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Reliance as the Key for a Better Understanding of Mistake: A Belgian Law Perspective

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I. INTRODUCTION

Torts and contract are essentially about the allocation of risks. When allocating risks, the legislator and the judiciary have to balance several countervailing interests. For example, the contractual rules governing mistake (or error) determine which of the contracting parties should bear the risk of an erroneous assumption made by one or both of them[1] when entering into a contract.

Belgian case law on this subject is very rich: someone purchases a tapestry in the erroneous belief that it has Asian origins;[2] someone purchases a motor vehicle with the explicit intention to export it to Poland, without

[1] A contract can also be made with multiple parties. However, the analysis in this paper is limited to the paradigm case of a contract between two parties.
[2] Facts of Court of Cassation of 3 March 1967, *RW* 1966-67, at page 1907.

knowing Polish law forbids its import;[3] someone thinks he is buying an oil painting, but it turns out to be a mere lithograph;[4] someone buys a building without knowing it lacks the necessary building permits;[5] or one party thinks he is selling an item, while the other thinks that the item is a gift.[6]

In principle,[7] a contract comes into existence whenever two parties consent to obligations the subject of which can be determined. Parties have to come to an agreement on the basis of their free will (*consensus ad idem*). However, if one or both parties misunderstood an element relevant to the creation of the contract, the will of one or both parties is no longer free. If strictly applied, the will theory implies legal protection should always be conferred to the mistaken party and, as a consequence, the contract should be vitiated, voided, or nullified. However, the will theory is not so strict-ly endorsed. Several tests have been developed to ascertain whether legal protection should go to the mistaken

[3] Facts of Justice of the Peace of Ostend of 9 January 1997, *TWVR* 1997, at page 180, annotated by P. Arnou.
[4] Facts of Justice of the Peace of Roeselare of 15 April 1988, *T Vred* 1993, at page 293.
[5] Facts of Bergen 17 March 1998, *TBBR* 1999, at page 197.
[6] A so-called "*error in negotio.*"
[7] Apart from consent, the validity of an agreement under the Belgian Civil Code (article 1108) also depends on the capacity of both parties to form a free will, on an existing, determinable, possible and lawful/licit/legal object, and on an existing and lawful/licit/legal "causa" which nowadays is defined as the determinant motives/rationales of the parties (or, sometimes, even of one party) for concluding a contract (see in English J.H. Herbots, *Belgian law of contracts*, in *International Encyclopaedia of Laws*, Deventer, Kluwer, 1993, at pages 121-143).

party because of the defectiveness of his will or to the other contracting party because of his reliance on the effectiveness/validity of the mistaken party's declared intention.

The same balancing between several countervailing interests occurs under the theory of apparent authority, which is known under Belgian law as the theory of reliance (or the theory of appearance). In principle, a person is only bound by another person's juridical act (e.g. a contract concluded with a third party) if that other person has acted within the confines of a given agency or authority. In some circumstances, however, it is felt to be just to protect the third party who has relied on the appearance[8] of authority, thus binding the apparent principal and allowing the third party to enforce the contractual obligation(s) against the apparent principal. Yet, if the will theory and its inherent protection of the free will were strictly applied and were without exception, there would be no room for the theory of apparent authority because an apparent principal lacked the intention to enter into a contract concluded by an apparent agent.

The subjects of mistake and reliance are traditionally covered under the two separate headings of, respectively, validity and formation of contracts. At first sight, they do not have much in common because they have

[8] For example, a person is an agent but does not have the necessary powers to conclude contracts above certain amounts; he or she simply has never been an agent; or he or she is no longer an agent.

diametrically opposed legal consequences. Mistake may have the effect of avoiding the contract, despite the parties' consent (based on an erroneous assumption by one or both parties). To the contrary, reliance on apparent authority may lead to a contract being enforced, even though the apparent principal did not have any intention to enter into that contract. It is nonetheless interesting to compare the theories of mistake and reliance because they both deal with situations in which appearance and reality fail to coincide. One intends to purchase a Van Gogh but, in reality, the canvas is a mere imitation. One intends to contract with the agent of a bank but, in reality, the bank has already terminated the agency on which one relies.

The present paper therefore aims to analyze whether the Belgian theory of "reliance" can shed some light on the theory of mistake and thus elucidate the concept of contract under Belgian law. First, a brief and general overview will explain the two theories as they are applied in Belgium, beginning with reliance and ending with mistake. Then this overview will be applied to explain how the two subjects of mistake and reliance are interlinked. Finally, distinguishing various scenarios of mistake will make analyzing mistake in terms of reliance easier.

II. RELIANCE UNDER BELGIAN LAW

A. Reliance in general

Understanding Mistake Through Reliance

Reliance is a tricky legal concept. It should first be explained what this shorthand-formula stands for because it is used in a varied way in different legal systems, mainly because it performs a different function. The concept of reliance under Belgian law does not have much in common with the idea of "detrimental reliance," as it is known in the United States.[9] According to American law, a mere agreement without consideration does not create a contract. The American concept of reliance (also known as promissory estoppel) makes it possible to enforce certain promises that were not supported by consideration. In other words, the unbargained-for reliance plays the role of sur-rogate for consideration. This occurs, for example, with regard to charitable subscriptions and even to various promises in a commercial context.[10]

Since the concept of consideration as such (much criticized in common law) is unknown to Belgian law, the introduction of the American concept of reliance would be superfluous.[11] When the concept of reliance is

[9] Section 90 (1) of the (non-binding) 2nd Restatement of Contracts provides that "*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. The remedy granted for breach may be limited as justice requires*." In subsection 2 of this provision, however, the detrimental reliance does not have not to be shown any more with regard to certain promises: "*A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance*."

[10] *See e.g.* C.L. Knapp and N.M. Crystal, *Problems in Contract law – Cases and Materials*, Boston, Little, Brown and Co., 1993, at page 222.

[11] Belgian law enforces both unilateral contracts and unilateral promises, although there is still some ongoing discussion about the scope of unilateral

employed by Belgian lawyers, it rather denotes an exception to the classical "will theory" that normally requires mutual assent or agreement for the formation of a contractual obligation.

According to the traditional body of Belgian contract law, the actual will (or intention) of the contracting parties (and not the declaration in which the intention is manifested) is the basic test for the formation of a contract. In principle, Belgian law thus adheres to the subjective theory of contract. This theory is said to be laid down in the statutory provision of the Belgian Civil Code (Article 1156) which requires judges, when interpreting contracts, to search for the common intention of the contracting parties rather than for the literal meaning of the words used by the parties when manifesting their will.

Although this subjective contract theory is still reflected in most authoritative textbooks,[12] its scope in practice should not be overrated for several reasons. First, it may turn out to be difficult to prove that a party's mind intended something different from what he or she expressed by his or her words or acts. Moreover, since it is usually impossible to find out what a party

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promises, (see the recent thesis of C. Caufmann, *De verbindende eenzijdige belofte*, Antwerpen, Intersentia, 2005, 952 pages and especially her elaborate bibliography).

[12] *See* W. Van Gerven and S. Covemaeker, *Verbintenissenrecht*, Leuven, Acco, 2001, at pages 48 ff.; L. Cornelis, *Algemene theorie van de verbintenis*, Antwerpen, Intersentia, 2000, at pages 33 ff. *See also* R. Kruithof, H. Bocken, F. De Ly, and B. De Temmerman, "Overzicht van rechtspraak (1981-1992) – Verbintenissen," *TPR* 1994, at page 317.

actually had in mind when entering into a contract, case law searches for the intention of the parties in contractual documents and in "*external circumstances*," such as pre-contractual documents or the way the parties have acted in the performance of the contract. Thus, courts avoid fitting in their decisions entirely within the scope either of the subjective or the objective theory, but they "*rely instead on the particular circumstances of the case.*"[13] Another reason why the practical scope of the subjective theory should not be overrated is that courts have to give full effect to the clear terms of a written document and to respect the rules of evidence whereby written documents which have been drafted to serve as a proof are preferred to oral testimony (Article 1341 of the Belgian Civil Code).[14]

In cases where the wills of two parties have not come together, the reliance theory may come into play.[15] Under Belgian law, reliance is not used to enforce promises which lack consideration (it does not use that concept), but to attach the legal consequences of a contract to conduct other than a promise. In other words, reliance is not an exception to the test of consideration, but

[13] A.T. von Mehren, "The Formation of Contracts," in *International Encyclopedia of Comparative Law*, VII/9, "Contracts in General," Tübingen, Mohr, 1992, at page 32, no. 47.
[14] *Id.*
[15] Reliance also plays a role for binding unilateral promises, (W. van Gerven and S. Covemaeker, *work cited*, at page 165: "*Unilateral juristic acts are acts whereby the legal consequence contemplated by the juristic act, comes into existence by the manifestation of one person (or by the appearance by which a third party in good faith has been induced*)").

to the basic test of mutual assent through the concurrence of the actual will of two or more parties.

The status of the reliance theory in two-party relationships is still hotly debated by Belgian lawyers. For its proponents, reliance is often viewed as an additional source of obligations, apart from contract or tort. However, it may also be seen as an explanation of the binding force of contracts, either as a substitute for the common intention of parties or at least as an alternative to the will theory. The importance of reliance arises from its usefulness as a legal tool to solve the problems that arise when the actual intention of a contracting party does not coincide with the declaration in which that intention has been manifested. Although priority should be given in principle to the actual intention of the parties, the declaration of one of the partners may take effect when the other legitimately relies on the declaration translating the actual intention of the party. Whenever a party orders a book by Markesinis at a legal bookstore although he actually intended to purchase the most recent volume of Posner, the bookstore can legitimately rely on the assumption that the customer's declaration effectively coincides with his actual intention.[16]

Some authors, however, vehemently resist the idea that reliance can take the place of intention as the basis of a contract between two parties.[17] In support of this

[16] *See* W. van Gerven and S. Covemaeker, *work cited*, at pages 66-67.
[17] *See* I. Verougstraete, "Wil en vertrouwen bij het totstandkomen van over-

thesis, they often invoke a Court of Cassation case which states a general principle of reliance does not exist in Belgian law.[18]

As already stated, judges tend to avoid taking a position in this debate and they hardly refer to reliance, at least explicitly, as a substitute for the common intention of two parties. However, judges do invoke it more often in the process of interpreting a contract or of defining the scope of contractual obligations.[19] Reliance has more than once been used as the basis for broadening or, conversely, restricting or mitigating contractual obligations. For example, a surgeon was held responsible for the negligent acts of an anesthetist on the basis of the reliance theory because a patient relies on the surgeon to organize the whole operation efficiently.[20] This is an example of the broadening effect of reliance on contractual obligations. Excessively high attorney fees charged to a client is an example of the mitigating effect of reliance on contractual obligations.[21] The Court of Appeal of Antwerp invoked the reliance theory in order to mitigate the fees of an attorney (although it simultaneously refers to a negligent/tortious act of the attorney, viz. the attorney's negligence not to have agreed in ad-

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eenkomsten," *TPR* 1990, at pages 1163-1196.

[18] Court of Cassation of 26 March 1980, *Pas* 1980, I, at page 915.

[19] Note the difference between "*substitut du contrat*" and "*soutien du contrat*" in A. Danis-Fatôme, *Apparence et contrat*, Paris, LGDJ, 2004, 676 pages.

[20] Court of First Instance (criminal affairs) of Leuven, 30 June 1992, *Vlaams Tijdschrift voor Gezondheidsrecht* 1992, at page 109, annotated by F. Dewallens.

[21] Arbitration Award of the Council of the Bar of Attorneys of Brugge 19 June 2001, *TWVR* 2001, at page 192.

vance on the fees with his client or at least not to have informed his client on the fees).[22] It is, however, questionable to use reliance in this way to broaden or restrict contractual obligations. Good faith would be a more suitable legal technique for doing so under Belgian law (Article 1134, third paragraph of the Civil Code).[23]

B. Apparent authority

No matter how random the intrusion of the reliance idea upon the relationship between two contracting parties is, its relevance in an agency situation has been firmly established by several decisions of the Belgian Court of Cassation.[24] A person can be bound vis-à-vis a third party for acts committed by someone who creates the appearance of being the agent of that person, although in reality he is not.

Before analyzing whether the theory of reliance is a key for better understanding the rules on mistake, I will broadly outline the three[25] tests used in case law for

[22] Court of Appeal of Antwerp 30 March 1998, *RW* 1998-1999, at page 369.

[23] Then again, good faith is sometimes seen as the legal basis of the reliance theory. This is questionable under Belgian law because the status of good faith as a general principle of law (which has to be distinguished from the duty to perform a contract in good faith) is still debated.

[24] Decisions of the Court of Cassation of 20 June 1988, *TRV* 1989 at page 340, annotated by P. Callens and S. Stijns; 20 January 2000, *Pas* 2000, I, no. 54; 25 June 2004, *www.cass.be*, A.R. nr. C.02.0122.F.

[25] Some authors name one or two additional tests, viz. damage and causation (see for further references in B. Tilleman, *Lastgeving*, Antwerpen, Story, *APR*, 1997, at pages 247-248, no. 457; see also W. van Gerven and S. Covemaeker, *work cited*, at page 99). It is, however, unclear whether or not they so want to exclude the compensation for the profits which the relying party might expect

applying this theory. The first test is an objective appraisal of the situation at hand; the second and third tests are assessments of the behavior of the third party with whom the apparent agent entered into a contract and of the apparent principal's behavior. First, the theory only applies when reality differs from appearance. More specifically, the apparent agent in reality lacks the powers to bind the apparent principal. Second, the third party should have legitimately believed the appearance was reality. It should have been legitimate for him to believe the agent had the necessary powers. If he knew or should have known the agent did not have the necessary powers, his reliance would not be protected by law. Thus, this test implies an evaluation of the behavior of the relying party. The third test, with regard to the significance of the behavior of the partner of the relying party (the apparent principal), has been greatly disputed.

Going back in history, before the theory of apparent authority was established; the "relying" party had to show the apparent principal had acted negligently by creating the appearance of the agent having the powers to bind him. In other words, the tortious rules of negligence were applied. However, case law soon stretched the concept of negligence by treating the creation of an appearance as being negligent in itself. In a decision on

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from the performance of the contract. The existence of this condition is closely linked to the question whether reliance is an autonomous source of obligations or rather a substitute or alternative for the common intention of parties as a basis of contracts (see above).

20 June 1988, the Belgian Court of Cassation followed the French Court of Cassation and laid down a reliance theory independent of negligence rules. From then on, courts protected the reliance of a third party without analyzing wheth-er or not the behavior of the apparent principal was negligent. Again, the question arose whether the reliance should be imputable in some way to the apparent principal. Legal doctrine was divided on whether or not the "imputability" (accountability) of the appearance should be a separate requirement. Finally, a majority of authors found it excessive if the appearance were to be treated as reality as applied against persons who had no actual role in creating the false impression.[26]

In a recent case on 25 June 2004,[27] the Court of Cassation so affirmed and refused to quash a decision of a lower judge who made the imputability test part of the reliance rule and it thereby emphasized that imputability can exist apart from negligence. The following facts gave rise to that case: a person regularly introduced new clients to a bank and, in order to present them to the bank in one of its back offices, he had to pass through one of the bank's employee offices. On one occasion, he stole two booklets of standard documents used for ordering wire transfers and fraudulently used them to embezzle clients' monies. According to the Court of

[26] See the balanced analysis of the interests involved in P.A. Foriers, "L'apparence, source autonome d'obligations, ou application du principe général de l'exécution de bonne foi – A propos de l'arrêt de la Cour de cassation du 20 juin 1988,"*JT* 1989, at pages 541-546.
[27] *www.cass.be*, no. C.02.0122.F (Record-case).

Cassation, the lower judge legally refused to apply the theory of apparent authority on the basis of the following fact findings:

1. the bank's name was not indicated on any sign or publicity of the embezzler's personal office

2. even the most restrictive system of control could not have prevented a theft of the stolen documents; therefore, the bank could not have taken additional measures to hinder a theft and could not have prevented the appearance that the agent represented himself as its agent

3. the victims of the embezzlement failed to ask themselves why they never received an official document of the bank

This case makes it extremely difficult to distinguish imputable appearance cases from non-imputable appearance cases. It is equally unclear how to draw the line between the former requirement of negligence and the current requirement of imputability. In the present case, it is even seriously questionable whether it was imputable to the bank or even negligent to allow persons to pass through its offices where only the bank's employees should have access and the ability to grab wire transfer documents. It is, however, very difficult to assess this case since the facts are not further spelled out in the decision of the Court of Cassation.

III. MISTAKE UNDER BELGIAN LAW

Before linking reliance to mistake, I still need to sketch the various tests determining when a contract[28] may be voided on the basis of a mistake of a contracting party including: the "excusable" character of the mistake; the question to what extent the other party must know of the determinant nature of that element; the moment of making the mistake; and the lack of assumption of risk of mistakes.

A. The Nature of the Mistakenly Assumed Element and its Determinative Nature

A contract can be avoided for mistake concerning the identity or the characteristics of a contracting party ("*error in persona*") if those were determinative elements for entering into a contract (Article 1110 § 2 of the Civil Code). A contract can also be nullified if the mistake[29] relates to the "substance of the thing that forms the object of the contract" (according to a literal translation of Article 1110 § 1 of the Civil Code)[30] or (as it is often freely translated to the subject matter of the contract) "error in substantia." The language of this statutory provision is not very clear,

[28] The theory of mistake is also applied to unilateral acts (see e.g. Commercial Court of Mons of 8 July 2003, *TBBR* 2004, at page 2008).

[29] Unless a statutory provision provides, a mistake can relate either to facts or law.

[30] The text in French is: "*L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet.* "

but it has been interpreted to a large extent on the basis of the (very succinct) preparatory records of the Civil Code.

