in which the party who is applying for financing has to obtain it. The Financing BON is a conditional BON to another promise or agreement so that if financing should fail to succeed, the party applying for the financing would not be obliged to the opposing party and the negotiations will fall or be subject to further negotiations.

- **Exchange BON**

The purpose of the Exchange BON is to delineate the terms and conditions of the exchange that are determinable between the parties. The Exchange BON may have a descriptive attachment or photo that escorts it to ensure that both parties have agreed to the same object(s) of exchange. BON serve to propel more specific steps of the Horizontal Object BON.

1.3.3 Agreement BON: classification of agreements that parties intend to be legally binding

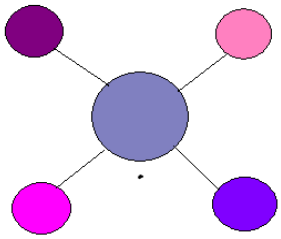
Agreement BON are intended to record bilateral exchanges that are partial or incomplete. As the parties establish a particular arrangement, they can document the commitment agreed to and confirmed between the parties. The Agreement BON indicate that the parties intend to take measures to preserve their commitments as legally enforceable between themselves in case of non-performance.[1605]

These Agreement BON may include specific commitments, such as an agreement to cooperate with one another, agreement to renegotiate in the event of unforeseen circumstances arising between the parties during negotiations or following the conclusion of a contract. A Burden of Proof BON establishes which party bears the burden to evidence non performance. Network and Multi-lateral

[1605] Agreement BON may also be subject to Horizontal Scope BON.

BON connect expansions of the negotiation relationship. Dispute Resolution BON enunciate party preference in the event of an unresolved dispute. The parties may also attach an INCOTERM to BON.

- **Commitment BON**



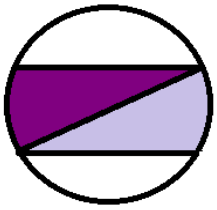
Commitment BON indicate that the parties are willing to preserve the business amity between them and sincerely strive towards preserving trust. Commitment BON in tandem with Relationship BON establish the intensity of the relationship and therefore the extent of commitment to be preserved. This is evidenced by the number of chains chosen by the parties. Each link indicates a further step towards solidifying the relationship to ensure an insecure party that the relationship is one of a serious nature. The nature of the commitments can be attached to the Commitment BON.

- **Cooperation BON**

Cooperation BON are provided to permit the parties to choose cooperation as the dominant strategic position ensuring that all the parties' interests are taken into consideration.[1606] Choosing the Cooperation BON engages a certain standard of conduct conducive to a partnership, aiming towards promoting the business relationship and attaining mutual goals. The competitive antics subside in favour of a more distributive relationship that enhances the way tasks are divided and assumes that the pie may be partitioned such that one party can choose the icing whereas the other party may prefer the cake.[1607]

- **Renegotiation BON**

[1606] *See supra* note 49. Usunier.
[1607] *See supra* note 223. MM on the division of a chocolate cake.

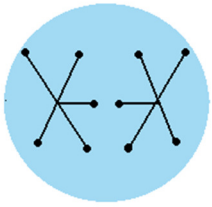


It is important for negotiating parties to signal when negotiations are to allow the flexibility of renegotiations in the dynamic world of TBN. In other words, what might have been decided in the past may be altered with present and future obstacles that threaten the very well-being of the TBN parties' relationships. As a result, a party who has not otherwise agreed on a renegotiation strategy is free to offer a Renegotiation BON to preserve the relationship between the parties. Renegotiation BON will require careful selection of the Vertical Relationship BON of good faith and the Horizontal Scope BON.

- **Burden of proof BON**

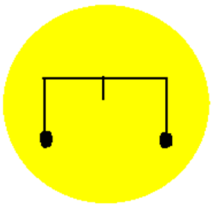
The burden of proof should be allocated between the parties to contribute to transparency. Burden of Proof BON determine which party is subject to providing proof on any given level. Risk allocation, Disclosure and Agreement BON may be addressed in Burden of Proof BON.

- **Network BON**



Network BON provide both parties with a potential network of resources due to multiple parties that have interests in the same project. Networks must be disclosed for transparency reasons and to offer the opposing party(is) opportunities to group with these.

