

The Impact of Hogg's Co-operative Will Theory of Contracts on Pre-negotiations and Post-negotiations in Long-term Contracts

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Abstract: There is a presumption that legal consequences are absent during the processes of negotiations. This phenomenon is due to the poverty of juridical tools available to business parties. As a result of not having the proper working tools, misunderstandings of party intentions have blinded adjudicators so that they are unable to ascertain the true meaning of ongoing business arrangements. A better understanding of negotiations as a juridical act, how negotiation approaches can contribute to business parties meeting their mutual goals and comprehension of the negotiation processes will lead to a greater understanding of the legal intentions of business parties while negotiating. Since agreements need not necessarily be in writing, it is not always easy to produce evidence to prove the legal rights and obligations that parties intended and relied upon.

Keywords- business negotiations, communications, legal obligations

1. Introduction

Are business negotiations regulated by law? Should they be, and, if so, how – could we improve regulating them. Negotiations are currently regulated by law, but not in accordance with an expressed set of specific rules; rather piecemeal and under the “shadow of the law”¹. In order to understand how to regulate a human activity, we must understand it. To do so, it is necessary to explore how other disciplines perceive the manner in which negotiations are conducted, outside the law. This paper explores how the law sees what the parties are doing when negotiating business transactions.

There is precious little written on the subject of legal negotiations that lends itself to an overview of “how” negotiations are conducted, and many juridical contexts focus on negotiations directed towards lawyers representing their clients while negotiating, and ethical considerations that must be considered on a deontological level². How business parties negotiate towards establishing a “deal”, whether successful or not, remains an enigma to most of the legal community.

Law does not truly understand what business parties are doing, what the parties’ intentions are during negotiations, and therefore whether the parties have intended to create legal obligations between one another. Furthermore, business parties have no tools to express the measurement of legal obligations in character and intensity and when legal obligations should commence. Since business negotiations appear intangible to law, legal theory has preferred to wash its hands of considering legal implications during negotiations, thereby dubbing negotiations as non-juridical acts.

2. Negotiations – A juridical act?

Are negotiations a juridical act or are they considered “norm-free”, in other words, having no legal consequences? 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*”. The mere definition of “negotiations” is a dichotomy; both exponential (gathering momentum until an agreement is formed) and translatory (transferring legal rights and obligations). The context of the definition of negotiations depends on the lens of the discipline investigating the phenomenon. Black’s Law Dictionary offers: “Negotiation is [a] process of submission and consideration of offers until [an] acceptable offer is made and accepted”³. Once an offer is made and accepted, it is recognized by law as being a contract insofar as the formalities of a valid contract have been respected by the terms of the jurisdiction that the parties are subject to. Consequently, contract is simply a part of the negotiation processes. Leading up to the execution of a contract is the formation of a contract. In long-term relations, this formation can last for a long period of time.

Although human negotiations are innate, historically the definition *per se* has only been available through the processing of dictionaries. The term “*negotatio*” originated

in dictionaries during the late 15th century where it was defined as “*doing business*” or “to bind together”.

“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”⁴.

Popular discussions depict negotiations as a mere phase leading up to the signing of a contract or agreement, ignoring that the formation stage is as relevant as the performance and extinction of a contract. In modern days, the value of negotiations as a ‘correlation’ has declined and the relationship aspects of negotiations have been overlooked as negotiations have been misunderstood as a mere stage prior to a contract. Negotiations are not linear, they are rotating, dynamic and three-dimensional processes that require many different features to operate in tandem, which includes both planning and improvising while parties strive to find a mutual settlement to resolve differing interests. Negotiation parties are drawn together because neither one of the parties can accomplish the same goals without the other. Each negotiation party brings a new aspect to the negotiation table.

We do not deny that negotiations can be short term, but our focus in this article is on long-term relationships between negotiating parties. In other words, rather than a transaction between strangers, there is a ‘correlation’, ‘*doing business together*’. It is an understatement to observe that there is confusion in this area of law. Negotiations have operated under social assumptions that parties are not creating binding obligations in law until a contract is signed. Legal theories have mushroomed throughout the modern world but without effectively addressing the problems in negotiations and contract law. The amount of information available through technological advancement has contributed to the inability for business parties and jurists alike to weed what is happening during negotiations and contracts that can record party intention.