According to Locré (an author, famous for his comment on and compilation of the preparatory records of the Civil Code), the parliamentary comments indicate avoidance for mistake is only possible if the mistaken party would not have entered into the contract had he not made his mistake and that avoidance is excluded when the mistake relates to a secondary characteristic of the object of the contract or when it relates to the motives determining the consent.[31]

Following the track set out by Locré, the Court of Cassation decided every mistake comes into play as far as parties would avoid entering into a contract if the mistake had not occurred.[32] In other words, the requirement that a mistake should relate to the subject-matter of the contract, means the element mistaken was determinant for, or causative of, concluding the contract. The statutory requirement is, in other words, no longer very restrictive as to the nature of the elements taken into account.

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[31] Locré, *Législation civile, commerciale et criminelle ou commentaire et complément des codes français*, at page 5: "*L'erreur ne vicie le consentement que lorsqu'elle est telle, qu'elle aurait empêché le contractant de consentir s'il eût été parfaitement instruit. Elle n'a donc pas cet effet quand elle ne porte que sur une qualité accidentelle de la chose, ou sur les motifs qui ont déterminé le consentement*."

[32] *See* Court of Cassation of 27 October 1995, *RW* 1996-97, at page 298.

As to the motives, Locré seems to have caused some confusion by excluding mistakes on motives as a basis for avoidance of contracts.[33] His summary does not correctly reflect the parliamentary comments. On the one hand, Bigot-Préameneu did leave some room for a mistake on motives if the truthfulness of the motives were a "condition" of the parties' obligation.[34] On the other hand, Mouricault stated an error on the determinant motive of the obligation should also be taken into account.[35]

For a long time, it has been judged that a mistake on motives does not imply the nullification of the contract. However, current case law also applies the regime of mistake in the event of mistakes as to determinant motives,[36] even though not all commentators approve this development.[37] Belgian law traditionally distinguishes mistakes on the subject matter the so-called *erreur-obstacle*. The latter is a mistake on the "object," on the nature, or on the "cause" (or determinant motive) of the contract. One party intended to sell house n° 17A, while the other party

[33] The complete exclusion of motives by Locré is most probably a typo (he probably meant to say avoidance is excluded when it relates to motives that have *not* determined the consent).
[34] Locré, *work cited*, at page 150.
[35] Locré, *work cited*, at page 243.
[36] *See e.g.* Court of Appeal of Brussels of 30 January 2001, *RW* 2001-02, at page 27.
[37] *See e.g.* S. Rutten, "Dwaling m.b.t. de oorzaak: zelfstandige rechtsfiguur of fata morgana?" *RW* 2001-02, at pages 28-32. In favor of the application of mistake rules to determinant motives e.g. W. van Gerven and S. Covemaeker, *work cited*, at page 69.

intended to buy house n° 17B (*error in corpore*); one party intended to donate, while the other intended to purchase (*error in negotio*); one party purchases a car in order to export it to Poland, but Polish law forbids its import (*error in causa*).

The *erreur-obstacle* (mistake-impediment) has traditionally been distinguished because it not merely renders the will of a party defective, but it more fundamentally negates consent (*dissensus*). It is a mistake that was an impediment to an agreement as such, rather than a defect of the will. It does not concern the validity but the formation of a contract.

The distinction between a mistake on the substance and a mistake-impediment was important in several respects: in the event of the latter, the contract did not have to be annulled by a court, but was simply non-existent; it was agreed that such mistake did not have to be excusable on the side of the mistaken party (both parties were, in fact, mistaken); there was no statute of limitations for establishing before a court that no contract existed, while a claim for nullity is barred after 10 years (Article 1304 of the Civil Code).[38] Nowadays, the non-existence of a contract does not play a part in current Belgian law unless a statutory provision provides for an exception.[39] Consequently, the sanction of nullification (relative nul-

[38] *See* E.A. Kramer, *work cited,* at page 48-49, no. 95.

[39] This is derived from a case of the Court of Cassation of 21 October 1971, *RW* 1971-72, at page 1145.

lity) is applicable for both kinds of mistakes.[40] This also implies the same statute of limitations applies. Finally, the excusability test has also been applied to the *erreur-obstacle*. In other words; since the legal consequences of both kinds of mistake are identical, there seems to be no reason to distinguish them, except for reasons of structural thinking (lack of consent versus defect of the will).[41]

It follows from the previous overview that there are not many restrictions left on the nature of the elements incorrectly assumed. One of the most important remnants of the restrictive character of the subject-matter of mistakes is nullification of the contract is not possible merely because one of the parties has miscalculated the value of the contractual obligations.[42] This restriction is logical in a system in which contracts in principle[43] cannot be set aside on the basis of *laesio* (the loss resulting from a disparity between the performances of the parties) because judges are generally not supposed to evaluate whether parties have received a reasonable value for what they do or give in return.

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[40] *See* B. Bouckaert, "Verdwaald in de jungle van de wet, biedt rechtsdwaling een uitkomst?", *TPR* 1993, at page 1362 and further references.

[41] *See* W. De Bondt, "De wilsgebreken herbekeken. Een studie van de wilsgebreken uitgaande van een feitelijke analyse van de wils- en toestemmingsdefecten", *TBBR* 1996, at pages 369-403. In case-law e.g. Court of First Instance of Hasselt of 6 January 2000, *RW* 2001-02, at page 351, annotated by A. De Boeck.

[42] Evidently, any mistake on elements other than on value, have an effect on the value of the bargain.

[43] Exceptions are possible if a statutory provision so provides.

B. The Excusable Character of the Mistake

The provisions of the Civil Code do not define any other test to determine whether a contract can be nullified on the basis of mistake. However, in a decision on 6 January 1944,[44] the Court of Cassation held a mistake should be excusable on the side of the mistaken party. An inexcusable mistake is defined as a mistake that no reasonable person would have made in the same circumstances. In other words, the mistaken party must have had proper reasons to make the mistake. This additional test has been introduced in Belgian (and French) law in order to better protect the legitimate interests of the other (relying) party. This is quite understandable as we have seen the nature of the element wrongfully assumed nowadays does not have a material restrictive effect on the possible nullification of a contract for mistake.

The legal basis of this additional test is not clear. Some authors consider the test to be an application of the rules on (tortious) negligence liability (Articles 1382-1383 of the Civil Code). A party who makes an erroneous assumption that no reasonable person would make, acts negligently. This view is disputed for two reasons. On the one hand, the Court of Cassation itself does not invoke the rules on negligence as the basis of the inexcusability test. On the other hand, the existence of damage is irrelevant for determining

[44] *Pas* 1944, I, at page 133.

whether or not a mistake is inexcusable, while it evidently is one of the prerequisites of negligence. Whatever the legal basis is, a contract should not be annulled for the mere reason that a contracting party made an erroneous assumption when entering into a contract (even if the assumption was determinant). The contract will be upheld if the mistaken party should have known the reality (the erroneous character of his or her assumption) because a reasonable person would have.

Whereas the test is quite clear in general, it is less obvious how it should be applied in practice. Two main trends can be observed. One trend is the personal characteristics of both parties (the mistaken and the relying party) are relevant to know whether the mistake is excusable or the reliance legitimate. Case law seems to attach some importance to the experience and the education of the mistaken or relying party. When assessing the behavior of the mistaken party, judges thus make the comparison with the reasonable person much more concrete or actual than what occurs under the tortious liability rules.

Another trend in recent case law in the excusable character of a mistake is to evaluate and assess the behavior of the partner of the mistaken party. More particularly; if a contracting party wrongfully informs his partner or does not inform him[45] (although he has

[45] This is also relevant within the theory of apparent theory. *See* Court of Appeal of Mons of 16 December 1992, *TBH* 1997, at page 800 (the apparent

a duty to do so), a court may find him negligent and this negligence (a pre-contractual fault) renders the mistake of his partner excusable.[46] The precontractual fault not only implies possible tortious negligence, but also a nullification of the contract.

The link between a mistake and the contracting party's negligence is rightfully emphasized these days. However, the link should not be overstated. On the one hand, it is not necessary to find a fault of the partner of the mistaken party in order to set aside a contract for mistake;[47] but it is merely an (important) element for discerning whether a mistake is excusable. Such a conclusion completely runs counter to the distinction that is made under Belgian law between the theory of defects of will (including mistakes) and the theory of pre-contractual liability. It was clearly the legislative purpose to allow mistake more broadly, including situations in which a party erred independently of the other party's behavior. On the other hand, the opposite is equally false: the lack of a fault of the partner of the mistaken party should not automatically imply that a mistake was excusable.[48] An assessment of the behavior of the mistaken

principal should have individually informed the third party harmed about the revocation of the former agency).

[46] *See e.g.* A. De Boeck, *Informatierechten- en plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerpen, Intersentia, 2000, at page 572.

[47] Contrary to what was stated in a decision of the Court of Appeal of Liège of 27 April 2001, *RRD* 2001, at page 199.

[48] *See*, however, the Court of Appeal of Liège of 27 April 2001, *RRD* 2001, at page 193.

party remains relevant.

C. Element Entered into the Contractual Realm

Traditionally, the error of one party has been sufficient to nullify the contract. This is said to be logical in the theoretical framework that a mistake is a defect of the will of a party and not a defect of the consent of two parties. However, it seems reasonable that an element, on which a party is mistaken, should only be taken into account if the other party at least knew or should have known this element was causative of the contract. This is particularly relevant to the difficult problem of mistakes relating to the motives on the basis of which a party entered into a contract (*see infra*).

Legal doctrine and case law permitted purely unilateral mistakes to be taken into account in voiding a contract, in the sense the other party does not even have to know of the mistake. The so-called requirement of common mistake does not mean that both parties need to have been mistaken. It merely means the other party, when entering into the contract, at least knew or should have known[49] the determinative character of the element on which his or her partner has erred. In other words, the element at stake should

[49] It suffices that the other party should have known the determinative character of some elements if those are important characteristics or the normal purpose of the obligations assumed, (see W. van Gerven and S. Covemaeker, *work cited*, at page 69).

have been integrated into the contractual realm or should have been recognizable,[50] although it does not imply the element should have been expressed as a contractual "condition" in the technical sense of the word.[51]

D. Mistake Made at the Moment of Entering into the Contract

A mistake can only imply the nullification of the contract if it has been made at the moment of entering into the contract. This does not prevent the party requesting the nullification before a court to invoke facts (especially documents) which have occurred after the contract, in order to establish he or she effectively made a mistake when entering into the contract.

E. Assumption of Risk

Finally, a majority of legal doctrine and case law argues that mistake cannot be invoked when parties have contractually excluded this possibility.[52] With regard to a recent case in which a fungus was discov-

[50] *See* the well motivated decision of the Court of First Instance of Hasselt of 11 February 2002, *RW* 2003-04, at page 1426 (no building permit for studio apartment purchased).

[51] *See*, however, the case law in France, according to which a motive should be framed as a condition before it is taken into account for purposes of the theory of mistake, (see e.g. F. Buy, "Nullité du cautionnement pour erreur de la caution sur la solvabilité du débiteur principal", *JCP* 2003, Jur. No. 10.072).

[52] *See e.g.* R. Kruithof, H. Bocken, F. De Ly, and B. De Temmerman, *work cited*, at page 340, no. 117.

ered in the building purchased, the Court of Cassation held a purchase of a building *as found*, hinders him from invoking the state of the building as an element that caused the parties to enter into the contract.[53]

The entire exclusion of the risk of mistake is, however, not self evident. The remedy for mistake (satisfying all other aforementioned tests) is the nullity of a contract, implying the underlying rule is mandatory and thus protective of the weaker (viz. mistaken) party. Contracting parties are not allowed by contract to exclude in advance the application of this mandatory rule.[54]

IV. A LINK BETWEEN MISTAKE AND RELIANCE

A. Defects of the Will (Including Mistake) and Negligence Liability (Sanctioning Behavior)

According to the traditional view, the central idea of the theory of mistake (or error) is the free will of the contracting parties. Even if both parties have reached an agreement or mutual consent, the contract might still be annulled because one of the parties' will is defective. Mistake is somehow different from

[53] Court of Cassation of 24 April 2003, *www.cass.be*, no. RC.03402.
[54] This rule is criticized by L. Cornelis, *work cited*, at page 51.

other defects of will (or vitiating factors) because it does not (at least not necessarily) simultaneously involve any sanction of a party's negligent behavior when concluding the contract.

When a contracting party's will has been formed under the influence of the partner's deceit/fraud (dol) or duress (violence), that partner can be sanctioned, not only by way of damages on the basis of tort liability (Articles 1382-1383 of the Civil Code), but also by the nullity of the contract. In these situations, the nullity is often viewed as a way of restoring the harm suffered by the party who has been defrauded or on whom duress has been exercised. If not all harm has been restored by vitiating the contract, additional damages can be awarded in tort on the basis of pre-contractual (tortious) liability.

The idea of sanctioning the behavior of a contracting party cannot always explain the defects of the will. Deceit can only be invoked when it originates from a contracting party,[55] but a contract can be vitiated on the basis of duress by a third party (Article 1111 of the Civil Code).

The lack of the sanctioning character of the defects of the will is even more apparent with regard to mis-

[55] By extension, deceit is also a vitiating factor when it is attributable to the contracting partner's agent or when the contracting partner is an accomplice of a third party's deceit, (see W. van Gerven and S. Covemaeker, *work cited*, at page 71).

take or error. This defect of will is (as such) independent of any negligent conduct of the contracting partner. It explains this vitiating factor is often defined as the *unprovoked* erroneous assumption of facts or of the law (contrary to the erroneous assumption provoked by deceit). Even though a contracting party cannot be reproached with having acted negligently, a contract may be nullified because a contracting partner has made a wrong assumption when entering into the contract. This vitiating factor is not self-evident because the protection of the mistaken party has its price, viz. that the other party fails to see his expectations come true even though he or she did not act negligently. When parties enter into a contract, they rely on the contract having been concluded validly. However, when a party has made a wrong assumption, his or her partner may be frustrated in his "reliance" on the effectiveness of the contract.

B. Mistake and Reliance

Given the Belgian law's concern for the protection of reliance in the context of apparent authority, it is worth considering whether the application of the tests of the theory of apparent authority can explain the case law on mistake.[56]

[56] The idea that the theory of mistake is not foreign to the general theory of reliance, is not completely new, see N.J. Bricourt, *De theorie der schijnbaarheid inzake nietige rechtshandelingen*, Brugge, Die Keure, 1966, at pages 194-200, nos. 147-153.

In both situations there is a difference between reality and appearance. A party intends to purchase a magnificent villa that is built in conformity with the applicable regulations, but, in reality, no building permit has been awarded by the competent authorities. A party intends to enter into a contract with an insurer by contracting with his or her agent, but in reality the latter has no longer any authority to bind the insurer. There is, at first sight, a material difference between the two theories: in the event of mistake, the, otherwise valid, contract will be annulled, while in the event of reliance, a contract comes into play despite the lack of consent. In contrast with reliance, mistake gives victory to reality and not to appearance. However, this distinction is not as fundamental as one might think. In both theories, the question arises whether priority should go to reality or to appearance. Reality wins whenever the tests for mistake are satisfied and whenever the tests of reliance are not. Appearance wins whenever the tests of reliance are satisfied and whenever the tests for mistake are not. This is not merely a linguistic game. The goal is to find out whether and how reliance can explain that a nullity claim should be barred even if the will of one of the parties was defective because of a mistake.

V. MISTAKE IN RELIANCE TERMS

If the free will of contracting parties were fully pro-

tected, a party should be entitled to have the contract voided whenever that party made a mistake when concluding the contract. This is clearly not the law. Several restrictive tests have been worked out, not only by the legislator, but also by case-law. Consequently, the theory of mistake cannot be explained by a pure application of the will theory

The tests for mistake reflect a balance between the interests of the mistaken party and the interests of his partner relying on the validity of the contract. This is because the contracting party has relied on the contract. As soon as the conditions of reliance are not satisfied, the will theory regains its place. This interplay between will theory and reliance theory is shown hereafter by distinguishing several fact situations.

A. No Mistake without Mistake: Application of the Will Theory

The theory of mistake cannot apply without mistake. For example, as soon as a purchaser of a building effectively knows the building lacks a building permit, he or she cannot later invoke the nullity of the sales contract for not knowing this regulatory aspect. The purchaser was perfectly aware of the regulatory problem with regard to the building and has therefore assumed all risk inherent to it.[57] As soon as a con-

[57] It is another issue whether or not an argument of illegality (under Belgian law, an argument of illicit/illegal/unlawful object) could be invoked against such contracts (see my article "Geen bouwvergunning, verlies van elke rechts-

tracting party does not err about reality, there is no room for the application of mistake. This is important to emphasize because contracting parties often invoke so-called mistake in order to get out of a contract they no longer want to perform for some other reason. This has to be combined with the rule that the mistaken party has to prove he has made a mistake.[58] If he cannot, he should bear the consequences thereof and the reliance of his partner on the validity of the contract should be protected. These situations do not have to be explained in reliance terms, because they are simply an application of the will theory.[59] The other party can enforce the contract because both parties have consented to it on the basis of a free will and the opposite has not been proven. It is also understandable that future expectations which do not come true (e.g. the future profitability of an agreement for the management of a business), cannot be invoked as a mistake vitiating the contract. In that situation, a party cannot be said to have erred about reality.[60] Once again, the will theory fully explains why the

bescherming", *TBH* 1999, at page 843, no. 7 and the reference to a decision of the French Court of Cassation of 15 Juni 1982, *D* 1983, IR at page 480, column 2, annotated by C. Larroumet).

[58] Articles 1315 of the Belgian Civil Code and 870 of the Belgian Code on Civil Procedure. *See e.g.* Social Court of Appeal of Liège of 27 April 2001, *RRD* 2001, at page 193.

[59] With regard to the theory of the apparent authority, there is no reason to apply it if the reality is that the agent has the power to bind the principal. The principal is then bound on the basis of the theory of representation/agency.