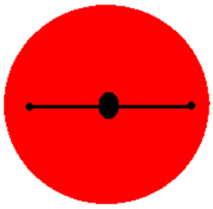
- **Multi-lateral BON**



Not all parties operate business alone. Some parties are attached to multi-lateral conglomerations that, at an advanced level of negotiations, can be exposed to the opposing party so that the opposing party can access recourse directly from another source. Similar to monogamous and polygamous

relationships, Multi-lateral BON can lead to many interests. At the same time, they may offer a direct recourse to a party who would otherwise not be considered in a contractual relationship.

- **Dispute resolution BON (and choice of law)**



The BON Centre is responsible to appoint an arbitral board as a default dispute resolution. However, parties are free to post their own dispute resolution by choosing a Dispute Resolution BON that the opposing party is willing to accept in the event of an unsettled dispute. If a BON is accepted and confirmed on the registry between the parties, they may express their consent to specific body of arbitration.

- **Attachment of INCOTERMS BON**

BON are flexible and dynamic. They can attach any type of document, agreement, letter of credit, bills of lading or INCOTERM to provide the parties with more precision regarding their business relationship.

We believe that BON will serve the global community in years to come by providing efficient, autonomous and securitized methods of transacting during TBN whereby party choice, within the boundaries of the tri-dimensional sources of law, will dominate. Since self governance has been successful during ancient times and in small communities, we strived to find a way that self-governance could prevail through a gyroscopic orientation of the regulation of transnational negotiations.[1608] Gyroscopic orientation connotes a manner to legally regulate by providing a means to pole the tensions ongoing during transnational negotiation processes and record party intention in a speedy but juridically securized fashion.

[1608] *See supra* note 1550. Hutchinson.

CONCLUSION: HOW A JURIDICAL INSTITUTIONALIZED SETTING CONDUCTING BILLS OF NEGOTIATIONS CAN OFFER SOLACE

Drastic measures need to be taken to securitize international trade and terminate the complacency, uncertainty and destruction resulting from the current legal regulation of transnational business negotiations. A new manner to regulate transnational business negotiations is long overdue. We realize that these measures may appear severe vis-a-vis the antiquated way that law has conducted regulation of transnational affairs. But transnational business negotiations require regulatory updating and enhanced security.[1609] Law has not attended to these needs and remains far behind, regulating in an orbit of uncertainty. Extra-contractual remedies have been applied which distort what the negotiating parties are actually doing and arranging together, thwarting the true nature of

[1609] *See supra* note 11. Piazzon advocates that three of the elements that provide juridical security are accessibility, stability and foreseeability at 17 and 62. Our current manner to regulate transnational business negotiations does not offer any one of the three elements.

negotiations.[1610] There is a distinct resistance in law to recognize meaningful arrangements that parties have communicated between themselves when an adjudicator is called to settle unresolved disputes.[1611]

Not only is there a vast universe of conflicting discourse amongst the legal systems, due to the diversity of conflicting laws that compete together producing different responses to the categorization of obligations arising out of negotiations, the measurement and enforcement of remedies is globally inconsistent.[1612] Adjudicators are called upon to decide matters without the necessary tools for diagnosis of the issues, lack of evidence of the true party intent that transpired during the processes of negotiations, and inadequate remedies to cater to the basic needs of transnational business negotiation parties.

We exposed that law was enforcing arrangements only when law could recognize a valid contract under law. Law has been resistant to recognize the mini, inter-connected agreements arranged between the parties. Law is blind to the semiotic communications exchanged between transnational business parties, thereby compensating by scrambling with extra-contractual remedies to sooth injured parties, oblivious to these meaningful communications that are exchanged and relied on between transnational business negotiation parties in long term transnational business negotiations.

This diversity causes rupture and uncertainty in the regulation of transnational business negotiations and interrupts the expedition towards a desired cooperative and harmonized global legal solution.[1613] As transnational laws have many permutations and may not always coordinate

[1610] *See* 2.2 in Section 3 of Chapter 1, Part I. *See supra* note 43. *Red Owl*. The tort debate is whether or not promises made during negotiations should be based on consent?
[1611] *See* 1. in Section 3 of Chapter 1, Part I.
[1612] See our comparative analysis documented in 1. in Section 1 of Chapter 1, Part II.
[1613] *See supra* note 171. Maniruzzman at 692 and Bell at 240.

with domestic laws, a wave of unpredictable interpretation has been prevalent during the resolution of unsettled transnational transaction disputes.

