Juridically Secure Trade Mechanisms for Alternative Dispute Resolution in Transnational Business Negotiations

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***Abstract*— The pluralistic methodology adopted in the author's doctorate thesis focuses on promoting an understanding that the regulation of transnational business negotiations [TBN] between private business parties fundamentally requires an alternative juridical framework. This article re-examines the research that demonstrated that negotiations are commonly misunderstood within the complexity of pluralistic and conflicting legal regimes due to insufficient juridical tools. This inadequacy causes uncertainty in the enforcement of legal remedies and leaves business parties surprised. Consequently, parties cannot sufficiently anticipate when and how legal rights and obligations are created, often counting on oral or incomplete agreements which may lead to the misinterpretation of the extent of their legal rights and obligations. This uncertainty causes threats to business parties as they fear creating unintended legal obligations or, conversely, that law will not enforce intended agreements for failure to pass the tests of contractual validity. Finding a manner to set default standards of communications and standards of conduct to monitor our evolving global trade would aid law to provide the security, predictability and foreseeability during alternative dispute resolution required by TBN parties. The conclusion of the study includes a proposal of new trade mechanisms, termed "Bills of Negotiations" [BON] that can enhance party autonomy and promote the ability for TBN parties to self-regulate within the boundaries of law. BON could be guided by a secure juridical institutionalized setting that caters to guiding communications during TBN and resolving disputes under alternative dispute resolution mechanisms that arise along the negotiation processes on a fast track basis.**

Keywords— alternative dispute resolution [ADR], good faith, juridical security, legal regulation, trade mechanisms, transnational business negotiations.

I. INTRODUCTION

Negotiations are innate to human activity [1]. The purpose and function of negotiations is intertwined: "The purpose of negotiations is to strike mutual goals…beneficial to all parties, by placing parties in a better position within their association…than without each other. Parties accomplish this goal through the function of negotiations…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 to achieve the negotiation purpose" [2]. Negotiation arrangements are a forum for transactions that can be recognized by law either implicitly through party conduct, in a verbal agreement or in written form. Negotiations also feature a distinct constitution as dispute resolution mechanisms since two parties struggle to establish mutual agreements while a constant thread of tension is resolved: self-preservation of one's own interests versus exertion towards a relationship for the common interests of the parties [3]. These tensions affect the fundamental norms required by business parties: efficiency, autonomy and certainty.

Transnational business negotiation [TBN] parties would not negotiate unless they foresaw the possibility of being better off with each other than alone [4]. But TBN parties must be wary of legal ramifications that may arise at any given time [5]. The purpose of law is to offer certainty, to securitize transactions and honour the flexibility required when people exercise human activities. Law's destructive categorization of the parties' actions during negotiations is a threat to the global market. Whether parties will be recognized as falling into a contractual setting or some other extra-contractual category paves a nebulous path for TBN parties who must query whether their agreement will qualify under the formalities required for the law to enforce an agreement, on the one hand. On the other hand, TBN parties must question whether they have not inadvertently created legal obligations that they did not intend.

There is currently no universal recognition of tools that set standards of conduct and standards of communication and allow TBN parties to operate through party choice. Although merchant custom is evolving, there is only embryonic acceptance of the duty of good faith under common law contract law [6] to remedy "scumbageous" [7] behavior in the formation, performance and extinction of contracts under Canadian common law [CCL]. The parties remain left with no proper juridical tools to choose the level and intensity of such a standard of conduct.

II. HOW NEGOTIATIONS FUNCTION TO CREATE A DEAL

TBN negotiations are sequences of communications [8]. Communications are not without a power struggle to preserve each party's own interests while simultaneously exploring how

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to convene sought mutuality. Commentators have divided negotiations between *competitive* and *problem-solving* approaches which travel through various stages of negotiation, each stage climbing towards reaching the anticipated mutual goals [9]. Parties proceed from one stage to another, assessing each other while taking their positions, challenging and then matching each other's positions with a view to build a mutual business relationship. Silent negotiations and signals form part of the communications exchanged between TBN parties during the strategic tandem of *competitive* and *problem-solving* approaches [10], [11]. During these exchanges there are certain standards that must be set to overcome misunderstandings due to the parties' personal tensions of self-interest as well as defeating cultural roadblocks and language barriers.