Nevertheless, negotiations do not overtly fit into legal doctrines and theories as they often fall outside of the realm of an apparent contractual conclusion until the plume has signed. Within the lacanae lies negotiations... *caduque*, fallen by the wayside for want of validity of contract. In other words, in law it is more often than not considered that there is no definitive settlement of an agreement even though promises have been made. When agreements have been made and a business relationship ensues, these promises, agreements and relationships may very well have been relied upon, consequently forming rights and obligations between the parties.

3. Negotiation approaches and how business parties reach mutual goals

Law has identified two approaches used by business parties during negotiations: problem-solving and competitive negotiations. The problem-solving is considered non-zero sum or “win-win” where parties cooperate to find solutions.

The competitive approach to negotiations is considered zero-sum or “win-lose” where one party is attempting to snatch the biggest piece of the pie. An emphasis on problem-solving negotiations has occupied legal scholars who ponder negotiations. This emphasis has been accompanied with a repugnance to adversarial or competitive negotiations. However, management and behaviour scientists disagree. In fact, both problem-solving approaches and adversarial competitive approaches are used in tandem along with other conflict positions and tactics that have not been identified by law during the complex processes of negotiations⁵.

Conflicts are inevitable during negotiations due to existing tensions between the interests of one person over the interests of another person. Each party has its own interests to protect. However, there is a stronger incentive that drives parties towards establishing mutuality: the fact that parties are better off together than alone. Parties endeavor to “self” problem-solve throughout the various stages of negotiations. While some commentators focus on tactics and strategy, particularly in the initial stages of negotiations, in recent years, scholars have attempted to widen the categorization to place more emphasis on general negotiation approaches or styles and not just on specific strategies⁶.

The parties must assess and communicate options available to them while keeping their eyes on the prize. “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”⁷.

Preparatory factors include *identification* of one’s own business interests as well as *characterization* of the other parties’ interests, requiring various conflict positions to move negotiations forward, delineating how to project and relate to one another⁸. While negotiations are characteristically interdependent and require an inordinate amount of planning and preparation, they are also dynamic and must remain flexible to the improvising required during the various positions of conflict, including competition, collaboration, compromise, avoidance and accommodation. Although *competition* is confrontational, it plays an important role in the power-dependence that is inevitable to reinforce one’s own position (identification). Meanwhile, there is a need to use *collaboration* seek solutions to bridge the tensions between one’s own position and respect for another party’s interests to build trust(characterization). When competition and collaboration do not function, alternative solutions may be used, such as *compromise* by a party who is willing to sacrifice their position for a long-term purpose, *avoidance* whereby a party withdraws from the conflict diplomatically or *accommodation* which is the opposite of competition, known as “forced obedience”. All

these conflict positions are used in combinations that are improvised as negotiations develop.

How to reach negotiation goals depends on how negotiating parties view their business relationship. Hofstede has studied the patterning of various cultures doing business across borders and has offered contrasting orientation processes based on whether parties are from “high-context” countries or “low-context” countries, predicting that various constructs contribute to attaining mutual goals⁹. There is also a number of cultural obstacles that must be resolved during negotiations, including the meaning of various semiotics exchanged during negotiations and the nuances of silent languages and what they mean to different cultures¹⁰. Unless law is willing to consider the significance of these social factors and how they contribute towards the creation of legal rights and obligations, law will never truly be able to guide this human activity without becoming a nuisance.

4. What law has identified negotiations as transactional mechanisms and dispute resolution mechanisms

Negotiations have been differentiated by law between two distinct mechanisms: transactional mechanisms and dispute resolution mechanisms.

4.1 Negotiations as transactional mechanisms

Transactional mechanisms are transactional, characteristically, *voluntary*, serve to establish *future conduct* between the parties, and used to promote *problem-solving*.¹¹

They are *voluntary* because legal theory has advocated that negotiation parties, in principle, cannot be forced to negotiate with one another if they see no way to reconcile their differing interests together. Negotiations *establish future conduct*, meaning they impact future conduct of the parties. In other words, the willingness to work together to attain their mutual goals¹². The aspect of *problem-solving* is meant to seek solutions that can mutually satisfy the parties that their business relationship is worthwhile and that they will be better off together than alone. Legal regulation should work towards “a way which promotes and maximizes human interactions that are creative, enfranchising, enriching and empowering, rather than alienating and conflict-provoking.”¹³.