It is no wonder that law has failed to find a proper manner to guide this human activity. There is no specific category of obligations governing the regulation of transnational business negotiations. Furthermore, there is no way to provide a uniform and transparent analysis of the negotiation processes due to the insufficiency of legal tools to measure the stages of negotiation since there is no juridical tracking system. There is no way to isolate the meaningful promises, agreements and address the conduct within the business relationship exists to track parties' intentions during the climb through negotiation strategies and tactics. And yet, the business world has beseeched assistance.[1614]

Without the proper juridical tools to track and record the meaningful arrangements between transnational business negotiation parties the regulation of transnational business negotiations by law remains complaisant,[1615] uncertain,[1616] or destructive.[1617] A lack of understanding by law of both the full extent of the processes of negotiations and the meaningful communications that are exchanged between transnational business negotiation parties leaves parties masked with uncertainty since parties cannot predict whether their arrangements will be recognized and enforced by law.

Transnational business negotiation parties prefer to self regulate;[1618] they prefer to delineate their own legal obligations to one another and call for a manner to record the applicable scope and intensity of these obligations to their own business relationship. Yet, the parties themselves have been given no means by law to ensure the certainty required to securitize their arrangements.

[1614] *See supra* note 15.Ghauri at 22.

[1615] *Laissez-faire* was the general attitude of commercial law during the rise of sovereignty. *Supra* note 12. Yee.

[1616] In other words, whether an agreement will be recognized by law or not; whether other legal obligations will be presumed by law to exist between the parties. *See* 1. of Section 3 of Chapter 1, Part I.

[1617] *See* 3. of Section 3 of Chapter 1, Part I: interference with party autonomy and the inability of law to provide juridical security, thus interrupting efficiency and invading business negotiation parties' rights.

[1618] *See supra* note 49. Usunier at 116-117.

Law can offer proper guidance in the regulation of transnational transactions. We propose a manner that law could recognize business arrangements that fall short of a contract through an authentic legal institution that can properly guide business parties. An administrative centre that can verify the capacity of the parties must be put into place to ensure the viability of their arrangements. Corporate authority and status must be confirmed to ensure parties they are dealing with proper legal persons. Simple and expeditious manners must be initiated to track and record the processes of negotiation to delineate the arrangements transnational business negotiation parties intend to be legally binding. The choice of intensity and scope of legal obligations are fundamental functions for the parties themselves. Deposit securities are beneficial, so the seller is assured of payment whereas the buyer's funds remain secure until delivery of the goods. Rapid, professional assistance to settle disputes through mediation and arbitration has proved to be the preferred choice of adjudication by business parties.[1619]

The problematics: We identified three primary factors that contribute to the uncertainties occurring in legal regulation of unsettled disputes during transnational business negotiations. We were, necessarily, forced to discard the idea of *sui generis* rules for negotiations; the first and most fundamental problematic of the regulation of transnational business negotiations, until a category of obligations regarding negotiations can be established by law itself. The consequence of not having any specific category of negotiation obligations in law is that law remains at a complete loss to properly address how business arrangements arising during negotiations should be categorized.[1620]

We advocated that we *could* contribute to the second and third problematics, namely the lack of transparency and uniformity of transnational business negotiations. This contribution could be

[1619] *See supra* note 39. Carbonneau.

[1620] *Supra* note 9. Swan explains: "The method of legal reasoning that the common law has developed (or which characterizes the common law) has certain features that sometimes make principled analysis difficult. The common law seldom starts from a statement of principle: its principles, such as they are, are constructed out of a backward look at what has been done to see what, if any, generalizations can be made from the "wilderness of single instances"...The lens has changed from time to time so that the generalizations that, through one lens, appeared clear and consistent, are, through another, vague, erratic and contradictory." at 168.

accomplished in an institutionalized setting and would require law to step outside the usual comfort zone to better understand the meaningful promises and agreements, characteristically oral and incomplete, exchanged dynamically during the processes of negotiation. In time, this institutionalized law may very well develop a set of specific category of obligations inherent to the processes of negotiations.

Law cannot envision when transnational business negotiation parties intend their arrangements to be legally binding, nor the scope and intensity of the legal obligations that should be applied to their business relationship. There is a need to find other means for law to contribute by joining uniformity between formal law and law in action, otherwise the functionality of law in the global market will continue to be challenged.[1621] In absence of specific laws pertaining to transnational business negotiations, we argued that we could find solutions to the lack of transparency and uniformity.