Many disciplines consider negotiations as a "dance" of concessions [12]. The parties must embrace the challenge of intrinsically communicating and must adjust their own interests to appeal to a common understanding. Cooperation promotes trust in the business relationship but requires the parties to consider each other's interests.

Several stages exist within the negotiation processes. Nevertheless, there is a consensus that strategies and tactics contributing to mutual success towards a higher stage have elements of improvisation [13], contributing to the inability for law to guide in any meaningful way throughout the negotiations processes [14]. Commentators point out two "cornerstones" of negotiations: 1) preparation to advocate one's own interest, and (2) consideration of the other party's needs and interests. Therefore, observing "cues" from body-language, silence or unspoken languages [15] are important communicative elements for successful negotiations. Some signs or semiotics expressed between TBN parties are documented in an agreement or contract while others remain more remote, such as a wink or handshake. These phases roll into one another like the rhythm of a dance enhancing the relationship between the parties, increasing the need to be recorded if law is to recognize the arrangements agreed to between TBN parties. Whether business parties have a deal or do not should be a *consensual* question rather than left up to chance. The outcome of extra-contractual remedies is dangerous to TBN parties who prefer to assess risks and who do not appreciate surprises imposed by law.

When negotiations are initiated and how long they last directly impacts the recognition of legal rights and obligations resulting between TBN parties.

III. Problematic

Law is Not Catering to the Normative Framework of Transnational Business Negotiations [TBN] as Negotiation Agreements are Often Not Enforced by Law, or Conversely, Extra-contractual Legal Rights and Obligations Risk Being Imposed on TBN Parties.

Negotiations are commonly misunderstood by law within the complexity of pluralistic and conflicting legal regimes resulting in inconsistent measurement and enforcement of remedies to business parties. TBN parties often rely on oral or incomplete agreements to document meaningful business arrangements, leading to harmful consequences when law is unable to interpret the extent of the rights and obligations pledged to one another. For example, when agreements appear incomplete, adjudicators either deny enforcement of the agreements or turn to fictitious rationalizations that supersede party autonomy, inadvertently impeding the sanctity of contract. Conversely, legal rights and obligations during negotiations may be construed within an extra-contractual scope as the law has few choices of resolution turning to general law of obligations that distort the autonomy of business parties' true intentions. The innovative and cyber global market is forced to operate in a dynamic setting having only static antiquated 18th century contract law at its disposal which cannot adequately record the promises and agreements undertaken between business parties. There is an urgent need for a new vision to do business in the global market in a transparent, flexible and secure setting. Therefore, the search for a new framework for law to operate to guide the autonomy, efficiency and certainty craved by TBN parties is imminently necessary. An institutional setting could operate to ensure that TBN parties can reduce the impact of domestic conflict of laws and securitize legal aspects of transnational trade.

Law has not grasped the patterns of behaviour during TBN identified by other disciplines. Commentators have divided negotiation norms during these patterns into a framework comprised of descriptive norms and prescriptive norms; how negotiations *are* (or *ought* to be) [16] versus those norms that are derived from customary or industry standards by norms that are so commonly accepted as appropriate behavior during negotiations by the merchants themselves. When these prescriptive norms become recognized and enforceable by law (following a minimum formation of law that has become widely accepted [17]), they are considered legal norms.

Three descriptive norms intrinsic to negotiations are *efficiency* [18], *autonomy* [19], and *certainty. Efficiency* is axiomatic. *Autonomy* is essential to self-regulation and voluntary creation of mutual agreements. *Certainty* is where law can guide negotiating parties by providing juridical security: predictability and foreseeability [20]. If law offers to guide human activities, law must proceed cautiously in order not to become a nuisance and over-regulate. To do so, law must come to a deeper understanding of the anatomy of business negotiations and how business parties are really arranging.

IV. Objective

A Possible Formula to Determine When the Negotiation Dance Begins and How Long it Lasts or Provision of a Juridically Secure Manner to Standardize Communications and Conduct During TBN.