4.2 Negotiations as dispute resolution mechanisms

Legal theory has differentiated negotiations as transactional mechanisms and negotiations as dispute resolution mechanisms, separating the two with three fundamental differences.

Dispute resolution mechanisms are considered to be *compelled* (not voluntary), *rectify past conduct* and *motivate* the parties to settle conflicts for fear of intervention by third party adjudicators who may grant a less favourable or flexible resolution of the dispute.

The willingness of the parties promotes the success of dispute resolution negotiation, and party conduct is of crucial importance to finding solutions. Respect builds trust that brings the parties closer to finding adequate solutions.

Management has demonstrated that negotiations, as mechanisms, need not necessarily be delineated into two separate mechanisms that operate before or after an agreement has been entered into. Rather than both mechanisms operate simultaneously or in tandem in any given phase of negotiation throughout the relationship. The negotiation relationship comprises past, present and future, and is a continuum, proceeding from one stage to another in dance sequences. There is a danger when law classifies negotiations into two separate mechanisms. Law may fail to identify the continuum that exists during the negotiation processes. It is not a dance that jerks from one step to another or from one position to another to stages of negotiation. Negotiations are a dance that transforms step by step from one dance step to the other, frontwards, backwards, side by side; interchanging positions to lead the parties to the next stage of negotiations. The continuum can be completed more readily when parties can transparently communicate with one another.

5. The co-relation between negotiation communications and legal intentions of the parties

Negotiation communications are subtle and business parties use various signals, their own semiotics and silent languages while communicating, which appear intangible and unpredictable to law¹⁴. To attain predictability, we must analyze both the planning and preparation side of the communications as well as the intuition side that adds an element of unpredictable actions and reactions between negotiating parties¹⁵. Therefore, there is a normative patterning during negotiations but there is also a spontaneous factor that operates on an investigatory basis while parties strive to restore their conduct to some kind of normative model by making rational choices¹⁶.

During negotiations, the parties’ first agenda following the establishment of the arena is to establish whether they can strike a mutual bargain. Preliminary meetings are held to determine this basic step and, mostly, parties do not attempt to eat the “whole pie in one mouthful”. In the interim, information is exchanged that the parties could not obtain without negotiation communications to assess their own and each others’ interests. If this information contains confidential content obligations may ensue. How much information must be disclosed depends on the context of valid decision-making.

To reflect on the elements of a theory of negotiations, consider Hogg’s ‘co-operative will theory’ of contracts and its potential application to negotiations. Hogg has integrated various theories of contract into one theory by interconnecting the concepts. The relational theory of contracts, contract as agreement and contract as promise can all be applied to negotiations. To take a closer look at Hogg’s theory, he has argued that three factors apply to the ‘co-operative will theory’:

- 'Emphasis on liberty and responsibility which promotes party autonomy' while 'increasing external control and regulation';
- Rejection of 'fictional explanations and presumed intention of the parties'; and
- Recognition of the 'importance of external societal norms such as good faith'.

Hogg places an emphasis on liberty which is fundamental to support the norms of negotiation: autonomy, efficiency and certainty. Business parties prefer to create their own autonomous rules, essential to support the fundamental normative factor of efficiency, without which parties would not negotiate in the first place. Normative aspects of autonomy also include *solidarity*, *reciprocity* and *flexibility* to ensure that the business relationship continues to harvest trust. To accomplish *solidarity*, party autonomy must be exchanged in transparent communications. *Reciprocity* includes cooperation and the willingness to consider each other's interests. *Flexibility* entails that party autonomy remains dynamic to accommodate changes that arise during the negotiation relationship. Accompanied with dynamic autonomy is a responsibility to societal norms as well as inter-relational norms of the parties. To enforce this responsibility, Hogg suggests there must be an increasing control, external to the parties and regulatory system. This external control can guide parties in difficulties concerning communication and dispute resolution. There exists a great tension between external regulating and party autonomy since regulations can interrupt the natural forces of competition and limit party autonomy. Nevertheless, liberty and responsibility are inherent during negotiations.