To offer solutions to provide transparency and uniformity, we excavated a better understanding of the purpose and function of negotiations by entering into business' and behavioral scientists' perspectives to bring back to law a better understanding of the normative patterning of transnational business negotiations and requirements of transnational business negotiation parties during transnational business negotiations.[1622] Consequently, the current vision of law on the parameters of a minimum standard of behaviour during transnational business negotiations is lost. Transporting business and behavioral perceptions back to law; we investigated current juridical tools available to these parties to ascertain whether law was providing for the needs of these perceptions outside the law. We discovered disparity, inconsistency and conflict between law and other disciplines.

[1621] *Ibid*. Harris contends that otherwise legal doctrine will be trumped by a new emphasis on the "social significance of law" at 325.

[1622] Law and society are intertwined, both dependent on empirical data that evidences normative patterning exposing regularities within a human activity that could be considered, generally, as acceptable standards of behavior in a given community. *See also supra* note 17. Fisk/Gordon.

Business and behavioral scientists' perspectives concur that the *purpose* of negotiations is to strike a deal; a mutual goal that is beneficial to both parties, where parties are better in the association than without. The law has every interest to protect this purpose.[1623] Its *function* is connected to approaches and behavior strategies which operate when parties arrive at the bargaining table with differing interests and potential conflicts to attempt to strike the purpose of negotiations: a mutually beneficial goal. Transparency and uniformity operate best when parties can preserve *certainty* in their transactions and *autonomy* and *flexibility* are supported, contributory factors towards the promotion of *efficiency* in transnational business negotiations dealings.[1624] Furthermore, party autonomy was, and remains, the preferred regulatory source of law for transnational business negotiation parties, a notion that must not be forgotten when law regulates this activity.

There is an underlying connection between the function and purpose of negotiations that requires law to support party autonomy and the parties' ability to self-regulate. Law has suffered limitations due to the inability for law to recognize all the arrangements that transnational business parties are exchanging. Where law can guide is to supply a manner to express the expectation of a certain standard of behaviour which exists during negotiations to promote trust.[1625] Transnational business relationships require cooperation, accomplished when parties exchange meaningful communications together,[1626] but these commodities need measurement which can be readily be accomplished by the parties themselves with the right juridical tools. Transnational business negotiation communications include the creation of promises and agreements that necessitates

[1623] *See also supra* note 179. Lowenthal.
[1624] *See* 3. in Section 1 of Chapter 1, Part I for further expansion on these norms. *See supra* note 11. Hogg and Gutmann.
[1625] *See* 1. in Section 2 of Chapter 1, Part I.
[1626] *Supra* note 48. Druzin.

cooperation,[1627] and through this cooperation buds trust.[1628] Trust spawns the necessity of a minimum standard of behavior or conduct, such as good faith.

Transnational business negotiations are twined with a constant tension between self-preservation *versus* exertion towards the purpose of negotiations and the need to maintain trust between the parties. Thus, there is an expectation of certain standards of behaviour while parties function in the processes of negotiations. Whether transnational business negotiation parties accomplish their goals also depends on how they conduct themselves during the functioning of the processes of negotiations.[1629]

The important lesson for law to learn from business and behavioural scientists' perspectives is that transnational business negotiation parties prefer to self-regulate in an efficient, autonomous and certain manner. This self-regulation cannot, necessarily be encumbered by an expectation of a standard of conduct that remains chameleonic and undefined by law. The expectations of standards of conduct in party autonomy during transnational business negotiations are not in sync with law, and therefore law has not offered a valuable contribution towards the protection of these meaningful exchanges, leaving the expectations of transnational business negotiation parties sabotaged.

Law must learn to decipher the importance of defined standards of conduct during negotiation processes and the necessity of building trust through interdependence to keep up. The parties' must be given access to juridical tools outside of classical contract law so that they can *choose* standards that are acceptable to all sources of law. If only law could document negotiation arrangements in a simple and efficient manner to promote successful negotiations.[1630] Recalling the words of Hume:

[1627] *Supra* note 49. Usunier at 116.
[1628] *Ibid*. Usunier at 116 and 117.
[1629] *See* Section 2 of Chapter 1, Part I; in particular supra note 70. Manrai.
[1630] *See supra* note 49. Usunier at 116-117.