Commentators from many disciplines have tried to ascertain a formula to establish when the negotiation dance begins and when it ends. Law professor William Reynell Anson provided a formula [21], which was dismissed, but a lesson can be learned through his theory that provides characteristics of

ongoing business negotiations that illuminates elements of how to determine when negotiations begin.

There must be two or more parties to the negotiations who are communicating together. The parties must be definite; meaning there must be two identified legal persons having the legal capacity to exchange, who are communicating with one another. These communications are necessarily interdependent as they are directed towards the reconciliation of their self-interests to a mutual goal. The communications must disclose adequate information required to assess one's own and opposing interests without giving the whole game away. The object of mutuality in the negotiations must be identifiable and serious, and the mutuality must have a monetary value. In order to complete the vision that parties have begun the negotiation processes, there must be a tangible willingness to reconcile self-interests with those of the remaining parties.

TBN are a continuum that can begin during the formation stages of a contract and last well beyond any contract, into post-contractual relations. Negotiations do not end upon the signature of a contract; they continue to develop as the relationship requires, thereby making it difficult for law to strike a moment in time whereby negotiations have ended. New circumstances may arise during the business relationship causing the need to address auxiliary elements. A contract may require re-negotiation or a contract may need to be revised or renewed [22].

Honestly, why should an objective formula substitute a manner when TBN parties themselves could autonomously delineate when negotiations begin and when they end? Martin Hogg loaned his theory of contracts for application towards a legal negotiation theory. Based on contracts as a promise, contracts as an agreement and contracts founded on relationships, the bilateral component of Hogg's twin pillars provides a theoretical basis to sustain the practical application of BON: "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" [23], [24].

V. Transnational business negotiation agreements

TBN Agreements are Often Not Enforced by Law, or conversely, Extra-contractual Legal Rights and Obligations Risk are being Imposed on TBN Parties.

Even if there were a formula to establish when negotiations begin, conjecture remains. There is no harmony in law to assess meaningful arrangements that parties rely on once they have begun negotiations, nor how a breach of the exchange of meaningful arrangements should be remedied. Law is unable to interpret the intentions of negotiating parties with precision, relying on 18th century contract law. There is no guarantee that law will enforce TBN agreements that take place during negotiations since, characteristically, they are mini, incomplete or verbal agreements, unrecognizable by law for the most part, and where the intention of the parties is subject to interpretation.

In reality, during the exchange of communications in negotiations, certain commitments are understood by TBN parties. Investments of time and capital are spent, and risks are taken. Since there are no specific legal rules governing negotiations, law has turned to general legal theories to identify obligations arising during the negotiation processes.

Legal obligations are divided between those obligations that are derived from expressed party consent (contractual) and those assumed from other sources of obligations (extra contractual). Negotiations will fall into the doctrine of contract only if a valid contract can be identified by adjudicators. If party consent cannot be discerned by law, legal obligations can be imposed extra-contractually. Obligations can result from voluntary actions of the parties through fictious mechanisms of implied contract or may result out of pre-contractual liability [25] or custom, depending on the applicable law. This legal interference overrides the ability of TBN parties to regulate their own affairs, the content and intensity of obligations and, consequently proposes uncertainty in the application of a legal remedy imposed.

Using Canadian models, Canadian common law [CCL] and Quebec civil law [QCL] jurisdictions, demonstrates how law recognizes and enforces valid expressed contracts , yet law does not necessarily an agreement to negotiate [26] let alone an agreement to negotiate in good faith which has been (except for two small concessions[27]) categorically denied in most instances under CCL : "[...] 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. Each party to the negotiation is entitled to pursue his (or her) own interest"[28]. How these agreements are interpreted will vary from one jurisdiction to another. On a consensual level, to create a legal obligation, the parties must refer to legal relations; in other words, the parties must demonstrate the *intention* to be bound. The threat, on a legal basis, is that the law cannot see *transparently* what the parties have decided and therefore law will either not enforce the agreement or law will "interpret" an incomplete agreement. There is no consensus between common law and civil law legal regimes on the force of preliminary instruments such as letters of intent or negotiation agreements because there is no consensus as to how to determine party intention and whether an objective or subjective test will be applied by law to test whether the parties' agreement is binding.