The second factor of Hogg's co-operative will theory rejects "fictional explanations and presumed intention of the parties." Hogg's theory counters what is actually taking place in current adjudication where implied terms or implied contracts have been found to exist in order to justify the enforcement of legal obligations between negotiating and contracting parties. If we consider law in action, we could initiate Hogg's second factor and eliminate the necessity of dividing the domestic sources of law between objective and subjective standards when determining the intentions of the parties to respond to the inherent standards of conduct in business relations.

Hogg's third factor emphasizes the importance of recognizing "external societal norms, such as good faith". This element is circular, reverting back to liberty and responsibility. The "external norm" of good faith has now been identified by common law jurisprudence and has always existed under civilian codes. If we add this external norm to the concept of negotiations in customary recognition of principles, we could consider that this norm is now recognized by all regulatory sources of law.

We have identified that party autonomy is exercised during the entire continuum of negotiations through the use of the tools found in freedoms of contract. Other factors have been invoked to enforce obligations between negotiating parties when adjudicators have been unable to find that an agreement has taken place, including pre-contractual and post-contractual stages bear similar evidentiary

resemblances. To assess whether negotiations create legal obligations (or not), we must first distinguish between two possibilities:

- 1) Parties who have established an express agreement to negotiate; and
- 2) Parties whose conduct or verbal promise has created commitments regardless of the fact there has been no expressed agreement.

5.1 Expressed agreement to negotiate

An agreement to negotiate is only recognized by law if the parties specifically and unambiguously express their intention to be legally bound to terms and conditions that are definite and certain. Business parties need to plan but often don't have all the issues resolved. Expectations arise as parties strive to reach mutual goals and promises are made that are relied upon. Long-term business relations require the investment of time and investment of expense so allocation of risk needs to be addressed at various times during negotiations. Furthermore, should negotiations cease and the parties determine that they cannot do business together, one or more parties may have given up other offers by interested third parties.

"legal recognition of the obligations consented to during negotiations are "beneficial not only on functional grounds, but may also contribute to the harmonization of contract law across civil and common law jurisdictions...the law of contracts should be more than just a blunt instrument which ignores expenses incurred in the conduct of negotiations and consequences such as the loss of a chance to conclude an agreement with a third party "locked out" as a precondition for negotiations." ¹⁷.

While we may attempt to apply the doctrine of contract to an agreement to negotiate, it is like stuffing an elephant in a refrigerator to apply the same rules to negotiations, particularly where no expressed agreement is in sight. Although the prospects of recognition of an agreement *expressed* by the parties is far greater in the civil law systems due to a wider acknowledgement of agreements due to acceptance of a subjective standard, legal interpretation must still be performed in the event of a dispute between them.

5.2 Absence of an expressed agreement to negotiate

In absence of an expressed agreement, the law experiences low vision since, even under QCL, evidence of subjective intent is not necessarily transparent and an objective test, required under CCL, overrides the parties' intention where evidentiary considerations fail. Negotiations become a misfit where law scrambles to apply justification for the enforcement of obligations. In civilian jurisdictions, the subjective test of proving that the parties attained a meeting of the minds allows an opening to parties to present subjective material to evidence that, in fact, there is a certain commitment between the parties. However, the three factors of why parties document negotiation agreements are the very three reasons why parties rely on promises made by verbal promises or party conduct during negotiations.

With no recorded documentation an implied contract would seem less legitimate, depending on circumstances. In *Emirates Trading Agency LLC v. Prime Mineral Exports Pirate Ltd.* the court recognized the intention to be legally bound: “friendly discussions” prior to arbitration are considered “an enforceable condition precedent to invoking the arbitration clause.”¹⁸ Whether terms are certain or not can be considered in the context of an enforceable good faith obligation existing during negotiations. Mr. Justice Leggatt, in *Yam Seng*, considered that a duty of good faith is contextual. He found a duty to act honestly as an implied term within the parties’ contract considering the facts that occurred during negotiations and what would be expected objectively within the scope of the particular commercial activity¹⁹.