"were there certain symbols or signs instituted, by which we might give each other security of our conduct..."[1631]

While law has gathered a vague understanding of the process of negotiations, it has failed to recognize the plurality of processes of negotiations as well as a firm grasp of the juridical consequences due to the lack of juridical tools to deal with the flexibility and dynamic quality of negotiations.[1632] Popularly, the position that there are no legal ramifications during the negotiation processes since they "cannot be monitored"[1633] can be overturned. We propose that there *is* a way to monitor transnational business negotiations using an institutionalized setting that can track and record bills of negotiations privately; representing the arrangements that the parties intend to protect by being recognized as legally binding.

Towards a solution: Our comparative law analysis demonstrates the tensions inherent in our legal systems. Yet, notwithstanding the obvious rupture, one major similarity appears in all three sources of law: every source of law supports party autonomy to some extent. The bridge to cross occasions the capricious responses of limitations to party autonomy by each of the sources of law to cease. Some commentators consider the limitation an interference or intrusion on parties' autonomous rights. We concur with Hogg that proper conduct is a responsibility inherent in the privileges of freedoms of contract;[1634] in fact, the price of freedom. We hypothesized that the tri-dimensional sources of law could be reconciled through a juridical gyroscopic orientation of law by amalgamation of the following propositions:

[1631] *Supra* note 1256. Markovits refers to Hume`s quote at 1333. [our underline]. *See also* the processes of formation of trust that can be built short term: Parimal Bhagat, "Relationship Development: Tracking the Formation of Relationship Commitment in a Controlled Setting", Journal of Relationship Marketing, 8: 267-278, 2009, DOI 10.1080/15332660902991056.

[1632] *See* Section 3 of Chapter 1, Part I.

[1633] *Supra* note 1. Holmes Norton.

[1634] *Supra* note 1302 at 38.

- ❖ re-characterization of the concept of negotiations as promises, agreements and relationships, using an application of HCWT, heeding normative function of transnational business negotiations;
- ❖ recognition of the amity in transnational business negotiation relationships as a continuum and the basis of party autonomy as its own juridical order; and
- ❖ setting flexible standards of transnational business negotiation parties' communications and conduct through party choice by following the normative patterning of business negotiations through trade mechanisms to guide party choice at each step, position and stage of negotiations.

Although, it is logical that negotiations intensify through stages of negotiations, we have witnessed that it is not necessarily the stage of negotiations that determines whether legal obligations have occurred or not. There are rights to protect and obligations that may ensue as early as the pre-negotiation stage, such as trade secrets or procurement of information by negotiating when a party never intended to go through with any deal or issues of disclosure. "Legal ramifications in the early stages of negotiation are probable at inception".[1635]

A proposed solution: There is a call from the business community for further security.[1636] Law could respond by enhancing its support of party autonomy with efficient juridical tools. In the past, civil law systems have used notaries to record commercial transactions.[1637] When notaries securitize a transaction, they ensure that the parties have the capacity to contract and that a party representing the legal person has the authority to transact. A corporation must be verified in good standing. A notary records and authenticates agreements entered into when parties desire to be legally bound. While drafting and executing a document, the notary is an expert in legal drafting. The notary can hold secure deposits in the purchase and sale of property, holding funds in trust as a security between the parties. The notary also acts as a mediator and facilitator to the resolution of disputes between the parties.

[1635] *Supra* note 176 at xviii.
[1636] *Supra* note 15. Ghauri at 22. *See also supra* note 64. Edlund and Roxenhall/Ghauri at 261-268.
[1637] *Supra* note 24.

We propose to apply these notarial functions into an institutionalized system that can accomplish the same security for transnational business negotiations by recording these promises, agreements and the scope and intensity of the business relationship the parties' desire in the simplistic form of bills of negotiations. The Centre administrating bills of negotiations [BON Centre] could operate as the axis of the gyroscope, which must remain free to alter in direction to preserve the flexibility and stability required to do business from different legal jurisdictions. The axis of the gyroscope is built upon support for party autonomy accompanied by a minimum standard of good faith during the negotiations which, without breaching the divergent standards existing within the three sources of law, chosen and confirmed by the parties through symbols that are represented by bills of negotiations.