[60] This situation should be distinguished from the situations whereby a party contractually guarantees the profitability of a contract to his partner or whereby he negligently or intentionally gives wrong information which is relevant for estimating the possible profitability of a contract.

contract will not be set aside in this situation. One step further, a party may be uncertain about a particular characteristic of the obligations assumed at the moment he enters into a contract. In that situation, he has to assume the risk the obligation lacks that characteristic because the party effectively knows a particular circumstance may or may not be true. He does not err because doubt excludes mistake. This is, once more, a mere application of the will theory. Reliance does not come into play because a problem fails to arise with regard to the will of a party.

As already stated, it is even possible contractually to assume the risk of mistake and therefore to exclude the possibility of invoking mistake. This situation can be explained by the fact that it was part of the contractual sphere that no certainty existed about other characteristics beyond what was agreed. As has already been observed, doubt excludes mistake. The test of assumption of risk is therefore a mere application of the will theory. Reliance does not come into play because no mistake has been made.

B. No Knowledge of the Causative Nature of the Mistaken Element

The test that the relying party must or should have known of the determinative character of the mistakenly assumed element, can be explained in terms of reliance. If a party did not know that a particular element was causative for the mistaken party to enter

into the contract, he or she has legitimately relied on the effectiveness of the contract and the appearance is imputable to the mistaken party because he did not inform the other of the importance of the element at issue. This situation deserves a "footnote" in more detail due to two recent cases on a carousel on value added taxes.[61] The Court of Cassation held a (sales) contract could be avoided on the basis of an illicit/illegal determinant motive of only one party because it ran counter to the rights of the tax authorities, which are protected by legislatively determined public policy. The fact that the other party did not even know of the motive was considered irrelevant. A purely unilateral motive sufficed to render a contract null and void.

Given the restrictive wordings of the Court's holding, it is doubtful whether the unilateral *causa* doctrine should be transplanted to the theory of mistake. The Court's decision explicitly restricts its holding to the rights of tax authorities which are protected by the legislation of public policy (sanctioned by "absolute nullity"), while mistake is only mandatory in the interest of the mistaken party (sanctioned by "relative nullity"). Moreover, the interests of the partner of the mistaken party would be heavily encroached by applying the "unilateral doctrine" to mistake: his le-

[61] Court of Cassation of 12 October 2000, *www.cass.be*, no. C.99.0136.Fv, *RCJB* 2003, 74, *RW* 2002-03, at page 416, annotated by A. Van Oevelen; 7 October 2004, *www.cass.be*, no. C.03.0144.F.

gitimate reliance would no longer be protected where it should be. Finally, such a far-stretching idea would not be comforted by a comparative law analysis.

C. "Negligence" of the Partner of the Mistaken Party

Mistake is generally defined as the *unprovoked* wrong assumption of facts or the law, in contradistinction to deceit whereby a wrong assumption has been provoked by the fraudulent action or silence of the other party. However, as we have seen before, the conduct of the other party is an increasingly preponderant element for judging whether or not a mistake was excusable. This is once more easily explainable in terms of the reliance theory.

As soon as a contracting party has negligently provoked a mistake of his partner, his reliance on the effectiveness of the contract is no longer worthy of protection; it is no longer legitimate.[62]

The reliance idea provides a better explanation than the mere negligence of the partner of the mistaken

[62] Here again, it should be noted that the idea of reliance is a tricky concept because it can be used differently. The Dutch author Van Dunné, for example, argues the appearance caused by a wrongful or negligent lack of information is the reason why the mistaken party may ask the nullity of the contract (*See* J.M. Van Dunné, *Verbintenissenrecht – Contractenrecht*, Deventer, Kluwer, 2004, at page 519; for further references see A.S. Hartkamp, *Algemene leer der overeenkomsten*, in *Verbintennissenrecht*, II, Deventer, Tjeenk Willink, 2001, at pages 161-162, no. 170; see also Civil Court of First Instance of Hasselt of 6 January 2000, *RW* 2001-02, at page 351, annotated by A. De Boeck).

party (Articles 1382-1383 of the Belgian Civil Code). First and foremost, the latter theory does not show why the fault of the other party renders the fault of the mistaken party irrelevant (*see infra*). According to general liability rules, whenever both parties have caused damage by their negligence, both should be held liable (except in the event of fraud of one of the parties). Moreover, by requiring the mistake be excusable, case law at first sight emphasizes the behavior of the mistaken party, not of its partner. Finally, it is unclear whether the nullity of a contract may be said to be the sanction of negligence.

D. "Negligence" of the Mistaken Party

It has already been shown the excusability test was introduced in order to restrict the scope of mistake and its legal basis has been disputed. Articles 1382-1383 of the Civil Code do not seem to be the correct basis for denying the nullification of the contract, because the actual qualities of the mistaken and relying party are taken into account to judge whether the mistake is excusable. The standard of negligence liability, however, is more abstract because it compares the actual behavior with the hypothetical behavior of a standard person without taking as many personal characteristics into account as occurs when assessing the excusable character of mistake. Moreover, as already explained, it would be contrary to negligence principles that only one person is sanctioned if both have acted negligently (*see infra*).

Reliance offers a better explanation: the nullity should be refused because the partner of the mistaken party legitimately relied on the effect of the contract and the appearance of a valid contract is imputable to the mistaken party.[63]

E. "Negligence" of both Parties

It is also possible that both parties' behavior is reproachable and such behavior has caused an erroneous assumption when entering into the contract. The partner of the mistaken party may have omitted relevant information or may have given incorrect information. By the same token, the mistaken party may have himself omitted information or he should have known that his assumption was wrong given his expertise and/or experience.

According to the limited case law on this situation, the existence of a fault of the partner of the mistaken party is sufficient to consider the mistake to be excusable and to set aside the contract.[64] This case law can be explained, once more, in reliance terms: although the mistake is partly due to the mistaken party

[63] *See also* the criterion mentioned in Commercial Court of Mons 8 July 2003, *TBBR* 2004, at page 208, annotated by C. Delforge and P. Wéry: the contract should only be avoided in the event that "*it concerns a inexcusable mistake or if the addressee [of an offer] could establish that his legitimate expectations have been disappointed and that this has caused an injury to him*" (literal translation of the original French text).

[64] *See e.g.* Civil Court of First Instance of Hasselt, 6 January 2000, *RW* 2001-02, at page 351.

himself, his partner cannot legitimately rely on the effect of the contract because of his own negligence. However, it is not so evident that this solves anything. Depending on the actual circumstances of the case, a judge may well consider the partner of the mistaken party might still have legitimately relied on the effectiveness of the contract; this is especially true in cases in which the relying party is weak and the mistaken party should not have made a mistake because of its experience and expertise on the element erroneously assumed. In other words, the outcome in the situation whereby both parties acted 'negligently' should not be solved automat-ically in favor of the mistaken party, but the actual circumstances will be decisive in determining whether the parties could legitimately rely.

F. No "Negligence" of Any of the Parties

Another situation arises when none of the parties can be reproached for any negligence in better informing himself or his partner. The exercise of balancing between both parties' interests is the most difficult in this situation.

It may well be argued, at least under Belgian law, reliance should not be protected because the appearance of an effective contract is not imputable to the mistaken party. One might then reply the interests of the partner of the mistaken party are too easily sacrificed. I do not agree because of the current test that

the relying party must have recognized the element wrongly assumed was determinative. As he was well aware a certain element was causative for his partner to enter into the contract, the scale more readily tips in favor of the mistaken party. Since reliance does not play a role, the will theory fully regains its territory and the contract can be set aside for mistake.

VI. CONCLUSION

It follows from the various situations distinguished that mistake cannot solely be explained by the will theory, but must be understood rather in light of the interplay between the theory of will and the theory of reliance. In summary, if a problem arises with the free will of a party because of a mistake, the reliance which is legitimate on the side of the partner of the mistaken party and which is imputable to the mistaken party will hinder a nullification of a contract for mistake. However, if the tests of reliance are not satisfied, the will theory plays its role and the contract can be voided for mistake.

Agreements in Polish Criminal Procedure

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I. INTRODUCTION

Polish criminal procedure allows in certain circumstances for agreements between the prosecution and defense. Done correctly, this may benefit both parties, while facilitating the administration of justice and benefiting society as a whole. Agreements begin with negotiations, which lead to a collective final decision which is acceptable for all interested parties. The purpose of the negotiation process is to reach an agree-ment, which would achieve or partially achieve a settlement in the dispute. This dialogical ap-proach to decision-making leads to greater effic-iency, in contrast to "the monologue model" of completely adversarial proceedings. Imposing de-cisions on defendants unilaterally may cause resistance, whereas court decisions will be better respected when they are obtained with the con-sent of the addressee.

Another important benefit of the agreement is that it reduces the number of contested cases and shortens

their duration. This may also limit the number of executive proceedings and decrease court and social costs. Therefore, settlements should be encouraged in all legal conflicts. They have an obvious benefit in all civil cases, but can also be very useful in criminal cases, where they have been used less often.

It is generally acknowledged, that such agree-ments are easiest to achieve when both parties in the negotiation have equal bargaining power. This is very seldom the case when negotiations concern criminal liability. It may even seem contrary to the public interest for those responsible for conducting criminal cases to nego-tiate with a person who is suspected of commit-ting an offense. Such negotiations might seem to imply special treatment for a person who has already violated the rule of law, yet gets a voice in his own treatment or punishment by the state.[1] Of course, the model of adversarial system as understood in the civil law will have to admit some features of settlement by the parties. There is no doubt, that mediation proceedings, which exist in the Polish criminal law, serve such a purpose.[2] Moreover, the purpose of many

[1] A. Światłowski: *W stronę koncepcji porozumień karnoprocesowych.* [The concept of the settlements in criminal justice.] Państwo i Prawo 1997 No. 7, p. 78.

[2] The mediation proceedings were introduced to the Polish criminal procedure by the Code of June the 6th 1997. Article 23a provides that the court, and in the preparatory proceedings the state prosecutor, may, *ex officio* or upon the motion from or with consent of the injured party and the accused, refer the case to a trustworthy institution or person for the conduct of mediation proceedings between the injured party and the accused. The duration of the mediation proceedings shall not exceed one month and this time is not included in the calcu-

other regulations is to induce the accused and the injured person, to reach a point of reconciliation.[3] Such agreements are usually taken into account by the court while making its decision.[4] But, the most controversial settlements are those between the accused and an agency conducting criminal proceedings, such as the state prosecutor during preparatory proceedings or the

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lation of the duration of preliminary proceedings. Thus the positive outcome of mediation proceedings shall be used as an argument for conditional discontinuance of the proceedings; an extraordinary mitigation of punishment; may suspend it conditionally; or may decide solely on a penal measure.

[3] The main purpose of proceedings in cases of privately prosecuted offences is to create the best conditions for the accused and the private prosecutor to reconcile. First of all, the main trial shall be preceded by a conciliatory session. This session shall begin by calling upon the parties to reach reconciliation. Of course, there is also a possibility for the parties to reach agreement during the trial. In case of a reconciliation of the parties the proceedings shall be discontinued.

[4] In proceedings in cases of offences prosecuted *ex officio* the fact of reconciliation of the accused with the injured person may convince for conditional discontinuance of the proceedings. There is a general rule that conditional discontinuance shall not be applied to the perpetrator of an offence for which the statutory penalty exceeds 3 years deprivation of liberty (Article 66 § 2 of the Penal Code). But, according to § 3 in the event that the injured party has been reconciled with the perpetrator, the perpetrator has redressed the damage or the injured party and the perpetrator have agreed on the method of redressing the damage, the conditional discontinuance may be applied to a perpetrator of an offence for which the statutory penalty does not exceed 5 years deprivation of liberty. Besides the court is obligated to generate the possibility for the parties to reconcile. Moreover, according to Article 341 § 3 of the C.P.C.: If the court finds it purposeful, because of the possibility of reaching an agreement between the accused and the injured on the matter of redressing damage or compensation, the court may adjourn the session and designate a suitable time-limit for the parties. On a motion from the accused and the injured, the court shall announce a suitable break or adjourn the session. Moreover the court, in imposing the penalty, should also take into consideration the positive results of the mediation between the injured person and the perpetrator, or the settlement reached by them in the proceedings before the state prosecutor or the court (Article 53 § 3 of the P.C.) .

court during judicial hearings, because of the binding effect on the final judgment.

Despite these doubts, legislatures in many countries have introduced agreements in various forms into the criminal justice system. Increases in delinquency require greater numbers of state prosecutors, policemen, and judges, whose time can be saved if agreements are used to bring criminal cases to an earlier conclusion.

Polish regulations on the agreement of the parties were officially introduced into Polish criminal procedure by the Criminal Procedure Code of June the 6th 1997.[5] This was not done primarily to shorten criminal proceedings. Agree-ments had not been taking place in the Polish criminal justice system for a long time before they were recognized by statute or approved by the Supreme Court. Before 1998 many agreements already occurred between state prosecutors, coun-sels for the defense and even judges. But of course they were not legitimate. These took place infor-mally, without a legal basis. About 50% of respon-dents (judges, state prosecutors and defense counsels) answered that they had participated in the practice themselves. The answers show that such settlements were usually made between: judges, state prosecutors and defense counsels. Judges were the main initiators of agreements. The most frequent reasons for agreements were described as: difficulties in gathering evidence, the prospect of long trials, and the particularly complicated

[5] It came into force on September the 1st 1998.

subject matter of the case. When defining agreement conditions the following facts stood out: in return for agreement the judge promised the parties a specified kind of punish-ment, change of the legal classification of an offense, or conditional reprieve.[6]

The outcome of this research confirms the suspicion that such arrangements had always been transacted in the courtrooms of civil law countries. The hope is that the introduction of formal agreements into the Code will decrease the number of informal agreements that take place, without legal sanction.

II. AGREEMENTS ACCORDING TO THE POLISH CODE OF THE CRIMINAL PROCEDURE

The Code of Criminal Procedure of 1997 pro-claimed two regulations, which empower the court to render a judgment based on the agree-ment of the parties. The first one is commonly referred to as "conviction without trial" (Articles 335 and 343 of the C.P.C.);[7] the second

[6] J. Sobczak: *The phenomenon of plea bargaining in the Polish legal practice. Analysis of questionnaire research. Summary.* [in:] *Porozumiewanie się i uzgadnianie rozstrzygnięć przez uczestników postępowania karnego.* [Communication between and settlements on decisions by participants in criminal proceedings.] Pod red. A.J. Szwarca. Warszawa – Poznań 1993, p. 46.

[7] Article 335. § 1. The state prosecutor may include in the indictment a motion to issue judgement, imposing a penalty of a penal measure with consent of the accused for a misdemeanour subject to a penalty not exceeding 10 years deprivation of liberty, without conducting a trial if circumstances surrounding the commission of the misdemeanour do not raise doubts, and the attitude of the

one, as "voluntary submission to penalty" (Article 387 of the C.P.C.).[8] These regulations differ from settle-

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accused indicates that the objectives of the proceedings will be achieved.

§ 2. If conditions for filing the motion referred to in § 1 occur, and in light of the evidence collected the explanation of the accused does not raise any doubts, then conducting any other evidentiary actions in preparatory proceedings may be abandoned; however these evidentiary actions for which there is a danger that taking them at the hearing would be impossible shall be conducted.

§ 3. The statement of reasons for the indictment may be limited to indication of circumstances referred to in § 1.

Article 343. § 1. Upon granting the motion referred to in Article 335, the court may apply an extraordinary mitigation of punishment, suspend it conditionally or decide solely on a penal measure specified in Article 39 subsections 1 through 3, 5 through 8 of the Penal Code.

§ 2. In the case specified in § 1: 1) the extraordinary mitigation of penalty may be applied also in cases other than envisaged in Article 60 sections 1 through 4 of the Penal Code; 2) the conditional suspension of the execution of penalty may be applied irrespective of the premises specified in Article 69 § 1 of the Penal Code, but it shall not be applied to the penalty of deprivation of liberty exceeding 5 years, and the period of probation shall not exceed 10 years; 3) limiting the conviction to the imposition of a penal measure may occur only if the misdemeanour attributed to the accused, is subject to a penalty not exceeding 5 years of deprivation of liberty.

§ 3. If Article 46 of the Penal Code does not apply, the court may make the granting of the motion conditional upon redressing the damage in part or in full, or upon compensation for wrongdoing. The provision of § 341 § 3 shall apply accordingly.

§ 4. The evidentiary proceedings are not conducted. The provision of Article 394 shall, however, be applied accordingly.

§ 5. The state prosecutor, the accused and the injured person shall have the right to participate in the session. The injured person may, not later than in this session, submit the declaration referred to in Article 54 § 1. The participation of the state prosecutor, the accused or the injured party in the session shall be mandatory if the president of the court or the court so decides.

§ 6. Upon granting the motion, the court shall convict the accused by a judgment.

§ 7. If the court finds no grounds for granting the motion, it shall direct the case to be heard at a trial according to the general rules.

[8] Article 387. § 1. Until the conclusion of the first examination of all accused persons at the first-instance hearing, the accused who is charged with a misdemeanor may submit a motion for a decision convicting him and sentencing him to a specified penalty or penal measure without evidentiary proceedings; if the

ments as practiced in common law countries. In Polish criminal procedure, the guilt of the accused cannot be the subject of agreement. This is because Polish procedure begins from the premise that the entire procedure should be directed towards establishing the true facts of the case.[9] Moreover, the Polish Code imposes an obligation on agencies responsible for prosecuting offenses to institute and conduct preparatory proceedings, when there is good reason to suspect that an offense has been committed. The public prose-cutor has the obligation to bring and support charges, with respect to an offense prosecuted *ex officio*. The authorities must also consider that "except for cases described in domestic law or international law, no-one may be discharged from liability for a committed offense."

accused has no defense counsel of his choice, the court may, on his motion, appoint a counsel *ex officio*.

§ 2. The court may grant the motion of the accused to issue a judgment convicting him only when the circumstances surrounding the offence have not given rise to doubt, and the objectives of the proceedings are to be achieved, in spite of the hearing not being conducted in full; granting that motion is only possible when the state prosecutor does not object, nor does the injured party being properly served the notice of the date of the hearing and instructed on the possibility of such motion to be lodged by the accused.