Courts have turned to other doctrines to advise on expected conduct during commercial dealings, such as tort/delict, unjust enrichment or promissory estoppel to remedy an injured party, simply because there are no other juridical tools. These vehicles are used intermittently and sparsely as exceptions rather than an obsolete general rule, creating great uncertainty for business parties who cannot resolve their differences and must turn to third party intervention where the juridical tools available are blunt; like using pliers to remove a sliver. Meanwhile negotiating parties wonder whether unintended obligations will be imposed upon them or whether obligations they intended to be legally binding are not recognized.

The co-relation between communications and the willingness to create of legal rights and obligations during negotiations is directly affected by whether such communications have formed a conventional contract, which is often not possible during negotiations since the parties are still driving and have not reached destination.

6. When do legal obligations arise during negotiations?

When are obligations be formed during the conflictual normativity of negotiations? In other words, how can we recognize a “meeting of the minds” or “intention” by the parties to form a commitment during conflict? Put another way, can obligations exist when there is no negotiating agreement, or an impartial agreement or where there is no tangible evidence of what the negotiating parties are doing and intending? “Legal ramifications in the early stages of negotiation are probable at inception”²⁰.

We must first review the nature of the conflict during negotiations to ascertain how obligations can and do arise during various interchanges between the parties. There exists a tension between the parties’ self-interests and the willingness to strike a mutual goal. Conflict is inevitable during negotiations due to many factors, including “goals, beliefs and philosophies; roles, responsibilities and boundaries”²¹.

Most business negotiations begin by the parties’ assessment of their own position and then the anticipation of the opponents’ position. Although conflictual, while negotiating parties strive to match their own interests to a mutual goal satisfactory to the other party(ies), there is an exchange of information which can include trade secrets,

promises to investigate or to obtain something such as licensing, or a commitment to a particular task even though an agreement on every factor has not been established.

Obligations ensue because of normative constraints established by custom and industry standards that initiate obligations between the parties. There are instances in which the intensity of the relationship and degree of mutuality in the alliance created by negotiating parties will be a factor. Personalities, culture and values of respective negotiators and how they respond in a negotiation setting can influence how parties are communicating and therefore whether they intend to create legal obligations. Communications can be subtle between negotiators, but nevertheless a commitment or promise may have been made.

One party may have benefited to the detriment of the other. This is not intended to be an exhaustive list, rather examples of where obligations may be construed to have arisen between negotiating parties. These factors contribute to the reasons adjudicators will enforce obligations between negotiating parties or not. It is important to note that 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 when the law is called upon in unresolved disputes.

The primary key to determining whether obligations are being created during negotiations has its foundation in the *intention* of the parties during negotiating communications. How parties communicate reveals the intentions of the parties and displays the commitments that the parties have made together. The threat, on a legal basis, is that the law cannot see *transparently* what the parties have decided. There is dissension in the ranks regarding the interpretation of the parties’ actions or intentions and whether an objective or subjective test should be applied to determine the extent, if any, of the parties’ relationship. CCL and QCL are divided on how to determine party intention. On the one hand, the common law deems that unless the parties have expressly determined their intentions, they are determined in accordance with objective standards of what a reasonable person would have done in the same circumstances. On the other hand, the civil law is willing to consider the subjective interests of the parties insofar as there is sufficient evidence to consider their intentions.

All of these situations potentially result in the creation of binding obligations, often unforeseen by the parties or, conversely, the non-enforcement of intended obligations. Swan cautions, “It’s very important to understand that...obligations...will be imposed on the negotiating parties while they are negotiating”²². The surprise ensues, particularly, in business parties from traditional western classification of “negotiation” as a non-juridical phase, filled with empty promises. In law, formalists deny the existence of juridical consequences to negotiations if they fall short of contractual validity under contract doctrine. But whether there are juridical ramifications is not necessarily within a doctrine itself; rather the difference between a juridical act and a non juridical act is whether the law recognizes that rights and duties exist between the parties which are enforceable by law.