To promote an institutionalized system, there is a need for a new legal negotiation theory of transnational business negotiations that can provide methodological insight. This new legal theory could be based on Hogg's cooperative will theory of contract combined with an understanding of the normative patterning of transnational business negotiations. This practical application could symbiotically provide the theoretical base required to develop predictability of the proposed bills of negotiations, and contribute to the future development of transnational business negotiations with similar security as that offered by the notarial practice. Promises, agreements and the business relationship itself would become transparent to transnational business negotiation parties by following Depth Bills of Negotiations that mark the stages of negotiations, Horizontal Bills of Negotiations to track negotiation strategies (negotiation positions) and hearken parties of what must be addressed in each stage of negotiations, and Vertical Bills of Negotiations that provide a pathway to follow negotiation tactics (negotiation steps). These promises, agreements and the parties'

conduct in their business relationship represent a practical application of Hogg's Co-operative Will Theory of Contracts to transnational business negotiations.

How our proposal is expected to improve regulations is that it will illuminate many of the current hurdles that are keeping law from moving forward and updating the provision of proper guidance of transnational business negotiations in a modern, global and technological world. Our proposal is expected to expose and record arrangements that are currently not recognized by law. The common law contract debate on whether contract is a promise or whether contract is consent can be eradicated during transnational business negotiations. Bills of negotiations will eliminate the query of whether or not transnational business negotiation parties have created a valid contract. Transnational transactions will be securitized as parties will be assured that their capacity to contract has been verified. The differences that drive legal systems apart regarding whether an objective test or a subjective test is necessary to determine party intent can be annihilated. The formation of bills of negotiation agreements will be solidified thereby reducing the application of implied contracts and pre-contractual liability. Alternative dispute resolution processes will be accessible in the BON Centre.

- **Recording intangible negotiation movements and dispensation of the debate between contract as a promise and contract as consent**

Debates regarding whether contract is a promise or whether contract is consent[1638] will no longer be relevant with the use of bills of negotiations. The parties will register their arrangements

[1638] *See* 2. in Section 2 of Chapter 1, Part II. See also Lisa Bernstein, "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms", 144 U. Pa L. Rev. 1765, 1995-1996. Bernstein considers the financial viability of an entire contract: "Sometimes transactors allocate

and, by so doing, confirm their legal undertakings to one another. Bills of negotiations [BON] will have the composites of a mini contract. Each bill of negotiation, when registered by a party, may be rejected or confirmed by another party. If it is confirmed between the parties, it forms a bilateral offer and acceptance between the parties. Bills of negotiations are designed to expose the entire negotiation system by tracking negotiation steps, negotiation positions and negotiation stages. Bills of negotiations will delineate when the negotiation dance has begun, in which negotiation stage the parties are situated and when the negotiation relationship has come to an end. Bills of negotiations [BON] will record those business arrangements that transnational business negotiation parties consider to be legally binding through bilateral processes, having the ability to delineate the scope and intensity of their business relationship as well as the scope and intensity of their legal rights and obligations.

- **Verification of party capacity**

The BON Centre will be responsible to confirm each party's capacity and corporate good standing. Accredited notaries in civil law jurisdictions and accredited lawyers recognized by the law society in common law jurisdictions will perform this function for the BON Centre. A list of accredited jurists will remain with the BON Centre for consultation.

- **Defeating considerations of validity of contract**

Bills of negotiations [BON] will be exchanged with consideration; a token contributed to the seller's deposit fund held by the BON Centre. It will be collected with each registration fee to file the

aspects of their contracting relationship to the extralegal realm because the transaction costs of including a sufficiently well-specified written provision in their contract would exceed the benefits." at 1789.

BON to eliminate want of consideration[1639] and applied by the BON Centre to the deposit held for the seller. As each BON must be submitted and then accepted by the opposing party(ies) there is a bilateral offer and acceptance with the confirmation of each BON formed.