§ 3. The court may make the granting of the motion conditional on introducing into it an amendment indicated by the court. The provision of Article 341 § 3 shall apply accordingly.

§ 4. When granting the motion the court may regard as revealed the evidence specified in the indictment, or documents submitted by a party.

§ 5. If the motion has been brought before the hearing, the court shall examine it at the hearing.

[9] Article 2 § 2 of the Code of Criminal Procedure.

It might seem that the subject matter of these two regulations is a distinction without a difference since they lead to very similar results. Yet they serve somewhat different purposes.

III. THE ESSENCE OF BOTH REGULATIONS: SIMILARITIES

Both regulations empower the court to render a judgment based on the agreement of the parties. The parties are only authorized to negotiate the question of punishment. The positive outcome of negotiations, together with the court's evaluation that all residual conditions have been fulfilled, can lead to the conviction of the accused and sentenc-ing, without evidentiary proceedings carried out before the court. This is the essence of both regu-lations. But there are further similarities between them. In both cases the court may grant the motion for issuing a judgment only when the circumstances surrounding the offense have not given rise to doubt. The court is obliged to examine, whether this condition has been ful-filled. The basis for the court's appraisal is the evidence that is collected, preserved, and exam-ined during the preparatory proceedings.[10] As the Supreme Court emphasized, this

[10] According to Article 387 § 4: When granting the motion the court may re-gard as revealed the evidence specified in the indictment, or documents sub-mitted by a party. Moreover in accordance with Article 343 § 4 article 394 which shall be applied accordingly decisive: Personal data pertaining to the accused and the outcome of an inquiry within the community may be admitted without actual reading. If the accused or a defense counsel so request, they

evidence must without any doubt indicate that the accused has committed an offense imputed to him.[11]

The statute does not express explicitly whether the accused should plead guilty or not. Therefore opinions of theoreticians are divided on this question. Some authors claim that the accused must plead guilty, because of the requirement that the circumstances surrounding the offense must be proved without a doubt.[12] But as other authors emphasize, a guilty plea does not remove all doubt.[13] The defendant might plead guilty just to receive a milder penalty if they think that there is strong evidence in the case. Authors also consider the Supreme Court's views on this. The Court has stated that the condition is that there be no doubt. This can be met when the accused pleads guilty in such a manner that no question of innocence remains. This requirement is also fulfilled when perpetrators have been caught in the act of committing an offense or when

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should be read aloud.

§ 2. The records and documents subject to reading at the trial, may be admitted as disclosed in whole or in part without actual reading. These should, however, be read if any of the parties so move.

[11] The judgment of the Supreme Court of July 20th 2003, II KK 125/02, LEX No. 75361.

[12] T. Grzegorczyk: Wniosek oskarżonego o skazanie go bez przeprowadzenia postępowania dowodowego na rozprawie. [A motion of the accused for a decision convicting him and sentencing him without evidentiary proceedings.] Przegląd sądowy 2000, No. 1, p. 25.

[13] P. Hofmański, E. Sadzik, Z. Zgryzek: *Kodeks postępowania karnego. Komentarz.* [The Criminal Procedure Code – a commentary.] Warszawa 1999, Vol. II, p. 199.

there is evidence to ascertain that they have committed the offense imputed to them.[14]

It is worth mentioning that there is also another opinion, which holds that the motion of the accused for a decision convicting them and sentencing them to a specified penalty or penal measure or their consent to the state prosecutor's motion[15] should be considered as the equivalent of a confession.[16]

A guilty plea should not be necessary for conviction without a trial or for granting the accused a motion for voluntary submission to a penalty. The requirement of a confession could violate the presumption of innocence[17] and also the rule that the accused is under

[14] In spite of the fact that this decision concerns regulation of the conditional discontinuance of the proceedings, it surely might also be used for both regulations of agreements. According to the Penal Code, one of the conditions which empower the court to decide about it is also the court's evaluation that the circumstances of the commission of the act do not raise doubts. *See* The resolution of the joint bench of the Criminal Law Chamber and the Military Chamber of the Supreme Court of January 29th 1971 r., VI KZP 16/69, OSNKW 1971 r., No. 3, item 33.

[15] Despite the fact that Article 335 § 1 provides that "the state prosecutor may include in the indictment a motion to issue judgment, imposing a penalty of a penal measure with consent of the accused" it is generally considered that the consent of the accused concerns not only the punishment, but also form of conviction. Moreover, according to the original wording of this regulation the application was made by the state prosecutor and submitted with the agreement of the defendant. This change of the regulation of Article 335 was made by the amendment of January the 10th 2003.

[16] S. Waltoś: *Proces karny. Zarys systemu.* [The Criminal procedure. Introduction to the system.] Warszawa 2003, p. 508.

[17] According to Article 5 § 1 the accused shall be presumed innocent until his guilt has been proven and ascertained by a valid and final judgment. Moreover, all irresolvable doubts shall be resolved in favor of the accused (§ 2).

no obligation to prove his innocence or to submit evidence.[18] Moreover, research shows that in practice courts sometimes grant motions of the accused.

When the accused voluntarily submits to penalty or consents to the application of the state prosecutor,[19] this should be considered as their resignation of the constitutional right to a public hearing of their case (Article 45 section 1 of the Constitution of the Republic of Poland). Agreements are concluded according to the rule of *do ut des,* i.e., consensus through mutual concessions.[20] In other words, agreements exempt the authorities from the duty to conduct evidentiary proceedings. This means that the accused should acquire something through the relinquishment of rights. What they usually get is a milder penalty. By consenting to the agreement, the accused secures mitigation of punishment, suspending it conditionally or deciding on a specific penal measure, such as:

[18] Article 74 § 1 of the C.P.C.

[19] The amendment of January 10th 2003 also entitled other than the state prosecutor agencies which shall have the right to file and support the charges before a court of the first instance in cases subject to examination in summary proceedings to include in the indictment a motion for conviction without trial, as well as for objecting to the granting of the accused motion referred to Article 387 (Article 325 i § 3). Those agencies f.i. are: units of the taxation authorities which can act as the public prosecutor in cases of fiscal offences - those are regulated by the Fiscal Penal Code; units of the Border Guards (they can act f.i. in cases of illegally crossing a border); units of the State sanitary authorities.

[20] S. Waltoś: *The admissibility of plea bargaining in Polish criminal law*. Summary. [in:] *Porozumiewanie się i uzgadnianie rozstrzygnięć przez uczestników postępowania karnego*. [Communication between and settlements on decisions by participants in criminal proceedings.] Pod red. A. J. Szwarca. Warszawa – Poznań 1993, p. 69

deprivation of public rights, interdiction preventing the occupation of specific posts, the exercise of specific professions or engaging in specific economic activities, inter-diction on driving vehicles, obligation to redress the damage, supplementary payment to the in-jured or for a public purpose, pecuniary consid-eration, or making the sentence publicly known.

The next attribute of regulation which is shared both in the case of trial and of voluntary submission to penalty, is the court's decision(s). The court is entitled to issue one of three possible decisions:

1. Granting the state prosecutor's motion as well as the application of the accused and a conviction as the consequence. Upon grant-ing a motion the court shall convict the accused by a judgment. According to the Supreme Court's jurisprudence, acceptance of a motion for a decision convicting the accused and sentencing obligates the court to impose on the accused a proposed penalty. Imposing a stricter penalty would violate the "specific agreement" and as such give grounds for a cassation appeal.[21]

2. Refusal to grant motions, as the court is not obliged to grant such proposals. Granting motions is possible only if the court

[21] The judgment of the Supreme Court of September 7th 1999, WKN 32/99, OSNKW 1999 r., No. 11 – 12, item 77 and the judgment of August 3rd 2000, WKN 16/2000, OSNKW 2000, No. 11-12, item 101.

> acknowledges that all conditions have been fulfilled. When there is any doubt on the part of the court concerning the circum-stances surrounding the offense, the court is obliged to examine evidence at the main hearing. This means refusal to grant mo-tions. When the state prosecutor so moves, the court is under obligation to direct the case to be heard at the main trial.

3. Granting the motion, on the condition that an amendment indicated by the court is introduced.[22] It may happen that the court acknowledges that all conditions necessary to grant the motion have been fulfilled, but the penalty proposed by the parties is not adequate, or there arises an issue of compensation for the injured person. This interference of the court may initiate renegotiations between parties concerning the essence of the motion. But one thing needs to be stressed. The court cannot be a partner to these agreements, due to its independence.

In spite of the fact that such a judgment is based on the agreement of the parties, it is still a "regular" judgment and as such might be a subject of an ap-

[22] Article 387 § 3. The counterpart of this regulation regarding the conviction without trial is provision of article 343 § 3 of the C.P.C. So, the interference in the substance of a motion concerns mainly, but not only, interests of the injured person.

peal.[23] The general rule of appellate proceedings is that the appellate court may render a decision adverse to the accused only if an appellate measure has been filed against them, and only within the limits of such an appellate measure, unless otherwise provided by law. An appellate measure filed against the accused may nevertheless also result in a decision for their benefit (*reformationis in peius* prohibition). But the amendment on 10 January 2003 introduced one limitation concerning this rule. The prohibition on deciding to the prejudice of the accused shall not apply in cases of conviction without trial and voluntary submission to penalty. So, the accused has the right to appeal against the judgment, but the second instance court may decide against the accused.

IV. DIFFERENCES

In spite of the fact that there are many points in common between conviction without trial and voluntary submission to penalty, the regulations also have differences. They are separate regu-lations. In voluntary submission to penalty the author of a motion is the accused. The defense counsel may make the motion on behalf of their client, but it has to be the independent decision of the accused.[24] It is the state prosecutor who

[23] The order of the Supreme Court of October 17th 2000, V KKN 362/00. OSNKW 2001/1-2/9 and the judgment of the Supreme Court of October 11th 2000, III KKN 600/99, Prokuratura i Prawo 2001, No. 1.

[24] The judgment of the Supreme Court of September 17th 2002, II KK 217/02, LEX No. 55536.

is the author of a motion for conviction without trial. However, the state prosecutor's application may be submitted only with the consent of the accused, which means that this proposal is the outcome of an existing agreement.[25] Thus nego-tiations usually take place in the course of preparatory proceedings. The court may interfere to initiate re-negotiations, with the further provision that negotiations should continue until they reach a final decision.

Consequently, the next difference between the two regulations is the stage of proceedings at which negotiations are conducted. In a voluntary submission to penalty, the accused may submit their application at the first-instance hearing.[26] Even when the motion has been brought before the hearing, the court shall examine it at the main trial.[27] The next significant distinction between regulations concerns parties of settlement. According to Article 387 § 2 of the C.P.C., the court can grant the motion when the state prosecutor does not object, and neither does the injured person who had been properly served the notice of the date of the

[25] In practice sometimes defendants or their defense counsels request that the prosecutor include such a motion in the indictment.

[26] That means that the accused has to be given a possibility to provide explanation of which he/she might take an opportunity or not. Article 386 provides that after the indictment has been read, the presiding judge shall instruct the accused as to his right to give or refuse explanations or answers to questions and then ask the accused whether he pleads guilty of the act imputed to him, and whether he wishes to make any explanations and of the nature thereof.

[27] Article 387 § 5 of the C.P.C.. But there is one exception - in the course of summary proceedings the motion of the accused referred to in Article 387 § 1, filed before a hearing, may be examined by the court in a session (Article 474a § 1)

hearing and instructed on the possibility that such motion might be lodged by the accused.[28] So the injured person, whether or not they are involved in the proceedings,[29] might be involved in the agreement concerning the penalty which would be imposed on the accused and the amount of compensation. This participant in the proceedings is entitled to disagree with the proposal, or to insist on participating in evidentiary proceedings. Thus, their objection might mean that it would become necessary to examine the evidence at trial. In a situation when the accused is interested in a quick conviction, the injured person's position during negotiations could be very strong. This regulation enlarges their chances for obtaining damages. It also renders[30] voluntary submission to penalty consistent with the constitutional require-ment regarding the right to the court.[31] Un-fortunately, the

[28] Article 334 § 2 obligates the public prosecutor to notify the accused and the injured person, if disclosed, as well as the person or institution that submitted the notice of an offence, that the indictment has been transmitted to the court and of the contents of Articles 335 and 387. When informing the injured person of this fact, the state prosecutor shall notify him of its rights to pursue pecuniary claims, and, when necessary, also of his right to enter a statement assuming the role of a subsidiary prosecutor.

[29] The injured is *ex lege* a party to the preparatory proceedings (article 299 § 1 of the C.P.C.) In the course of proceedings before court the injured person may become a party, when they file a statement on their intention to act as a subsidiary prosecutor or files a civil complaint. In cases of offences prosecuted by private accusation the injured person may as a private prosecutor bring and support charges.

[30] Article 338 provides that if the indictment contains the motion referred to in Article 335 § 1, a copy thereof shall be served on the injured disclosed.

[31] According to Article 45 section 1of the Constitution of the Republic of Poland: Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

second regulation does not give the injured person an advantage. The injured person obtains some rights concerning this form of bringing the procedures to an end such as: the right to be informed about the essence of the motion and the right to participate in the court session.[32] Injured persons also have a right to file a statement on their intention to act as a subsidiary prosecutor alongside the public one. This is a new regulation, introduced by the amendment of 10 January 2003. It was introduced as an answer to criticism that the injured person had no opportunity to object to the state prosecutor's motion.[33] But there still is no such opportunity. The injured person's right to become the subsidiary prosecutor means they only have the right to appeal against a judgment. As a result the injured person does not have an effective right of objection that would be binding for the court.

The next difference between the two methods of ending a case through agreement concerns the situation of the accused. First of all, conviction without trial is admissible in cases of mis-demeanors[34] subject to a

[32] His presence just as the participation of the state prosecutor and the accused might be recognized as mandatory upon the decision of the president of the court or the court itself.

[33] R. A. Stefański: *Wniosek prokuratora o skazanie oskarżonego bez rozprawy.* [The state prosecutor motion for issuing a convicting judgment without conducting a trial.] Prokuratura i Prawo 1998 No. 2, p. 48, S. Waltoś: *Wizja procesu karnego XXI* [The Vision of the criminal procedure]. [in:] *Postępowanie karne w XXI wieku. Materiały z ogólnopolskiej konferencji naukowej* [The criminal procedure in XXI century. Materials of national conference.] Popowo 26 – 28 października 2001 r., pod red. P. Kruszyńskiego, Warszawa 2002, p. 26 – 27.

[34] The Penal Code provides that the offence is either a felony or a misdemean-

penalty not exceeding 10 years deprivation of liberty, as the accused may submit a motion for a decision convicting them and sentencing them to a specified penalty or penal measure without evidentiary proceedings when they are charged with any misdemeanor.

In return for their resignation of their constitutional right to a public hearing of their case, the accused may get some influence on the final decision and a chance to negotiate a lower punishment. Thus the biggest difference between conviction without trial and voluntary submission to penalty consists in the punishment, i.e., when the accused is convicted without trial, they may get a less severe punishment, than would be the case in a voluntary submission to penalty. Article 343 of the C.P.C. is very important. Its regulations provide the possibility of inflicting a penalty much milder than normal punishments under the Penal Code,[35] so that the court can reward the accused's motion by imposing a milder penalty.

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our. The felony is a prohibited act subject to penalty of imprisonment of not less than 3 years or to a more severe penalty. A misdemeanour is a prohibited act subject to penalty of a fine higher than 30 times the daily fine, penalty of restriction of liberty or penalty of deprivation of liberty not exceeding one month (Article 7).

[35] Article 343 § 2 provides that the extraordinary mitigation of penalty may be applied also in cases other than those envisaged in Article 60 §§ 1 through 4 of the Penal Code. Moreover, the conditional suspension of the execution of penalty may be applied irrespective of the premises specified in Article 69 § 1 of the Penal Code, but it shall not be applied to the penalty of deprivation of liberty exceeding 5 years, and the period of probation shall not exceed 10 years. According to the Penal Code: The court may conditionally suspend the execution of a penalty of deprivation of liberty of up to 2 years or execution of

Probably a milder penalty is the most important benefit for the accused. However the conviction without trial gives the accused something more: a chance to avoid the disgrace of being in the dock. According to the Code of Criminal Procedure, court sessions are closed to the public.[36] In the case of voluntary submission to penalty the defendant cannot avoid a public trial,[37] but might avoid publicly conducted evidentiary proceedings.

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a fine adjudicated as a one-off penalty, if it is regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him from relapsing into crime. Suspension of the execution of a penalty shall be granted for a probation period, which runs from the time the sentence becomes valid and final and is for:
1) from 2 to 5 years - in the case of a conditional suspension of the execution of a penalty of deprivation of liberty,
2) from one year to 3 years - in the case of a conditional suspension of the execution of a fine or a penalty of restriction of liberty.
3) In the case of the conditional suspension of the execution of a penalty with respect to a perpetrator who is a young offender or the one specified in Article 64 § 2 (a recidivist), the probation period is from 3 to 5 years.

And according to Article 343 § 2 of the C.P.C. limiting the conviction to the imposition of a penal measure may occur only if the misdemeanor attributed to the accused, is subject to a penalty not exceeding 5 years of deprivation of liberty, while the Penal Code provides that it is possible when: If the offence is subject only to a penalty of a deprivation of liberty not exceeding 3 years or, alternatively, to the penalties of fine, restriction of liberty, or deprivation of liberty.

[36] Article 96 provides that parties or persons who are not parties, if this is of significance to their defense, shall have the right to participate in the session of the court in cases provided by law, or may be under obligation to participate. In other cases, unless otherwise provided by law, these parties and persons shall have the right to participate in the session when they put in an appearance.