Conclusion

Our exercise, intended to explore how law sees what business parties are doing when negotiating business transactions, indicates without a doubt that negotiations can create legal obligations. Naturally, this broad statement depends on law being able to identify tangible negotiating movements. Commentators, such as Menkel-Meadow, have introduced an enhanced theory of negotiation bringing the realization that negotiation can be more than “one-shot” deals because negotiations form a relationship and that we should turn from competitive approaches to negotiating to problem-solving negotiations. Although commentators delineate two separate negotiation mechanisms that aid to break down what the negotiating parties are doing, law has failed to consider negotiations as a continuum that requires both competitive and problem-solving approaches. Communications within the developing relationships result in differing ideas and interests of one party or the other; thus a certain amount of conflict is inevitable. Conversely, these conflictual communications may also rectify the conflict by offering solutions which another party can build upon to support mutuality. These communications are not simply “give-and-take” rather they may require a few rounds of communication until the parties come to an understanding. However, as in any relationship, an effort to resolve conflicts preserves the amity, often blending the two identified mechanisms in negotiations, transactional and dispute resolution mechanisms together.

Because the law is unable to follow business parties on a step by step basis through each of the positions and phases

of negotiations, we have not been able to understand what marketing has comprehended: that transactional mechanisms and dispute resolution mechanisms along with competitive and problem-solving positions have been used interchangeably throughout each stage of negotiation.

As a result, legal obligations can ensue any time during the negotiation relationship and continue in intensity well beyond any agreement or contract. We assume, by this sweeping statement, that the parties have advanced past “window shopping” where one party dances the flamenco while another performs capoeira. The dance steps, in such a situation, do not match and there can be no “meeting of the minds”, “willingness” or “consent”. The key to unlocking whether obligations have been created between business negotiating parties, is found in the intention of the parties; whether they intended to create commitments that are legally binding; whether the parties have been willing to match the dance steps. When parties have expressly formed an agreement to negotiate or a preliminary agreement depicting their commitments, the law may assess these expressions and interpret what has been understood, albeit not in a uniform fashion, between the parties even though the contract is incomplete. This area of law is fraught with uncertainty and the insecurity is intensified when there is no expressed agreement between negotiating parties. Applying this insight and turning to the plurality of sources of regulating TBN, the plot continues to thicken on how the law interprets what business negotiating parties are *doing* and the boundaries of party autonomy. There is a solution to the dilemma, but it entails an alternative framework away from the antiquated values of 18th century contract doctrine.

¹ See Robert H. Mnookin and Michael Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce,” 88 Yale L. J. 950 (1979); Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving,” 31 UCLA L. Rev. 754, 1983-1984; Rebecca Hollander-Blumoff, “Just Negotiation,” 88 Wash. U.L. Rev. 381, 2010-201 at 392..

² See David A. Binder & Paul Bergman, “Taking Lawyering Skills Training Seriously,” 10 Clinical L. Re. 191, 2003-2004; Jim Hilbert, “Collaborative Lawyering: A Process for Interest-Based Negotiation,” 38 Hofstra L. Rev. 1082, 2009-2010; Roger G. Oatley, “Negotiating Techniques for Lawyers,” 6 Advoc. Q. 214, 1985-1986; Marjorie L. Benson, “A Negotiating Ethics Study,” La Revue du Barreau Canadien Vol. 84, 2005 at 593; John Richardson, “How Negotiators Choose Standards of Fairness: A Look at the Empirical Evidence and Some Steps Toward a Process Model,” 12 Harv. Negot. L. Re. 415, 2007; G. Bellow & Moulton, *The Lawyering Process: Negotiation*, Foundation Press (1978); X. Frascogna, H. Hetherington, *Negotiation Strategy for Lawyers* (1984); G. Williams, “A Lawyers’ Handbook for Effective Negotiation and Settlement” Washington, D.C.: U.S. Dept. of Justice, Office of Legal Education, the Legal Education Institute, Executive Office for U.S. Attorneys, 1984; Carrie Menkel-Meadow and Michael Wheeler, *What’s Fair: Ethics for Negotiators*, San Francisco, CA., Jossey-Bass 2004.