- **Annihilation of objective and subjective tests**

BON will demark express party consent and intention and therefore, eliminate the need for division between subjective and objective test standards. When the parties have expressly chosen BON, it is recorded and forms part of the agreed upon promises and agreements between the parties underlies the parameters of the business relationship. Where parties have omitted to choose BON, the membership default rules will be applied on an objective standard basis.[1640]

- **Solidification of the formation of an agreement**

Uncertainty as to whether an offer and acceptance have been mirrored under Canadian common laws or whether there has been a "meeting of the minds" in Quebec civil laws, whether notices are received before a stipulated time or whether a preliminary agreement is valid disappear through the transparency of registration of the BON.[1641] Transnational business negotiation parties will be free to evidence their promises, partial agreements and contracts with certainty that they will be recognized by law, expressly recognized by the parties themselves as legally binding, and therefore the ability to be recognized by all sources of law.

- **Reduction of legal fiction and unwarranted pre-contractual liability**

[1639] And avoid outcomes such as *Birkmyr v. Darnell* (1704) 1 Salk 27, 91 E.R. 27 (K.B.).

[1640] Article 4.1 UNIDROIT Principles on contract interpretation.

[1641] *See* 3. in Section 1 of Chapter 2, Part I. See also supra note 1630. Bernstein emphasizes the importance of business norms in business contracts: "Finally, one of the most important reasons that transactors allocate aspects of their agreement to the legal or extralegal realm turns on the distinction between observable and verifiable information. Observable information is information that it is both possible and worthwhile for transactors to obtain. Verifiable information is information that it is worthwhile for transactors to prove to a designated third-party neutral in the event of a dispute at 1791. Both observable information and verifiable information are accessible functions of BILLS OF NEGOTIATIONS and, when, secured, promote trust without the necessity of an entire formal contract.

Adjudicators will no longer have to guess what the parties' intentions are. If more than one promise is made, it will be clearly documented by BON with transparency, as each promise will require a separate BON. Most pre-contractual liabilities can be avoided by adhering to the BON system by diligently recording the negotiation communications and commitments desired to be legally binding between the parties. BON not only serve as tracking devices, but also reminders to transnational business negotiation parties of some of the considerations they need to deal with during the processes of negotiation, bringing evidence and transparency back to law when called upon to resolve a dispute.

- **Dispute mechanism alternatives**

Internal dispute resolution mechanisms will form part of the BON services offered to party membership. Upon demand by one of the parties to initiate mediation or arbitration of unresolved disputes, the membership to the BON Centre will access professionals who will have access to analyze the BON selected and discarded during the parties' negotiation processes to facilitate evidence for proper adjudication of the parties' legal commitments to one another.

Final Conclusion

In conclusion, law must tread carefully before regulating autonomous, business deal-making to avoid becoming a nuisance. But law must regulate to keep up with its duty to guide human activity. Our solution provides not only certainty and security but also flexibility as the law can evolve with the dynamic nature of transnational business negotiations. To regulate the processes of negotiations, law must attain the ability to envision the meaningful arrangements that transnational business negotiation parties intend to be legally binding and the scope and intensity of the business relationship, a valuable commodity to transnational business negotiation parties. Transparency and uniformity are keys that unlock the door of certainty. Private business parties require more security with the coming of a new,

innovative era and growing needs of the global market. The increasing danger in the global world necessitates improved regulatory processes. The fundamental norms of efficiency, autonomy and certainty merit legal protection and law should not dictate the standards of conduct that transnational business negotiation parties can choose themselves autonomously. Law can provide symbols that will offer transnational business negotiation parties the certainty they yearn for. Currently, legal negotiation theory is based only on what we can see on the surface and not the underlying nuances regularly occurring between transnational business negotiation parties. Regulation of transnational business negotiation arrangements remains inconsistent and ad hoc, considered mostly under the "shadow of the law" or evaluated without taking into consideration the anatomy of transnational business negotiations. BON venture to evince negotiations which should quintessentially have their own *sui generis* set of rules to match the true character of transnational business negotiations.

Implementation of a BON institution will require the continuing support of party autonomy during the processes of negotiation that is accompanied with a certain expectation of a standard of conduct. In an evolving global market, law can ill afford to be imprecise. A square peg in a round hole gains no more insight than a round peg in a square hole; doctrines of contract and tort, or a combination of the two, characterizing transnational business negotiations falsely thwarts the true characteristics of transnational business negotiations that beg characteristics of their own.[1642]

[1642] *Supra* note 629. Stephan at 1663: "With the transformation in international law's role have come fundamental changes in the way we think about its sources and methods. The move toward privatization seems logical and in some sense inevitable…The problem becomes not just changing the rules by which we play but changing the rules for determining what the rules are."

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