[37] Of course, there are some reasons, which obligate the court to exclude the public if the public nature of the hearing may be conducive to disturbance of public order; offend decency; disclose circumstances which in consideration of significant state interests should remain secret; or infringe important private

Still, the situation of the accused who submits a motion referred to in Article 387 § 1 is better, than one who accepts the state prosecutor's proposal. This is because the accused might obtain a defense counsel appointed *ex officio* if they do not have the defense counsel of their choice. The general rule is that the Code ensures the aid of an advocate *ex officio*, if the defendants can duly prove that they are unable to pay the defense costs without prejudice to their and their family's necessary support and maintenance[38] or when the participation of legal representative is mandatory.[39] Thus, Article 387 § 1 provides a distinct independent legal prerequisite for an appointment of defense counsel. The same argu-ment concerning the appointment of a defense counsel appointed *ex officio* should also apply to accuseds who agree to end their case at the court session. Nevertheless, currently when a man-datory defense does not apply, the defendants can obtain legal aid only when they prove a financial inability to afford the lawyer of their choice.

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interests.

[38] Article 78 § 1.

[39] In the course of criminal proceedings the accused must have defense counsel if: he is minor; he is deaf, dumb, or blind; there is good reason to doubt his sanity; when the court deems that necessary because of circumstances imped-ing the defense. Moreover, there is a mandatory defense in proceedings before a circuit court as a court of first instance, if he is accused of felony or deprived of his liberty. In such a case, the participation of defense counsel at the main trial is mandatory; it shall also be so at the appellate and cassation hearing, if the president of the court or the court finds it necessary, (Articles 79 and 80 of the C.P.C.).

V. CONCLUSION

Despite the differences between conviction without trial and voluntary submission to penalty, the essence of both regulations is the same. An agreement of parties regarding the penalty which shall be imposed on the accused provides an opportunity to eliminate the need for an examination of the evidence. Settlements may significantly contribute to relieving the court's workload. Thus they create a chance for more economical adjudicating. But saving time and cutting costs are not the sole benefit. Settlements do not only serve the administration of justice, but a defendant also gets the possibility of having some influence over the final decision and a chance to negotiate a lower punishment. An injured person gets a chance to receive compensation. The agencies responsible for conducting criminal proceedings get time to concentrate on more serious or complicated cases. Consequently, both modes of conviction are beneficial not only for the administration of justice and for participants in the proceedings, but also for society as a whole.

Freedom of Contract to Forcing Parties into Agreement: The Consequences of Breaking Negotiations in Different Legal Systems

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I. INTRODUCTION

In the western world, freedom of contract is one of the axioms of contract law. Parties should be free to enter or not to enter into agreements. For a time it seemed that what constitutes an agreement could be kept simple and clear: an agreement is reached at the moment that an offer is accepted. But times are changing. The classic procedure for entering into agreements no longer meets the requirements posed by the market today. The modern contract-making process is often a set of very complex agreements involving large amounts of money. The negotiations may last for months or even years. As a result, the parties will reach an agreement piecemeal. There is no longer a simple offer and acceptance. Instead,

there are offers, counter-offers, and partial agreements long before the final agreement is reached.[1]

When exactly should agreements be viewed as having become "final?"[2] Most legal systems have not made this clear.[3] In the absence of clear offer and acceptance, a whole set of new problems arises concerning:

1. whether the agreement has been concluded;
2. when it was concluded; and
3. if the agreement is concluded, what are its terms?

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[1] Also in the field of so called e(lectronic)-contracts new rules of formation are developed. *See* D. Gallet, *Formation of E-Contracts in the European Community. A Comparative Study of English and French Law* (2004), *available at* http://www.jullep.com/memoires/ Formation%20of%20econtracts.pdf; E.M. Weitzenböck, *Good Faith and Fair Dealing in the Context of Contract Formation by Electronic Agents, AISB Symposium 2002*, in ARTIFICIAL INTELLIGENCE AND LAW, V. 12, p 83 – 110 (Springer Science and Business Media B.V., Formerly Kluwer Academic Publishers B.V. 2004).

[2] I. Nosworthy, *A Practical Guide to Effective Contract Management. Pre-Contractual Negotiations and New Concepts in Contracting*, IES Conference 2001 (www.nospart.com.au/papers/IDN _Paper.doc); J.P. Kostritsky, *Bargaining with uncertainty, Moral Hazard, and Sunk Costs, A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 623-705 (1993). And even if a contract is concluded, sometimes parties have to renegotiate their agreements. *See* J.W. Salacuse, *Renegotiating international Project Agreements*, 24 FORDHAM INT'L L.J 1319-70 (2001). Concerning long-term contracts and changed circumstances, see A. Kolo and T.W. Wälde, *Renegotiation and Contract Adaptation in the International Investment Projects: Applicable Legal Principles & Industry Practices*, 1 TRANSNA'L DISP. MGMT. 1-46 (2004).

[3] A.N. Kucher*, Pre-Contractual Liability: Protecting the Rights of the Parties Engaged in Negotiations*, Paper written at NYU Hauser Global Law School, 2004*, available at* http://www.nyulawglobal.org/fellowsscholars/forums/papers/Kucher-paper.pdf.

R.J.P. Kottenhagen

This discussion will examine and briefly evaluate a very controversial topic in the theory of the formation of contracts: the relationship between parties in a situation in which an agreement has not yet been reached and one of the parties breaks off negotiations. This can be done in several ways. One party might end negotiations and walk away. The offeror might revoke his offer, or violate the option clause. Since there is no contractual liability in such cases, the question arises if there is any liability at all, and if so, according to what theory a party is held liable.

The problem will be discussed from the point of view of two legal families: Common law and Civil Law. In the context of this paper, Civil Law includes the codified law systems in Western Europe, such as French, German and Dutch law. It will be seen that there are important differences between the Common Law and the Civil Law approach to these problems.[4] As a result of the still growing trade market between the United States and Western Europe it is of utmost

[4] On the differences between Common Law and Civil Law in this context, see A.M. Musy, *The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures*, Global Jurist Advances 2001: Vol. 1: No. 1, Article 1. (http://www.bepress.com/ gj/advances/vol1/iss1/art1); N.E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 98-158 (1997); D.M. Goderre, *International Negotiations Gone Sour: Precontractual liability under the United Nations Sales Convention,* 66 U. CIN. L. REV. 258-81 (1997); J. Klein and C. Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT'L L.1-25 (1994); F. Kessler and E.Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: a Comparative Study*, 77 HARV. L. REV.402-49 (1964).

importance that one is aware of these differences.[5]

Three topics will be discussed:

1. How cross-boundary pre-contractual negotiations will bring together law and culture, as well as reality and perception to create many problematic situations;

2. How the different approaches mentioned above lead to different results on what is understood as pre-contractual liability;

3. How recent European developments in contract law have been realized in a proposed European Code of Contract Law.

II. LAW AND CULTURE

Pre-contractual negotiations not only bring together law and culture, but also reality and perception.[6] It is quite possible that one party, from his particular background and legal culture, may become convinced after some meetings that an agreement has been reached, while the opposite party thinks that only pre-

[5] C.E. Drion, *Amerikaanse standaardvoorwaarden in Europa: het proces van 'lokalisatie',* Contracteren, Tijdschrift voor de Contractspraktijk 30-35 (2002). *See also* Amerikanische Rechtskultur und Europaisches Privatrecht: Impressionen aus der Neuen Welt (R. Zimmermann ed., Tübingen: J.C.B. Mohr 1995).

[6] B. W. and T.H.M. van Wechem, Grenso-verschrijdende contractsonderhandelingen 5 (Deventer: Kluwer 2003).

liminary conversations have taken place. When this occurs, severe problems will arise and two questions have to be answered:

1. which law governs the breaking off of negotiations;
2. which court has jurisdiction to adjudicate the dispute.

Additionally, in Common Law countries, as a rule, lawyers will take part in the conversation in a very early stage of the negotiations. This is true not only in situations of commercial international contracting, but also in the case of contracting within the borders of the Common Law systems. Lawyers control the negotiation process from a legal point of view. This is less true of Civil Law countries. As a rule, in many Civil Law systems, lawyers will not take part in the first stage of the negotiations. An explanation could be that according to German and Dutch legal culture and tradition, there is a great emphasis on trust and good faith. If you take your lawyers with you from the start of the negotiations, it means that you do not trust the other party, and they in turn will not trust you. When entering into negotiations in a foreign law system it seems advisable to be aware of and to adhere to the tradition of that system.[7]

[7] *See* INTERNATIONAL BUSINESS NEGOTIATIONS (P.N. Ghauri & J.C. Usunier eds., Permagon 2001). This book is a collection of essays on the theme of intercultural business communication.

Forcing Parties into Agreement

Another difference between Common Law and Civil Law systems is the length of English and American contracts compared to German, French or Dutch contracts.[8] For example, contrast these two standard forms of a forum selection clause:

> American clause: *The exclusive forum for the resolution of any dispute under or arising out of this agreement shall be the courts of general jurisdiction of xxx and both parties submit to the jurisdiction of such courts. The parties waive all objections based on forum non conveniens;* German clause: *Ausschliesslicher Gerichtsstand ist xxx* (*the only competent court is xxx*).[9]

An explanation could be that Germany is a more homogeneous community than the United States:

> [T]he manner in which German contracting constrains opportunism requires considerable homogeneity and extensive repeat interactions among transacting partners; without such homogeneity and repeat interactions, recourse to courts will become more important because it is

[8] For a comparison between American and German contracts, see C. A. Hill & C. King, *How do German contracts do as much with fewer words?*, 79 CHI.-KENT L. REV. 889-926 (2004).
[9] *Id.* at 896.

> harder to agree upon police and enforce norms in a more heterogeneous community.[10]

When entering into international contracting:

1. be aware of the cultural differences in legal mentality between you and the other party;
2. try to reach an agreement on two questions as early in the negotiations as possible. These questions are:
    a) Which law will be applied if anything goes wrong (express choice of law)?
    b) Which court will have jurisdiction?

One way to answer these questions in the pre-contractual stage is through the use of a *Letter of Intent* or a *Memorandum of Agreement*.[11] In case anything goes wrong, such a Letter or Memorandum can save a lot of time and money for both parties. According to American case law, the binding force of the Letter or Memorandum will depend on the following factors:

a) amount of detail
b) language used
c) presence of escape clauses

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[10] *Id.* at 925.

[11] R.B. LAKE, LETTERS OF INTENT (Butterworth Law 1995); R.B. Lake, *Letters of Intent: a Comparative Examination under English, U.S., French and German Law*, 18 GEO. WASH. J. INT'L L. & ECON. 331-54 (1984); J. Schmidt, *Preliminary Agreements in International Contract Negotiation*, 6 HOUS. J. INT'L L. 37 1983).

d) presence of 'subject to formal contract/definitive agreement' clauses
e) contrariety
f) complexity of the transaction
g) behavior of the parties in the pre-contractual stage
h) custom[12]

In Civil law similar factors are used.

Making a choice in advance will save time and money. In the first place, parties will create greater certainty. They will know what to expect in case anything goes wrong. Secondly, parties can choose the law which is best applicable in this particular transaction. The choice of which court will have jurisdiction will clarify the costs and length of trial and other economic factors.

III. PRE-CONTRACTUAL LIABILITY IN SEVERAL LEGAL SYSTEMS

For a long time the law remained completely silent concerning the procedure for contract formation through negotiation. In former days the only requirements were offer and acceptance. This approach was based on the "aleatory" theory of the pre-contractual process, which held that each party bears its own

[12] N.B. Tanner & P. Hamilton, *Liability for Breaking Off Negotiations*, AIJA Naples 2004, National Report of the United States of America, at 13.

risks associated with the negotiation. Both benefits and losses are considered at risk in negotiations.

This classical theory of procedure is built on three assumptions:

1. Any interference will result in the violation of the freedom of contract principle;
2. Any interference will make the parties think twice before embarking on negotiations;
3. Unless the parties are bound by an enforceable agreement, their behavior should be ignored as legally indifferent.[13]

However, presently in some legal systems—especially in Civil Law countries—modern contract law recognizes negotiations as a separate contract formation procedure. A balance has to be found between freedom of contract and the protection of rights and interests of the parties entering into negotiations.

Because it is almost impossible to work out detailed provisions, only general principles of pre-contractual behavior can be established. First, I will take a short look at the Common Law approach and then I will discuss several Civil Law systems.

A. Common Law

This section will consider both English and Ameri-

[13] Kucher, *supra* note 4, at 7.

can Common law. The English approach is taken as a starting point, because this approach still strongly resembles the classical theory of contract law.[14]

1. English Law

In *William Lacey (Hounslow) Ltd. v. Davis*,[15] the view is expressed that a party to negotiations "undertakes this work as a gamble, and its cost is part of the overhead expense of his business which he hopes will be met out of the profits of such contracts as are made."

A more recent example and the leading case on this topic is *Walford v. Miles*.[16] The question was whether the parties can, by agreement, impose on themselves a duty to negotiate in good faith. Lord Ackner held that:

> Each party to the negotiations is entitled

[14] Concerning English law, see generally, J. Cartwright et al., Cour de Cass., 26.11. 2003, - *'Perte de Chance' (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations*, EUR. REV. PRIVATE L. 455-61 (2005); P. Giliker, *A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law*, 52 INT'L & COMP. L.Q. 969-94 (2003); P. GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW (Kluwer Law International 2002), R. ZIMMERMANN & S. WHITTAKER, GOOD FAITH IN EUROPEAN CONTRACT LAW 247-51 (Cambridge University Press 2000); D.K. Allen, "England" in *Precontractual Liability*, Reports to the Thirteenth International Congress of Comparative Law, Montreal 1990, at 125-43 (E.H. Hondius ed., Deventer: Kluwer 1991); J. Ghestin & B. Nicholas, *The Pre-contractual Obligation to Disclose Information,* in: CONTRACT LAW TODAY, ANGLO-FRENCH COMPARISONS 151-93 (D. Harris and D. Tallon eds., Oxford: Clarendon Press 1989).

[15] [1957] 2 All ER 712, [1957] 1 WLR. 932, 934 (QB 1957).

[16] [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174 (HL 1992).

> to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiation or to withdraw in fact in the hope that the opposite party may seek to reopen negotiations by offering him improved terms. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party.

In spite of this rather rigid and formalistic view, English law has taken on the question of failed negotiations. There are some situations in which it is possible to recover damages when negotiations fail.

Although the final contract has not yet been concluded, the court may hold that there is a collateral contract which gives rise to some rights during the negotiating process.

And even though there is no contract, a party may be entitled to restitutionary relief on the grounds that the other party has derived a benefit from the transaction for which he should compensate the plaintiff even if no contract has arisen (unjust enrichment).

Finally, a party can be held liable for loss which he inflicted on the other party through fraudulent mis-

representation (a claim in tort, e.g. when there was never an intention to form a contract) or negligent misrepresentation.

In England one can only claim a negative interest. Only losses can be claimed, but not expected profits (positive damages). Specific performance forcing parties to re-open negotiations is not possible.

2. American Law

As in English contract theory, it is generally agreed that in the United States the existence of a duty to act in good faith is denied in the absence of an enforceable contract,[17] but according to American law, there are other grounds for pre-contractual liability.[18]

As in England, unjust enrichment as a basis for liability could become a ground for restitution. How-

[17] Concerning American Law, see E.A. FARNSWORTH, CONTRACTS 189-201 (New York: Aspen Publishers 2004); N.B. Tanner & P. Hamilton, *Liability for breaking off negotiations*, AIJA Naples 2004, National Report of the United States of America; D.C. Turack, United States of America, in *Precontractual Liability*, Reports to the Thirteenth International Congress of Comparative Law, Montreal 1990, at 333-39 (E.H. Hondius ed., Deventer: Kluwer 1991); E.A. Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217-94 (1987).

[18] O. Ben-Shahar, *Contracts without Consent: Exploring a New Basis for Liability*, 152 U. PA. L. REV. 1829-72 (2004); L.A. Bebchuck & O. Ben-Shahar, *Precontractual Reliance,* 30 J. LEGAL STUD. 423-57 (2001). On the reliance principle in American law, see E.A. FARNSWORTH, CHANGING YOUR MIND. THE LAW OF REGRETTED DECISIONS (Yale University Press 1998). On the concept of 'good faith' in the precontractual stage in the American legal system, compare N.W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 72-213 (1993).

ever, very few courts have entertained such claims. The prevailing view is still the aleatory theory: both benefit and loss are at risk for the parties. Misrepresentation can be a ground for recovering losses in the pre-contractual stage in the United States, but this is rare.

The most fruitful basis for recovering pre-contractual damages in American courts is the doctrine of promissory estoppel:[19] one negotiating party cannot, without liability, breach a promise made during negotiations, if the other party relied on that promise. The leading case is *Hofmann v. Red Owl Store*:[20]

> [A] supermarket chain promised to sell the claimant a franchise, first advising the claimant to sell his bakery, move to another town and open a smaller grocery store as a means of gaining experience, and buy a lot the chain had selected for the potential franchise location. The supermarket chain then told the claimant to sell his small grocery store, which was operating at a profit, only to break off negotiations for the franchise shortly

[19] *Compare* A. Katz, *When should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249-1309 (1996) *with* J.P. Kostritsky, *Reshaping the precontractual Liability Debate: Beyond Short Run Economics*, 58 U. PITT. L. REV. 326-403 (1997).
[20] 133 N.W. 2d 267 (Wis. 1965).

thereafter.[21]

The Court formulated three requirements of promissory estoppel:

1. Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
2. Did the promise induce such action or forbearance?
3. Can injustice be avoided only by enforcement of the promise?

Then the Court held:

> We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action. As Dean Boyer points out; it is desirable that fluidity in the application of the concept be maintained. While the first two of the above listed three requirements of promissory estoppel, present issues of fact (which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice) are ones that involve a policy decision by the court. Such a policy decision necessarily embraces an

[21] Tanner & Hamilton, *supra* note 13, at 16.

> element of discretion.
>
> We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of the defendants to keep their promises which induced plaintiffs to act to their detriment.[22]

Under the doctrine of promissory estoppel, only negative interests can be recovered. Damages based on loss of profits are considered inappropriate because estoppel is not the equivalent of breach of contract.