On the one hand, there is resistance in CCL to recognize incomplete agreements and negotiations are not considered final. Consequently, a false presumption exists that negotiations are simply a series of unaccepted offers. Consequently, there are no rights or obligations recognized to have been undertaken between the parties since negotiations are in progress: "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 [29]. Unless the parties have specifically and unambiguously expressed their intentions in a valid binding contract, the offer may be revoked at any time. Whether the parties intended to be

legally bound is determined in accordance with objective standards of what a reasonable person would have understood under the same circumstances.

On the other hand, QCL is willing to consider the subjective interests of the parties insofar as there is enough evidence to consider a consensus [30]. The subjective intention of the parties may be ascertained, in accordance with Article 1387 of the Civil Code of Quebec [C.c.Q.] "by express or *tacit* manifestation of the will of a person". Epistemologically dissimilar to her common law sister, QCL is better able to reconcile the idea of a negotiating agreement. Firstly, QCL recognize an agreement as forming part of a relationship between the parties. Secondly, QCL roots are based on Roman laws, a *stipulatio*, used to make a promise binding, therefore it is not necessary that the contract be complete [31]. Furthermore, there is no need to *find* consideration, as in the CCL, since agreements are based on consent. Finally, Article 6 C.c.Q. states that good faith is a general overlying principle of Quebec laws, so it is presumed in all agreements. However, TBN parties remain subject to legal interpretation and conjecture.

Not only do TBN parties need to worry that their arrangements will not be enforced by law. A legal obligation is not limited to one arising from the consent of the parties. According to Article 1372 C.c.Q., [It] "arises from a contract or from any act or fact to which the effects of an obligation are attached by law." These additional sources of law may bring surprising results to business parties [32] [33] [34], such as extra-contractual or pre-contractual liability. CCL uses other mechanisms to provide a remedy to an injured party, such as promissory estoppel, restitution or tort. There is also the matter of TBN parties being subject to trade usage or custom. Although transnational soft laws tend to support party autonomy, particularly when business parties have chosen international arbitration to resolve their disputes, legal ramifications may be equated to a slot machine if the parties leave matters silent; they may become subject to a hostile, foreign domestic court under extra-contractual or pre-contractual liability.

There is no certainty for TBN parties regarding how law will interpret their communications during TBN. It is time that law rise to resist legal remedies that threaten to destroy the requirements of TBN norms of efficiency, autonomy and certainty.

VI. Results and Conclusions

Anticipated Developments for Future Certainty in Globalization and E-commerce include New Trade Mechanisms called "Bills of Negotiations" [BON] that Operate in a Juridically Neutral Setting.

The proposal that an institutional environment in law can juridically securitize TBN parties' arrangement caters to the fundamental norm of *certainty*, that functions by providing business parties with an autonomous and secure manner to do business. Proper juridical tools could guide and comfort TBN parties by privately and securely following patterns of behavior during negotiations and to solidify the foundations of reliance and trust through minimum standards of communications and minimum standards of behavior. The proposal of new trade mechanisms that serve to harmonize communications by taking into consideration language and cultural barriers, could operate by providing a series of multiple-choice symbols that parties can choose step-by-step, position by position, to move the TBN parties to the next stage of negotiations gracefully. It is imperative that party *autonomy* be preserved as a fundamental civil liberty, as it is also a primary norm of negotiations, highly valued by business parties [35]. The author proposed symbols, called "Bills of Negotiations" [BON] that will not only operate to document bilateral promises and agreements, but they will also serve to allocate risks, identify the intensity of rights and obligations and determine the level of intensity of the duty of good faith that TBN parties desire in their business relationship. BON will be boxed into an institutionalized setting that precludes domestic interference and provides dispute resolution mechanisms through mediation and fast track private arbitration.