³ Marcel Fontaine and Filip De Ly, *Drafting International Contracts: An Analysis of Contract Clauses*, Leiden; Boston, Martinus Nijhoff Publishers, 2009. Fontaine and De Ly affirm this principle: “The life of a contract begins at conception. The negotiating stage is not void of legal effects.” at xviii. The common dictionary provides an impasse as it defines “negotiation” as a “discussion aimed at reaching an agreement” on the one hand, inferring a “classical” interpretation of negotiations (adversarial and norm-free) but terminates by injecting, “the action or process of “*transferring ownership*” which raises the question of whether transformation into the juridical arena of a new law of property has occurred. The Oxford on line dictionary.

⁴ Parviz Owsia, *Formation of Contract, A Comparative Study Under the English, French, Islamic and Iranian Law*, Sterling House, London, UK 1994 at 155.

⁵ Saner, Raymond, “Strategies and Tactics” in Perez Ghauri and Jean-Claude Usunier, *International Business Negotiations*, UK, Emerald Group Publishing Limited, 2008 at 51; Hindriks, Koen, 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.

⁶ Menkel-Meadow concurs that “early work on negotiation was largely atheoretical and focused primarily on suggesting specific strategies...” Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving,” 31 UCLA L. Rev. 754, 1983-1984 at 771. Russell Korobkin, “A Positive Theory of Legal Negotiation”, 88 Geo. L.J. 1789, 1999-2000 at 1789 and 1790.

⁷ Frazer, Linda, “Juridical Gyroscopic Orientation of Transnational Business Negotiations”, https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/21175/Frazer_Linda_2017_these.pdf?sequence=2&isAllowed=y

⁸ Adair, Wendi L., 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. Caton Campbell, Marcia & 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; Gerarda Brown, Jennifer, Marcia Caton Campbell, Jayne Seminare Docherty, & Nancy Welsh, “Negotiation as One Among Many Tools”, 87 Marq. L. Rev. 853.

⁹ Hofstede, Geert, “Hofstede’s Dimensions of Culture and their influence on International Business Negotiations” in Ghauri, Perez and Jean-Claude Usunier, *International Business Negotiations*, UK, Emerald Group Publishing Limited, 2008, 137-153; Manrai, Lalita A. 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>.

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- ¹² *Ibid* at 759.
- ¹³ See Muir-Watt, Horatia, ““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). For a common law perspective, see Kennedy, Duncan, “From the Will Theory to the Principle of Private Autonomy : Lon Fuller’s “Consideration and Form”, *Colum. L. Rev.*, Vol. 100(1), 2000, 94 at 96.
- ¹⁴ See Martin A. Hogg, “Competing Theories of Contract: An Emerging Consensus?” in DiMatteo, Larry A., Qi Zhou, Severine Saintier & Keith Rowley, *Commercial Contract Law: Transatlantic Perspectives*, CUP, 2013; Thomas Gutmann, “Theories of contract and the concept of autonomy”, *Münster* 2013/55.
- ¹⁵ *Supra* note 11 at 763.
- ¹⁶ See 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; Evandro Menezes de Carvalho, “Semiotics of International Law”, *Law and Philosophy Library*, Vol. 91, 2011,3-12.
- ¹⁷ Korobkin, Russell, “A Positive Theory of Legal Negotiation”, 88 *Geo. L.J.* 1789, 1999-2000.
- ¹⁸ Korobkin, Russell and Chris Guthrie, “Heuristics and Biases at the Bargaining Table”, 87 *Marq. L. Rev.* 795, 2003-2004 at 7967.
- ¹⁹ Trakman, Leon E. 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 at 600 and 624.
- ²⁰ [2014] EWHC 2014 at para. [26].
- ²¹ *Yam Seng Pte Limited v. International Trade Corporation Limited*, [2013] EWHC 111 (QB) at para. [134].
- ²² *Supra* note 3.
- ²³ Trace, Karen, “The Art of Skillful Negotiating”, 34 *Alta. L. Rev.* 34, 1995-199 37. Trace contends that conflict can have both negative and positive attributes: “conflict can feel like a crisis...[but] can create change and actually improve relationships between the parties.” at 37.
- ²⁴ Angela Swan, *Canadian Contract Law, 3rd Ed.* Markham, Ontario, LexisNexis Butterworths, 2006 at 25.