In respect to promissory estoppel, American law differs from English law. In English law, this doctrine is seldom used in the context of pre-contractual liability. Also, when there is a binding agreement to agree, a general obligation of fair dealing attaches to the deal. The same result can be reached by a letter of intent, where a duty to negotiate in good faith is imposed on the parties when the language of the letter makes this duty clear or when it may be implied by the court if the agreement is silent.

In absence of any of the above mentioned conditions, the core premise of the aleatory view of con-

[22] *Hoffman,* 133 N.W.2d at 275. For a critical discussion of this case and its influence on later cases, see FARNSWORTH, CONTRACTS, *supra* note 18, at 197-98; *see also* G.M. Duhl, *Red Owl's Legacy*, 87 MARQ. L. REV. 297-321 (2003).

tract adopted by American courts is that a party to pre-contractual negotiations, may break off the negotiations at any time and for any reason, including no reason at all, and face no liability.

Recovery based on restitution is measured by the benefit of the party that improperly received the idea of services. The measure of damages for misrepresentation is reliance interest, expectation interest and lost opportunities. The same is true for pre-contractual liability grounded upon the doctrine of promissory estoppel.

No case law is available as to whether an American court would order specific performance of either continued negotiations or of entering the envisaged contract. The overall view is that specific performance might not be a realistic sanction in the case of a breach of the obligation to negotiate, because the possibility of success in a forced negotiation will be quite slim. It is most likely that in a pre-contractual situation, reliance damages will be granted.[23]

3. Conclusion on the Common Law Approach

Until now, English courts have refused to regulate the pre-contractual period, except in exceptional circumstances. The most important tool seems to be the theory of unjust enrichment. In American law, emphasis is on the theory of promissory estoppel as an

[23] Tanner & Hamilton, *supra* note 13, at 22.

explanation of pre-contractual liability. In my opinion the American approach is more fruitful and satisfying then the English, because estoppel can be applied in far more cases then unjust enrichment and is, as an equitable remedy, more flexible.

B. Civil Law

This section concentrates on the German, French and Dutch legal systems as an illustration of the way the problem of pre-contractual liability is approached and developed by civil lawyers. I will start with the German legal system, because German law was the cradle of the doctrine of pre-contractual good faith.

1. German Law

In 1861, Rudolph von Jhering introduced the concept of *culpa in contrahendo* in German law,[24] which means fault in pre-contractual negotiations. He divided the grounds for liability into three groups:

1. One of the parties appears to be incapable of entering into agreements and should have notified the other party thereof
2. The agreement cannot be performed

[24] R. von Jhering, *Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, in JAHRBŰCHER FŰR DIE DOGMATIK DES HEUTIGEN RŐMISCHEN UND DEUTSCHEN RECHTS 1-112 (Vol. 4, 1861).

3. The will of one or both parties in entering into the agreement is defective.

For the first time, a distinction was made between pre-contractual liability when the agreement is not concluded (1) and already has been concluded (2 and 3).[25]

On this theory it is possible to recover damages for breaking off negotiations. According to several cases of the Bundesgerichtshof:[26]

> [r]eliance damages must be paid by a par-ty who in the course of negotiations has made the other party believe that a contract will certainly be concluded, but then without good reason or from ulterior motives refuse to go ahead.[27]

Recently, this case law has been codified in the

[25] Concerning German law, see generally, G. Mäsch, German case note on Cour de Cass., 26.11.2003, - *'Perte de Chance' (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations*, EUR. REV. PRIVATE L. 452-55 (2005); R. ZIMMERMANN & S. WHITTAKER, GOOD FAITH IN EUROPEAN CONTRACT LAW 247-51 (Cambridge University Press 2000); W. Lorenz, 'Germany' in *Precontractual Liability*, Reports to the Thirteenth International Congress of Comparative Law, Montreal 1990, at 159-77 (E.H. Hondius ed., Deventer: Kluwer 1991).

[26] Bundesgerichtshof [BGH] [Federal Court of Justice] July 10, 1970, *Neue Juristische Wochenschrift* 1970, 1840 and Bundesgerichtshof [BGH] [Federal Court of Justice] June 12, 1975 and *Neue Juristische Wochenschrift* 1975, 1774.

[27] Lorenz, *supra* note 26, at 166. For a more recent decision, see Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 29, 1996, *Neue Juristische Wochenschrift* 1996, 1885.

German Civil Code.[28] Section 241 II provides that: when there is an obligation between two parties (a legal relationship between two or more persons) giving on the one hand a right and creating on the other hand a corresponding duty, they have to take into account each others' rights and interests. Furthermore, § 311 II adds that this legal relationship comes into existence when starting pre-contractual negotiations. In other words; parties must take into account each others' rights and interests during pre-contractual negotiations.[29] The Article reads as follows:

> § 311 BGB Rechtsgeschäftliche und rechtsgeschäftsähnliche Schul Verhältnisse
>
> 1. Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt.
>
> 2. Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch

[28] The legislature did not change existing case law, but codified this case law as part of the reform of the German law of obligations. For a discussion on this reform, see, e.g., B. Dauer-Lieb, *Die geplante Schuldrechtsmodernisierung – Durchbruck oder Schnellschuss?,* JURISTEN ZEITUNG 8-18 (2001); R. Zimmermann, *Schuldrechtsmodernisierung?,* JURISTEN ZEITUNG 171-81 (2001).

[29] On the history of the doctrine of culpa in contrahendo and § 311 II, see Münchener Kommentar 2003, *Bürgerliches Gestezbuch, Schuldrecht, Allgemeiner Teil*, at 1488-1534.

> a) die Aufnahme von Vertragsverhandlungen
>
> b) die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Bezie-hung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut
>
> c) ähnliche geschäftliche Kontakte.
>
> 3. Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 kann auch zu Personen entstehen, die nicht selbst Vertragspartei werden sollen. Ein solches Schuldverhältnis entsteht ins-besondere, wenn der Dritte in beson-derem Maße Vertrauen für sich in Anspruch nimmt und dadurch die Vertragsverhandlungen oder den Vertragsschluss erheblich beeinflusst.

In this way the doctrine of *culpa in contrahendo* is now part of the Civil Code. According to German law as it is now, the basis for pre-contractual liability is to be found in the above mentioned code provisions. One can recover for negative interests only and specific performance is not possible.[30]

[30] A recent decision of the district court Bielefeld, rendered on December 12, 2003 states: "The claim brought forward by the [Buyer] can also not be based on *culpa in contrahendo* (cf. now § 311(2) BGB), even if it is assumed in favor of the [Buyer] that the [Seller] had demonstrated its readiness to conclude a contract by the e-mail of 4 September 2002 and thereby caused the trust in future contract conclusion but had then refused to conclude the contract for no

2. French Law

Although France also has a codified law system and thus has its own Civil Code, this Code does not provide any rules governing the mechanism of negotiating and concluding contracts.[31] The point of departure is that as long as there is no contract, compensation for damages in the pre-contractual stage must be treated as torts. The theory of *culpa in contrahendo* is rejected in French case law.[32]

The French author, Saleilles, suggested in 1907 that it would be desirable to apply the "fair conduct" (good faith) principle to the entire pre-contractual

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reason. This is because a claim based on *culpa in contrahendo* is limited to the so-called reliance-interest. Neither lost profit nor additional costs of the alleged cover purchases are covered by the reliance interest. The [Buyer] has also not concluded the contract for the resale of the goods while trusting in the contract with the [Seller]. It had informed the [Seller] already be its e-mail of 29 August 2002 that it had gotten the order from its customer." Published – in English - at: http://cisgw3.law. pace.edu/cases/031212g1.html.

[31] Concerning French law, see generally, P. Giliker, *A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law*, 52 INT'L & COMP. L.Q. 969-94 (2003); P. GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW (Kluwer Law International 2002); R. ZIMMERMANN & S. WHITTAKER, GOOD FAITH IN EUROPEAN CONTRACT LAW 239-41 (Cambridge University Press 2000); J. Schmidt-Szalewski, *"Franc"' in Precontractual Liability*, Reports to the Thirteenth International Congress of Comparative Law, Montreal 1990, at 145-57 (E.H. Hondius ed., Deventer: Kluwer 1991); J. Ghestin & B. Nicholas, *The Pre-contractual Obligation to Disclose Information*, in: CONTRACT LAW TODAY, ANGLO-FRENCH COMPARISONS 151-93 (D. Harris and D. Tallon eds. Oxford: Clarendon Press 1989).

[32] Note that in Belgium law – a similar legal system and a similar civil code to France – this theory is accepted in doctrine and in case law. *See* H. Geens, *De grondslagen van de culpa in contrahendo*, JURA FALCONIA 433-66 (2004).

process.[33] Nevertheless, not until 1972 did the *Cour de cassation* (the French Supreme Court) allow a claim for the recovery of damages for breaking off negotiations.

Therefore, a party suffering loss must turn to article 1382 CC (on tort liability) and the following principles. Article 1382 CC reads:

> Any act which causes harm to another obliges the person whose fault caused the harm to make reparation.[34]

French Courts accept that negotiations in the pre-contractual stage involve a period of risk and they adhere to the aleatory theory. They do not want to excessively hamper the freedom of contract, especially in business relations. Accordingly, one Court dismissed an action for damages on the grounds that:

> it would amount to a serious injury towards individual freedom and busi-ness security if one could be easily liable for breach of negotiations and dealing with a competitor; the pre-contractual fault must... be obvious and undisputable.[35]

[33] R. Saleilles, *De la responsabilité precontractuel*, 6 REVUE TRIMESTRIELLE DE DROIT CIVIL 697-751 (1907).
[34] P. GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW , *supra* note 32, at 120.
[35] Schmidt-Szalewski, *supra* note 32, at 150 n.18 (the court of Pau, Jan. 14, 1969, D. 1969, at 150).

But at that point, intervention by the law is necessary to impose certain duties of good conduct (fairness and good faith) on the parties. The leading case is a decision of the *Cour de cassation* in 1972.[36] Intensive negotiations had taken place between the claimant and the executive distributor in France of American-made machines for the manufacture of cement pipes. In this period, the claimant had visited the United States to observe the operation of those machines at considerable expense. He had also attempted to ascertain further information, which the distributor was found to have withheld. Following the claimant's visit, a sudden termination of all discussion occurred and a contract was made with the claimant's competitor. According to a clause in that contract, the distributor would not supply a similar machine in that region for the following 42 months.

The *Cour de cassation* found that such conduct gave rise to invoke delictual liability.

Many subsequent cases followed this precedent. One citation of the Court of Appeal of Riom[37] on freedom of contract read:

> If freedom [of contract] is the main principle in the pre-contractual period and includes the freedom to break off the ne-

[36] Cass com 20.3.1972 JCP 1973 II 17543.
[37] 10.6.1992 RJDA 1992, No 893, at 732.

> gotiations at any time, it is still true that when the latter have reached a length and a level of intensity such that one party may legitimately believe that the other is about to conclude the contract and in readiness encourages him to incur certain expenses, breaking off such negotiations is wrong, causes loss and gives rise to reparation.[38]

In a recent case the *Cour de cassation*[39] highlights the factors influencing the decision of the courts:

> a) advanced stage of negotiations
> b) work already undertaken
> c) suddenness of withdrawal from the negotiating process[40]

According to French law, it is not possible to recover for loss of profit, for the same reason that supported the American Red Owl case mentioned before, which is to say a desire not to treat negotiations as equivalent to contract.

It is hard to say what exactly the basis for pre-contractual liability is in French law. A number of cases suggest a basis in the requirement of good faith

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[38] P. GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW, *supra* note 32, at 124.
[39] Com 7.4.1998 D 1999.514.
[40] P. GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW , *supra* note 32, at 125.

dealing, but not all. Liability will also be imposed where the defendant has undermined a relationship of trust between the parties. Liability can also be based on the concept of *abus de droit* (abuse of right). In any case, all these theories are based on liability in tort.

Whatever the underlying rationale may be, French case law shows that the concept of freedom of contract has been considered eroded by other concepts to impose certain duties of good conduct on the parties.

3. Dutch Law

The new Dutch Civil Code of 1992 has no provision on pre-contractual liability.[41] Although a provision was formulated, the legislature refused to incorporate it into the Code. The development of this doctrine was left to the courts. The main reason for doing so was that the doctrine was still developing in case law and the legislature did not want to interfere.[42]

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[41] Concerning Dutch law, see generally, M.W. Hesselink, Dutch case note on Cour de Cass., 26.11.2003, - *'Perte de Chance' (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations*, EUR. REV. PRIVATE L. 443-47 (2005); J.M. van Dunné, ''The Netherlands' in *Precontractual Liability*, Reports to the Thirteenth International Congress of Comparative Law, Montreal 1990, at 223-37 (E.H. Hondius ed., Deventer: Kluwer 1991); R. ZIMMERMANN & S. WHITTAKER, GOOD FAITH IN EUROPEAN CONTRACT LAW 246-51 (Cambridge University Press 2000).

[42] PG Boek 6 Inv., at 1438 – 1448.

Forcing Parties into Agreement

The Dutch Supreme Court (Hoge Raad=HR) held in a 1957 case[43] that parties in negotiations take part in a "legal relation ruled by the principle of good faith." The consequence of this view is that parties have to take into account the "justified interests of the other party." As a result, the court came to the formulation of a "duty of care," requiring the buyer to investigate the facts of the subject of the contract. A few years later, the court formulated a similar duty for the seller to disclose material facts to the buyer in the course of negotiations.[44] In these cases, the contracts were actually formed already and this principle of good faith in the pre-contractual stage was formulated in the context of the doctrine of misrepresentation.

These developments in case law were the beginning of reconsidering the law in a second situation where no contract was concluded at all between the parties, especially in cases of breaking off the negotiations. The first and still leading case in this field is *Plas vs. Valburg*.[45] The construction firm Plas tendered for the building of a municipal swimming pool in the town of Valburg. The mayor and his aldermen agreed to the plans, but their decision still had to get approval from the City Council. A member of the Council took the initiative to secure an alternative tender resulting in a lower price. Plas was therefore

[43] *Baris – Riezenkamp*, HR Nov. 15, 1957, *Nederlandse Jurisprudentie* (=*NJ*) 1958, 67.
[44] *Booy – Wisman*, HR Jan 21, 1966, *NJ* 1966, 183.
[45] HR June 18, 1982, *NJ* 1983, 723.

set aside and submitted a claim for damages. In this landmark decision, the court makes a distinction between three stages in the negotiating process:

1. *Initial stage*: parties are free to break off negotiations without any obligation to compensate the other party
2. *Continuing stage*: a party may be free to break off negotiations, but at this stage he is under the obligation to compensate the other party for expenses incurred
3. *Final stage*: a party is not allowed to break off the negotiations because this would be against good faith; violation of this obligation not only gives rise to a duty to compensate the negative interests of the other party, but also (if deemed appropriate) the positive interests, in other words the profits that would have been made by a party.[46]

In practice: despite the possibility of doing so in the final stage of negotiations, expectation damages have seldom been awarded in such circumstances.[47]

A further step was taken by the Supreme Court in 1983. When a party is unwilling to continue negotiations, there may still be a legal obligation to do so,

[46] Van Dunné, *supra* note 42, at 230.
[47] *See e.g.* Court of Appeal The Hague, Jan. 28, 2004, *Praktijkgids* 2004, 6182; H.J. de Kluiver, Plas/Valburg. Afgebroken onderhandelingen: een terugblik op 25 jaar rechtsontwikkeling, *Nederlands Tijdschrift voor Burgerlijk Recht* 238-46 (2002).

and the unwilling party may be forced by the court to negotiate.[48] The result of this development of the case law is that the freedom to break off negotiations may be barred on the ground of justified reliance on the part of the other party, in the expectation that a contract would be concluded or in consideration of other circumstances of the case. Specific performance of such obligations may be granted by the court with the use of a recognizance. In more recent case law, the Supreme Court has elaborated this doctrine somewhat further.[49]

In Dutch law, it is possible to force parties to re-open negotiations. This development in law is unique in the world. The overall view in the United States has been that specific performance might not be a realistic sanction in case of a breach of the obligation to negotiate, because the possibility of success in a forced negotiation will be quite slim.[50] The modern perspective on dispute resolution recognizes that the best solutions will be those chosen by the parties themselves, perhaps with the help of a mediator. It

[48] *Koot BV – Koot BV*, HR 11 March 1983, *NJ* 1983, 585. *See also Du Mee – Vestdijk and others*, Court of Appeal of Amsterdam, May 7, 1987, *NJ* 1988, 635.

[49] *VSH – Shell*, HR Oct. 23, 1987, *NJ* 1987, 1017, *De Ruiterij – MBO Ruiters*, HR June 14, 1996, *NJ* 1997, 481, *ABB – De Staat*, HR Oct. 4, 1996, *NJ* 1997, 65; *CBB – JPO*, HR Aug. 12, 2005, LJN: AT7337. For more information on these developments, see C. Bollen, *Afbreken van onderhandelingen: de drie mythes van Plas/Valburg. Van drie fasen naar twee stadia in het onderhandelingsproces,* WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE 857-66 (2004).

[50] *See infra*.

has been suggested that this case law will prevent parties from breaking off negotiations too quickly.[51] There is an increasing amount of case law in which judges force parties to re-open negotiations. Both in case law and in doctrine, criteria are being developed to judge whether re-opening negotiations is useful or not.[52]

In Dutch law, it is hard to explain on what theory pre-contractual liability is based. There are two doctrines: tortious liability and good faith. The latter doctrine is neither based on contract nor on tort. The pre-contractual stage seems to have a status of its own.

IV. PRE-CONTRACTUAL LIABILITY IN THE PRINCIPLES OF EUROPEAN CONTRACT LAW

The *Introduction to the Principles of European Contract Law* states that:

> In some respects, the Principles may be compared with the American Restatement of the Law of Contracts, which was published in its second edition in 1981. Like the Restatements, the articles drafted are supplied with comments and

[51] E. van Beukering-Rosmuller, De inschakeling van een mediator bij het rechterlijk bevel tot dooronderhandelen bij afgebroken contractonderhandelingen; een nieuwe loot aan de ADR-stam?, TIJDSCHRIFT VOOR MEDIATION 82-88 (2004).
[52] *Id*. at 85.