Transnational Legal Practice [TLP] has been on the rise for the last three decades. It is concerned with the globalisation of the sale of goods and services across borders. TLP operates by "actors…moving into space occupied by existing economic and regulatory activity" or "involv[ing] actors from several jurisdictions coming together to create a new framework for their joint enterprise" [36]. Transnational legal practice [TLP] purports to provide TBN parties with a regulatory manner that can cater to common interests: "…speed, efficiency, cost and accuracy" [37]. However, TLP suffers from various constraints. There are jurisdictional barriers whereby a legal practice is considered illegal in one jurisdiction and, yet. in another jurisdiction would be considered malpractice not to proceed in that manner [38]. Conflict of laws and the fact that regulations are not global, rather specific to the domestic jurisdictions hinder international trade. Government impediments, market failure, restrictive practices on legal practices in some foreign domestic jurisdictions and disciplinary proceedings are additional constraints. The elephant in the room that no one wants to talk about rests on academic minds. "Global lawyer mobility has increased in an effort to serve…corporate clients [who] buy and sell products and services in other countries" [39].

Although firms around the world have formed various mergers, referral programs, established foreign branches and alliances, they are still operating using archaic 18th century contract law which is unsuitable for the meaningful arrangements formed in the global market. Law cannot recognize most of these business arrangements nor can it monitor these private encounters, leaving business parties in a sea of uncertainty of how any foreign court might interpret their business arrangements; promises that the parties have relied on to move forward towards their mutual goals.

This article proposes a movement towards a new way of providing TLP to an efficient, simple, transparent, flexible and secure fashion. This involves an institutionalized legal system

that all domestic jurisdictions can recognize, but not influence on a regulatory basis, allowing the parties themselves the autonomy and flexibility they deserve. The institution, called the "BON Centre", will guide TBN parties through the proposal of trade mechanisms which the author named, "Bills of Negotiations" [BON].

The growth of TLP is said to be "led by supply as well as demand" [40] but the demands have not been met and the supply offers only slim pickings under domestic attack. Either domestic laws cannot recognize an agreement because it falls outside contract validity or domestic laws have enacted, interpreted, administered and enforced their own set of laws, unbecoming to the business world.

The 2018 Report on the State of the Legal Market asks whether "Law Firms are Ready [41]?" The report suggests that "current strategies may not be working" and points out the necessity of "breaking away from traditional strategies and better aligning with client expectations". Future predictions on law firms propose that legal services will continue to grow [42] if business needs are considered. Culture, strategy, competition and technology are the primary considerations identified to build client alignment. It is necessary to incorporate essential business norms that rely on trust, cooperation and interdependence, to build a new vision of TLP. According to a study performed by Deloitte, the "market is moving and growing…[and]…purchasing patterns are changing" [43]. Law has fallen behind and TLP is not able to keep up with the "integrated multidisciplinary services" and provide better "use of technology". There is a call for "Fixed fees, value pricing and greater transparency". A new TLP institution, the BON Centre, will not only provide the "regulatory and global compliance advice" called for by Deloitte but will include alternative dispute resolution services, guidance throughout all the processes of negotiations and practical legal consultation to the BON Centre's members. This security will include holding security deposits and verifying various legal considerations such as the capacity of the parties residing in foreign jurisdictions.

The market for international trade mechanisms is in need for further payment mechanisms, security deposits, and verification of legal considerations. Improvement of technical resources available for TBN has become imperative for the securitization, transparency and flexibility called for by interdisciplinary sources. These trade mechanisms could be manually exchanged but would more generally migrate into e-commerce to accommodate business parties through their dealings with one another, on a swift, flexible, secure and transparent basis. Yet, these symbols do not exist. TBN parties do business in a cyber manner that affects the quality of communications between parties, a breeding ground for yet more uncertainty and misunderstandings between business parties. This is not the time for imprecision. It is time to securitize trade and continue to strive towards promoting autonomous dealings for TBN.

VII. Conclusion

Regulation of TBN is inconsistent and *ad hoc*, following into outdated settings that can only consider matters under the "shadow of the law" [44], [45]. Legal regulation currently has no tools to evaluate an agreement by taking into consideration the patterning of TBN. Business parties deliberately create rights and obligations but have so few resources to document meaningful arrangements. Law is impairing TBN by regulating through antiquated contractual or extra-contractual sources of law. In so doing, law is generating unwanted risks, spawning unequal bargaining power that strategically gains advantage through an illusion of legal protection. TBN can no longer be subject to uncertainty. "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" [46]. It is time to open new avenues of communications that will provide party choice of minimum standards of conduct, a juridically secure environment that offers access a fast track alternative dispute resolution mechanisms.

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