> notes. The Restatements consist of non-binding rules, "soft laws." They purport to restate the Common Law of the United States. The Principles are also "soft laws," but their main purpose is to serve as a first draft of a partial European Civil Code. Furthermore; a common law does not exist in the European Union. The Principles has therefore been established by a more radical process. No single legal system has been their basis. The Commission has paid attention to all the systems of the Member States, but not every one of them has had influence on every issue dealt with. They have also considered rules of the legal systems outside of the Communities. So have the American Restatement on the Law of Contracts and the existing conventions, such as The United Nations Convention on Contracts for the International Sales of Goods (CISG). Some of the Principles reflect ideas which have not yet materialized in the law of any state. In short: the Commission has tried to establish those principles which it believed to be best under the existing economic and social conditions in Europe.

Section 3 of the Principles is on liability for negotiations. Article 2:301 reads:

> Negotiations Contrary to Good Faith
> 1. A party is free to negotiate and is not liable for failure to reach an agreement.
> 2. However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
> 3. It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue nego-tiations with no real intention of reaching an agreement with the other party.

Subsection 1 is found in English, German, French and Dutch law, but is emphasized in English law. Subsection 2 is true for German and French law; however English law does not go that far and Dutch law goes much further. Subsection 3 is true for German, French and Dutch law, but not for English law.

The conclusion is that Article 2:301 as a whole does not reflect any of the European legal systems discussed here. It is doubtful whether this Article will lead to the unification of European law as intended by the Principles. English law adheres firmly to the aleatory theory of contract, but as has been shown above, there are also many differences between the continental legal systems on this topic. If unification will ever

be achieved, it will take many years.[53]

V. CONCLUSION ON THE CIVIL LAW APPROACH IN COMPARISON WITH THE COMMON LAW

In the Common Law, pre-contractual liability is imposed on the basis of specific contract theories such as restitution, misrepresentation and promissory estoppel. In the Civil Law, there are many ways to incorporate a duty of acting in good faith into the pre-contractual stage. In France, the basis for this is in tort law, in Germany it is the doctrine of *culpa in contrahendo* (which seems to be an extension of contract law and now codified in the Civil Code). In the Netherlands, it is tort law or pre-contractual good faith as a standard of its own.

The Netherlands is the only one of those systems in which it is possible to recover for negative interests. The Dutch legal system goes two steps further:

a) one can recover positive damages as well
b) the court can force a party to re-open the negotiations

[53] *See* M. Hoch, *Is Fair Dealing a Workable Concept for European Contract Law?,* 5 GLOBAL JURIST TOPICS 1-57 (2005); J.H.M. van Erp, *The Pre-Contractual Stage* in: TOWARDS A EUROPEAN CIVIL CODE 363-80 (A. Hartkamp et al. eds., Kluwer Law International 2004). Another question is whether a single legal language is possible within a multilingual Europe, see M.J. Campana, *Vers un langage juridique commun en Europe?,* EUR. REV. PRIVATE L. 33-50 (2000).

Article 2:301 of the Principles of European Contract Law will unlikely lead to unification of the law in this area in the near future, if ever.

This leads to the overall conclusion that there are substantially more possibilities for the recovery of damages in cases of pre-contractual liability in the codified law systems discussed above, than in Common Law countries. Although there are exceptions, in the Common Law systems the aleatory theory is still firmly adhered to as the basis of legal reasoning in cases of breaking off negotiations. On the one hand, this leads to certain predictability of the law. On the other hand, in the Civil Law systems, there is a possibility of doing justice in a particular case. In my opinion, this is far more important than firm adherence to hard and fast rules which may lead to injustice.

When Are Agreements Enforceable? Giving Consideration to Professor Barnett's Consent Theory of Contract

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I. INTRODUCTION

Agreements are at the heart of contract law. In Anglo-American Common Law a persistent problem has been determining which agreements should be enforced. The common law has no difficulty dealing with bargained-for agreements between merchants exchanging goods for money, but has far more difficulty with agreements where there is no clear *quid pro* quo, and therefore "consideration" is doubtful. Most typically these agreements include guaranties, gifts and other gratuitous promises. Why shouldn't my agreement to meet Professor Sellers this evening for dinner be enforceable?

Over twenty years ago Professor Randy E. Barnett first proposed what he calls a "consent theory" of contract that he believes resolves most of these issues in American common law. For the last two decades he has promoted his theory and has gained significant attention from the legal academy. This discussion will consider: why the United States has contracts law theories; the basic elements of Professor Barnett's theory; how these elements are similar to Continental law; American legal insularity in evaluating Barnett's theory without reference to Continental systems; and finally, why this author believes that American example of law harmonization through restate-ment and voluntary adoption of uniform laws is not a good model for a future European civil code.

II. WHY THE UNITED STATES HAS CONTRACT LAW "THEORIES"

The last 30 years have seen a remarkable blossoming of contracts law scholarship in the United States and the development of a variety of contracts law theories such as that of Professor Barnett. Europeans have looked with a certain envy at the "rich literature" of American contracts law and contrast that literature to what they see as the "anti-theoretical nature of Continental Civil Law contracts scholarship.

Law and economics scholarship—which is by no means limited to contracts law—in particular has provoked considerable interest in Europe. American contracts law scholars are proud to point to the "richness" of American contract law and hope, in writing about it, that they will gain the notice of scholars in other legal systems.[1]

Europeans ought not to be envious of American contracts theories: they are indicative of the failure of the American legal system to develop a comprehensive set of contracts rules. A Greek professor, Aristides N. Hatzis, while admiring American contract theory, correctly points out why there are no comparable theories in Continental law: "in Civil Law there is no need for theories since the legislator, mainly through codes, has proclaimed what the law should be and the judge is (supposedly) a mere interpreter, useful only for accommodating trivial twists of facts." Hatzis observes that the lack of codes in Common Law creates a need for theories "in order to provide a sense of security to the contracting parties who did not place any trust in the caprices of individual judges and were looking for a more objective basis for their economic relationships."[2]

We have theory in the United States because our attempts at codes and rules have failed. For most of the nineteenth century the legal community in the United States debated the merits and demerits of codifica-

[1] *See*, in particular, Robert A. Hillman, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997). For a critical review, see Randy E. Barnett, *Book Review*, 97 MICH. L. REV. 1413 (1999).
[2] *HATZIS* at 5.

tion. We had our own debate similar to that in Germany between Savigny and Thibaut. In Germany the code won when the nation unified, but in the United States, the fight took place at the state level and the code lost. The debate began in the early part of the nineteenth century and lasted until the death in 1894 of the most prominent of codification proponents, David Dudley Field. Field, America's Thibaut, one might say, saw rules as essential for predictability in law.[3] His great opponent, James Coolidge Carter, America's Savigny, argued that statutory rules "are rigid and absolute, and cannot be modified and shaped to suit the varying aspects which different cases may exhibit."[4] Politics as much as jurisprudential reasoning accounts for the defeat of the codes. They simply were inconvenient for the practicing bar.

When the codification movement failed at the end of the nineteenth century, alternative steps were taken to unify the law of the several states. The drive for unification of state law led to creation of two institutions which survive to this day: the National Conference of Commissioners on Uniform State Law (Conference), founded in 1892, and the American Law Institute (ALI), founded in 1923.

[3] Stephan N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 340 (1988) ("In Field's world, predictability is more likely to be achieved with relatively inflexible rules and precise definition and by curbing judicial discretion. Field did understand that some unpredictability was unavoidable; a statute could not cover all situations and judges, on occasion, would have to analogize or make new law.")

[4] James Coolidge Carter, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884), *excerpted in* THE LIFE OF THE LAW, READINGS ON THE GROWTH OF LEGAL INSTITUTIONS 115, 120 (John Honold ed., 1964).

Some Europeans have a rather rosy view of the success of these institutions.[5] Both the National Conference and the ALI depend upon voluntary adoption of their work. The Conference and the ALI have almost no coercive power. Their mandates focus on rationalizing existing law in the form of uniform laws and restatements; law innovation, once almost clearly foreclosed, still does not fit easily in their programs.[6] Few would question that the Conference and the ALI have had salutary effects on the content and uniformity of American law, but those effects have not been nearly as substantial as their founders had hoped. In the first century of its existence, the Conference proposed approximately 200 uniform acts. Only about 10 percent of these Acts have been adopted by as many as forty states; more than half were adopted by fewer than ten states. Since ALI Restatements are not proposed for legislative adoption, their adoption necessarily is piecemeal. Lacking rules, we have theory. This brings us to Professor Barnett's theory.

III. BARNETT'S CONSENT THEORY OF CONTRACT

A central issue of the law of obligations is when agreements should be enforced. In answering this ques-

[5] *See* James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 29 YALE J. INT'L L. 109, 141, n. 196 (2003)
[6] *See* James J. White, *One Hundred Years of Uniform State Laws: Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2098-99 (1991).

tion in the Anglo-American common law of contracts the doctrine of consideration plays the central role. Consideration is a "strange notion" for jurists in the Continental tradition. The doctrine's roots are lost in history. Even today it remains "obscure" and "relatively ill-defined and controversial."[7] In present-day America, understanding consideration is a benefit received or a detriment suffered. It must be bargained for.[8]

Although consideration is a mandatory feature of instruction in contracts classes and on the bar examination, there is no consensus in the Common Law world that consideration is a concept worth keeping.[9] Indicative of this ambivalence is the treatment consideration received in the drafting of the Principles of European Contract Law. While drafters were generally disposed toward their own systems as "natural and just," consideration is one example that the Commission Chairman, Professor Ole Lando, gives when drafters found weakness in their own systems. He reports that "[t]here was no enthusiasm in the common law camp for the doctrine," so it was omitted.[10]

Professor Barnett himself long ago reminded his American colleagues that the bargain theory of consideration is "unavoidably plagued by serious defects."[11] It

[7] Denis Tallon, *Introduction*, in HUGH BEAL ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 140 (2002) [hereinafter cited as TALLON].
[8] RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71.
[9] TALLON.
[10] Ole Lando, *Comparative Law and Lawmaking*, 75 TUL. L. REV. 1015, 1022 (2001).
[11] Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal*

has two principal problems: some agreements are enforced, even though there is *no* bargain, while other agreements are not enforced, even though there *is* a bargain. In most commercial cases there is no problem finding the bargained consideration. But the doctrine of consideration handles other situations less well where there is no bargain or the bargain is elusive, as in the case of gifts, actions taken in reliance upon promises, and binding offers.

Barnett finds the American solution to the question of contract enforceability inadequate. Essentially, it consists of using bargained-for consid-eration as the principal device for determining enforceability and of filling out gaps with various *ad hoc* doctrines such as promissory estoppel.[12] The doctrine of promissory estoppel provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee… and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[13]

Barnett would take a different approach. According to Barnett, agreements (or more broadly, promises) should be enforceable when parties "manifest their consent to a legally binding transfer" of preexisting alienable rights.[14] There must be a "manifested intention to create

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Philosophy [Book Review of E. ALLAN FARNSWORTH, CONTRACTS] 97 HARV. L. REV. 1223, 1239 (1984) [hereinafter *Contract Scholarship*].

[12] *Contract Scholarship* at 1240.

[13] RESTATEMENT (SECOND) OF CONTRACTS § 90.

[14] *Contract Scholarship* at 1242.

legal relations or (to use another common formulation) a manifested intention to be legally bound."[15] This is "the key to distinguishing enforceable from unenforceable promises."[16] "The basis of contractual obligation is not promising *per se*." It is the manifestation of an intention to be legally bound. "The basis of contract is consent."[17]

Barnett distinguishes his consent theory not only from bargained consideration and reliance theories, but also from other approaches such as a will theory, economic efficiency, substantive fairness and restitution.[18] He offers his theory as a way to negotiate among all of these different theories and not as an "independent principle or core concern of contract." "[I]t seeks to provide a general criterion of contractual enforceability that strikes a reasonable and workable balance among the [other] party-based, substance-based, and process principles…."[19] His theory provides a framework for ordering these concerns to show where each stands in relation to the others.[20]

Barnett grounds his consent theory in something "more fundamental than the concepts of will, reliance,

[15] Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1002, 1027 (1992) [emphasis in original] [hereinafter *Contract as Promise*].
[16] *Id*. at 1029.
[17] Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 305 (1986) [hereinafter *Consent Theory*].
[18] RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINES 588-90 (3rd ed. 2003) [hereinafter CASEBOOK]
[19] CASEBOOK at 589; *see Consent Theory* at 271-91.
[20] *Consent Theory* at 294.

efficiency, fairness or bargain."[21] That something more is a theory of individual rights. Individuals have property rights that entitle them to use and consume resources. For Barnett, "the consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements. In sum, legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights."[22]

With painstaking precision Barnett shows how his theory of consent resolves numerous issues and problems of modern American contract law.

Unlike the will theory, the consent theory addresses the conundrum of objective versus subjective wills. The theory of rights requires that those rights be demarcated. Only a manifestation of assent that is accessible to all can fulfill that function.[23] A consent theory is interested in the actual intentions of the parties, but only the objective interpretation of a commitment establishes the clear boundaries required by an entitlements approach.[24] Still the objective interpretation is only the presumptive meaning; it can be rebutted by a special meaning that the parties shared.[25]

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[21] *Consent Theory* at 293.
[22] *Consent Theory* at 299.
[23] *Consent Theory* at 302-03.
[24] *Consent Theory* at 307.
[25] *Consent Theory* at 307.

The consent theory explains why in certain unusual circumstances, the Common Law of contracts enforces formal commitments where there is no bargained for consideration. The voluntary use of a recognized formality manifests the intention to be legally bound. Here, Barnett argues, consent provides "the missing theoretical foundation of formal contracts and explains their proper place in a well-crafted law of contract."[26]

Where there is bargaining, in the consent theory, there is little need to provide explicit proof of an intent to be legally bound. The bargaining is itself the evidence of consent.[27] Indeed, Barnett's theory regards consideration as one way of manifesting assent and not as a requirement of a *prima facie* case of contractual obligation.[28]

Barnett sees his consent theory as also explaining those circumstances under which promissory estoppel grants relief. The reasonable reliance that promissory estoppel requires, where the reliance is known or should be known to the promising party, serves as that party's manifestation of an intention to be legally bound.[29]

Barnett uses his consent theory to explain contract defenses as situations where the manifestation of assent does not have its normal moral and therefore, legal sig-

[26] *Consent Theory* at 311.
[27] *Consent Theory* at 313.
[28] *Consent Theory* at 314.
[29] *Consent Theory* at 314.

nificance. One group of defenses—duress, misrepresentation and possibly unconscionability—are all situations in which the manifestation was obtained by the other party's improper action. A second group—incapacity, infancy and intoxication—hold that the promiser did not have the ability to give meaningful assent. Finally a third group—mistake, impracticability and frustration—stem from the inability to fully express in any agreement all possibilities that might affect performance.[30]

Armed with his consent theory, Barnett attacks the persistent problem of form contracts. The problem is, if contract is based on promise, how can someone have promised to do something in a writing she or he has not read and was not expected to read. On the one hand, if the test is objective action, the parties have agreed. If, on the other hand, the test is the subjective view of the parties, then one party to the form contract has not agreed.[31] For Barnett, the solution is clear: "enforcement of private agreements is not about promising, but about manifesting consent to be legally bound." Thus what matters is not the assent to do an act, but the assent to be legally bound to do so. The agreement is to do whatever the other party says. But, according to Barnett, "I agree" really means "I agree to be legally bound to (unread) terms that are not radically unexpected."[32] In other words, I agree to terms "that I am

[30] *Consent Theory* at 318.
[31] Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 628 (2002) [hereinafter *Form Contracts*].
[32] *Form Contracts* at 637.

not likely to have read but that do not exceed some bound of reasonableness."[33]

IV. SIMILARITIES OF BARNETT'S THEORY OF CONTRACT TO CONTRACT LAW IN EUROPE

By now, contracts scholars in the audience from Civil Law countries are suppressing yawns. What is new, they may be thinking, about Professor Barnett's theory? After all, does not Article 2:101 of the Principles of European Contract Law provide explicitly: "A contract is concluded if: a) the parties intend to be legally bound, and b) they reach a sufficient agreement without any further requirement." Of course it does.

Intent to be bound runs throughout Continental legal systems. For example, Article 3.33 of the Dutch Civil Code provides: "A juridical act requires an intention to produce juridical effects, which intention has manifested itself by a declaration."[34] Professor Lando, in writing about the Principles of European Contract Law, observes that "[t]here is consistency among the laws that agreement only becomes a binding contract if the parties have intended to be legally bound." Thus, returning to the example at the beginning, in every European legal system, while I may be morally bound to honor my promise to have dinner with Professor Sell-

[33] *Form Contracts* at 638.

[34] NEW NETHERLANDS CIVIL CODE: PATRIMONIAL LAW (Haanappel, P.P.C. and Mackaay, E., eds. and transl., 1990).

ers, I am not legally bound to, because there is no intent to be legally bound.[35]

Just how far back in European legal history the concept of "intent to be bound" as a means of validating contract enforceability goes, I do not know, but clearly it goes back at least as far the nineteenth century when it found its way into the German Civil Code.

The German Civil Code—or BGB—places the doctrines of declaration of will (*Willenserklärung*) and of juridical act (*Rechtsgeschäft*) at the heart of the code's treatment of obligations.[36] The BGB enforces objectively manifested statements of consent notwithstanding undisclosed subjective intent to the contrary.[37] Yet it provides that the subjective intentions of the parties are to be determined in interpreting their declarations.[38] The BGB imposes no requirement of consideration and validates promises made with intention to be bound notwithstanding the absence of anything that might be deemed consideration.[39] It denies enforceability where the promise is not meant seriously and there is no inten-

[35] Ole Lando, *Salient Features of the Principles of Contract Law: A Comparison with the UCC*, 13 PACE INT'L L. REV. 339, 345 (2001).

[36] *See* BGB §§ 116-144. In a much quoted passage from the legislative history of the first draft of 1882, the drafters said:

[Das Rechtsgeschäft bedeutet] eine Privatwillenserklärung gerichtet auf die Hervorbringung eines rechtlichen Erfolges, der nach der Rechtsordnung deswegen eintritt ist. Das Wesen des Rechtsgeschäfts wird darin gefunden, daß ein auf die Hervorbringung rechtlicher Wirkungen gerichteter Wille bestätigt, und daß der Spruch des Rechtsordnung in Anerkennung dieses Willens die gewollte rechtliche Gestaltung in der Rechtswelt verwirklicht.

[37] BGB § 116 (*Geheimer Vorbehalt*).

[38] BGB § 133 (*Auslegung einer Willenserklärung*).

[39] *See* TALLON at 153.

tion to be bound.[40] For gratuitous promises, German law sometimes has form requirements and the BGB provisions governing *Willenserklärung* implement those.[41] The doctrine of *Willenserklärung* or the still more general provisions regarding juristic act treat the American contract law defenses. The BGB provides that a juristic act that is contrary to law or good morals is void.[42] It makes voidable declarations of will produced by misrepresentation or duress.[43] It provides that in most instances the declaration of will of someone without capacity is void.[44] It makes voidable declarations of will made as a consequent of mistake.[45] All this the German Civil Code accomplishes in about 40 relatively short sections that take about seven pages in a popular edition. In other parts of the Code it addresses impracticability of performance[46] and unfair terms in standard form contracts.[47] The treatment of standard terms contracts is similar to that proposed by Barnett, but far more robust.[48] The philosophical basis of the German Civil Code provisions are an overt manifestation of the view of freedom of contract as it prevailed in the late nineteenth century.

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[40] BGB § 117 (*Scheingeschäft*); § 118 (*Mangel der Ernstlichkeit*).
[41] BGB §§ 125-129.
[42] BGB § 134 (*Gesetzliches Verbot*); § 138 (*Sittenwidriges Rechtsgeschätft; Wucher*).
[43] BGB § 123 (*Anfechtbarkeit wegen Täuschung oder Drohung*).
[44] BGB § 145 (*Nichtigkeit der Willenserklärung*). Other provisions in this section, § 104-113, govern limited capacity for minors.
[45] BGB § 119 (*Anfechtbarkeit wegen Irrtums*).
[46] BGB § 119.
[47] BGB §§ 305-309.
[48] *See generally*, James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 29 YALE J. INT'L L. 109 (2003).

V. AMERICAN INSULARITY

That Barnett's theory of consent is similar to approaches of European civil law is not remarkable. For centuries Common Law countries have borrowed legal ideas from Civil Law countries to enrich contract law[49] and Civil Law Countries have borrowed from Common Law countries as well.[50] What is remarkable is that Barnett—and apparently American contracts law scholars generally—consider Barnett's theory to be a new one and have not noted its close similarity to European law.

Barnett likens his theory to new scientific theories such as those discussed by Thomas S. Kuhn in that author's famous 1962 book *The Structure of Scientific Revolutions*. Barnett offers his theory as a "potentially valuable approach to explaining contractual obligation" that might permit "the ongoing discussion of contractual obligation to emerge from its longstanding intellectual *cul-de-sac* and begin traveling a more productive course."[51] Barnett counts his theory a controversial one and questions whether it is even suitable reading for first year students.[52]

Controversial it is. A number of writers have taken issue with it. Its central proposition is largely rejected by

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[49] *See, e.g.,* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1847 (2000).
[50] Perhaps less in contract law directly and more in ancillary areas such as product liability and antitrust.
[51] *Consent Theory* at 321.
[52] CASEBOOK at 538.

the Restatement (Second) of Contracts in its section 21, which provides: "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."

Yet where is the discovery in Barnett's theory? It astonishes that in the twenty years that Barnett's proposal has been on the table, apparently no American contracts scholar has remarked on the similarities of his theory to the Civil Law.[53] Why do I have the feeling that it is as if someone in the United States announced the discovery of Pasteurization a century after Pasteur introduced it in France? In American patent law, inventors cannot claim a patent if anywhere in the world someone has published the same idea more than a year before the inventor applies for the patent.

Barnett has told me that he was not aware of Continental European law when he proposed his theory. That's too bad. If he had been, he could have made his life a lot easier by studying that law first, and he might have made his proposals even better.

That he was not aware of Continental law is in at least one way comforting. He did not conceal, as Karl Llewellyn once recommended, a foreign origin because of fear of adverse American reaction.[54] Llewellyn, who

[53] Barnett himself, however, has pointed out similarities to English law.

[54] In his *Consent Theory* Barnett thanks Professor George Fletcher for helpful comments. Fletcher later specifically called the attention of American jurists to

was principal drafter of the Uniform Commercial Code, took many of his ideas from German law. Yet he did not disclose, let alone discuss, their origin. He counseled that to disclose the foreign origin of a legal idea in the United States was tantamount to giving it the "kiss of death."[55]

But surely someone, somewhere along the line, has thought the similarity worth mentioning? Barnett's work has been subject to critical consideration. He and other American scholars have discussed his theory at length for over two decades. In all of this literature I have not found so much as a passing reference to Continental theories. I conclude that American scholars simply were unaware of the foreign law.

I know from my own experience that this ignorance of foreign solutions is not limited to Barnett's theory. Contracts scholarship has blossomed in the last thirty years and yet other developments central to contract law, such as the European Union's Unfair Terms Directive and Germany's Standard Terms Law, have gone completely unnoticed in the United States. And that is so even as those very same issues have consumed much of the American debate over new contract law.[56] While

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the importance of the German teachings of *Rechtsgeschäft* and *Willenserklärung*. *See* George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1 (2001).

[55] Stefan Riesenfeld, *The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States, in* Mathias Reimann (ed.), THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920, 89, 91 (1993).

[56] *See* James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*: 29 YALE J. INT'L L. 109 (2003).

creating a single European Market has made it a matter of course in Europe to examine foreign solutions—a part of the *Zeitgeist*[57]—it remains extraordinary in the United States.

Why are American jurists so insular? It was not always so. In the nineteenth century Americans were frequently keenly aware of foreign alternatives and anxious to learn from them. One of our most famous Supreme Court Justices, Joseph Story, said: "There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence."[58] There is a lively debate right now between present-day Justices Breyer and Scalia, as to whether the United States Supreme Court should take note of foreign punishments in applying the cruel and unusual prohibition of the U.S. Constitution.

While the American University debate is encouraging, the sad fact remains that the vast majority of American jurists lack any first-hand experience with Civil Law systems. Far more Americans enrolled in European universities to study the European Civil Law in the second half of the nineteenth century than did in the second half of the twentieth century. In Civil Law faculties in Europe and Asia, serious foreign study is the rule among faculty members rather than the rare

[57] *See* Abo Junker, *Rechtsvergleichung als Grundlagenfach*, 1994 JURISTENZEITUNG 921.

[58] *Progress of Jurisprudence*, *Address Delivered Before the Suffolk Bar at their Anniversary September 4, 1821, at Boston, reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 235 (1852). He added: Let us not vainly imagine that we have unlocked and exhausted all the stores of juridical wisdom and policy." *Id*.

exception that in the United States.[59] Serious study of a foreign system, in the language of that system, is essential to serious comparative law work.

American lack of interest in foreign solutions is not malicious. There are many reasons for the lack of interest. Among the principal reasons for American insularity are American political hegemony—and the lack of language skills that that brings—and American legal methods that anticipate incremental judicial development of law rather than legislation.[60]

In the nineteenth century, the United States did not enjoy world hegemony. In that century, Americans did study foreign legal solutions. But two world wars and the development of American hegemony in the world have led to American neglect of foreign legal solutions. I have to say that European history does not make it easy for those Americans who would like to promote Civil Law solutions. Inevitably, our American listeners object: the Civil Law had Hitler and we did not. Thus, in the twentieth century Americans switched from learning from foreign law to teaching American law to foreigners. American law became "imperial law." If the first five years of the twenty-first century are any guide,

[59] One law EU firm—Freshfields—probably has more jurists who have seriously studied both Civil and Common Law than all American law faculties combined! While American summer law school programs abroad encourage students to learn foreign and comparative law, few observers would count them as serious attempts to learn foreign legal systems.

[60] *See generally* Ernst Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 213 (Nedim Vogt *et al*. eds., 1997).

Americans in this century are, if anything, going to be more "imperial" in law than in the last.[61]

One consequence of American hegemony and of the resulting dominance of English as the world language is a lack of skills with foreign languages on the part of America's intellectual leadership. Before the First World War, 25 percent of American high school students studied German; since then, the number studying German has never exceeded 4 percent. Even under the best of circumstances, Americans would not normally learn foreign languages at a level sufficient to use them in academic work. The land is huge and there is little need or use for foreign languages for most people. I grew up in St. Louis: the nearest places where foreign languages are spoken are Mexico or Québec, each of which is about 1500 kilometers away. Contrast that to Europe; in Belgium alone, there are three official languages: Flemish, French and German. Moreover, English is inescapable here. The 50 American states have one official language: English. The 25 EU Member States have around two dozen. Finally, in Continental Europe, the first foreign language is automatic: English. In the United States, with which foreign language should a student begin: Spanish, Chinese, French, German, Russian, Italian, Japanese?

Yet without foreign language skills, one cannot learn the Civil Law systems first hand. One must rely on

[61] *Cf.*, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEG. STUD. 383, 391 (2003).

translations. There is a natural tendency to ignore that which one cannot understand and to regard it as unimportant. Thus, even as American law school faculties have shown a greatly increased interest in scholarship, comparative law has not benefited.

VI. A EUROPEAN CIVIL CODE?

I cannot resist the temptation to consider briefly one of the most interesting projects in the works today, a European Civil Code. As an American comparativist eager to get his colleagues to pay attention to the Civil Law, there is nothing that I should welcome more than a European Civil Code. No doubt that Code, much preparatory work and commentary would be in English. The Civil Law would finally be accessible in English. My colleagues could seize upon this wealth of legal learning. That learning would have behind it the force of the European Union—a political entity larger than our own—and would no longer be the patchwork law of 25 or 27 or 28 European states.

Whether a single European Code would work for Europe, or is even politically tenable, I do not know. Maybe the legal certainty and unity desired would be better obtained by a mixture of conflicts of law rules and of harmonized, not unified laws.

I do feel relatively sure, however, that devices such as the Principles of European Contract Law alone would not be sufficient to bring about the desired legal unity.

When Are Agreements Enforceable?

American experiences suggest that unless Europeans are willing to accept a level of legal uncertainty much greater than they historically have, voluntary approaches such as legal theory, Restatements and voluntary state laws, are not the answer. Legal unity and certainty should be imposed at the European-level even if that unity allows a great deal of diversity and subsidiarity within it.

Formalism in American Contract Law: Classical and Contemporary

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It is a truth universally acknowledged, that we live in a formalist era.[1] At least when it comes to American contract law.[2] Much more than the jurisprudence of a generation ago, today's cutting-edge work in American contract scholarship values the formalist virtues of bright-line rules, objective interpretation, and party autonomy. Policing bargains for substantive fairness seems more and more an outdated notion. Courts, it is thought, should refrain from interfering with market exchanges. Private arbitration has displaced courts in the context of many traditional contract disputes. Even adhesion contracts find their defenders, much to the chagrin of communitarian

[1] Substantial excerpts of this talk, presented at the 2005 EACLE Symposium on "Agreements" at Ghent University, are taken from my previously published work on American contracts scholar Samuel Williston. Mark L. Movsesian, *Rediscovering Williston*, 63 WASH. & LEE L. REV. 207 (2005). I thank John McGinnis and Brian Tamanaha for careful readings of earlier drafts and the participants in the EACLE Symposium and a workshop at St. John's University School of Law for helpful comments.

[2] *See*, *e.g.*, David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842 (1999); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995).

scholars.

This is not the first formalist era in American contract law. For about 60 years after 1870, the American academy was dominated by what has come to be known as classical jurisprudence.[3] The classicists were formalists, too. They argued in favor of objectivity and predictability and relatively free markets. Indeed, the story of their overthrow by the Progressives and Realists in the middle part of the twentieth century, a story told memorably by Grant Gilmore in *The Death of Contract* and *The Ages of American Law*, is in many ways the grand narrative of American contract jurisprudence.[4] It would be entirely understandable for contemporary formalists to view themselves as a kind of Restoration.

Yet New Formalists--the designation became popular in the 1990s--don't really see things that way. New Formalists reject classical contract jurisprudence as outmoded. They dismiss the essentialism of the classicists, preferring arguments about efficiency and pragmatism to conceptual analysis. They reject the classical belief in the ineluctability of legal rules; for New Formalists, legal rules have only presumptive force. Their commitment to the free market is less

[3]Recent years have seen a surge of interest in classical jurisprudence. For good examples, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9–64 (1995); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 497-507 (2003).

[4]*See* Mark L. Movsesian, Book Review, *Two Cheers For Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1529-31 (2002).

conceptual. Finally, New Formalists denigrate the under-theorized nature of classical jurisprudence. New Formalist scholarship does not focus on doctrine and does not rely on the intuitive justifications of lawyers and judges. Rather, it seeks to explain contract law with the tools of social science: economics and statistics.

In reality, the differences between classical and contemporary formalism are less pronounced than New Formalists believe. Some versions of classical jurisprudence might fit the image New Formalists have of it; the work of Langdell, perhaps, comes close to the caricature. But some classical jurisprudence does not. Using the work of an important classical contract scholar, Samuel Williston, I will show that at least one influential version of classical formalism also valued pragmatism. Williston was not an essentialist. He held that legal rules were presumptive, to be disregarded where important real-world values counseled a different result. Moreover, Williston did not support freedom of contract with the ideological fervor we sometimes attribute to him.

Nonetheless, there is an important way in which classical formalism did differ from the contemporary version. Compared to New Formalism, classical scholarship was unfortunately under-theorized. Classicists like Williston did indeed rely on the sort of commonsense explanations that lawyers and judges use in their daily work. Given what they were at-

tempting to do, their lack of interest in theory is understandable. Unlike today's legal academics, classicists did not see themselves primarily as members of the university world. They thought of themselves primarily as lawyers and they directed their scholarship primarily towards the profession. More than anything else, the difference between classical and contemporary formalism can be explained by the changing self-image of the American legal academy.

Before explaining the unappreciated similarities between classical and contemporary formalism, it is necessary to consider the purported differences. In the conventional account, New Formalism differs from the classical version in four important and related ways. First, New Formalism rejects the essentialism of classical contract law. Classicism maintained that "contract" was a concept with an essence, an irreducible descriptive and normative core.[5] Contract law was a set of axioms that followed from a true understanding of that essence, and a set of rules that followed from the axioms.[6] Classical contract law drew its justification from its supposed conformity with a proper understanding of contract *as a concept*, without regard to the practical effect con-

[5]*See*, *e.g.*, Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 48-49 (1983); *cf.* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THE STRUGGLE OF OUR AGE chs. 3, 4 (forthcoming 2006) (manuscript on file with author) (discussing "conceptual formalism" and distinguishing it from "rule formalism").

[6]*See* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1751 (2000).

tract law had in terms of efficiency or other values.[7]

To make this discussion more concrete, consider the famous example (at least to Americans) of Langdell's treatment of the "mailbox rule." Under the mailbox rule, acceptance of an offer made by correspondence is effective immediately upon dispatch--at the moment the offeree puts the acceptance out of his or her control--even if the offeror has not yet received it.[8] The rule is one of the foundational principles of American contract law, learned by thousands of first-year law students in the United States every year.

Christopher C. Langdell, one of the most prominent classicists (and dean of the Harvard Law School) rejected this rule.[9] To him, the essence of contract lay in the concept of promise, and the essence of promise lay in communication to the promisee. A promise that the promisee had not received was, by definition, not a promise at all; thus, acceptance could take effect only upon receipt by the offeror.[10] Langdell recognized that there might be practical arguments for the mailbox rule. He noted that judges had "claimed that purposes of substantial justice, and the interests of contracting parties as understood by themselves,

[7]*See id.* at 1750 (explaining that classical contract law maintained that fundamental doctrines were self-evident and allowed "no room" for "justifying doctrinal propositions on the basis of moral and policy propositions").
[8]*See* E. ALLAN FARNSWORTH, CONTRACTS § 3.22 (3d ed. 1999).
[9]*See* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 15 (2d ed. 1880).
[10]*See* Grey, *supra* note 5, at 4 (discussing Langdell's views regarding the mailbox rule).

[would] be best served by holding that the contract is complete the moment the letter of acceptance is mailed," and that some had posed cases showing that Langdell's approach "would produce not only unjust but absurd results."[11] For an essentialist like Langdell, though, these practical arguments were "irrelevant."[12] Once one understood the true nature of a promise, nothing else could matter.

New Formalists disdain this sort of essentialism. They advocate formalism, not because it coheres with abstract concepts like "contract" and "promise," but because it advances important pragmatic values like certainty, stability, and efficiency.[13] For example, Lisa Bernstein writes that formalist adjudication by private arbitral regimes benefits contracting parties by promoting clarity and predictability.[14] A comprehensive set of bright-line rules, she argues, reduces transaction costs and makes misunderstandings less likely. Moreover, if disputes do arise, a formalist approach improves the chances of settlement "by making arbitral outcomes relatively predictable."[15] Simi-

[11] LANGDELL, *supra* note 9, at 20-21.
[12] *Id.* at 21. Langdell did go on to demonstrate that, assuming practical arguments were relevant, he could muster some in favor of his own position. *Id*.
[13] *See* Thomas C. Grey, The New Formalism 4, 28-29, *at* http://papers.ssrn.com/paper.taf?abstract_id=200732 (Sept. 6, 1999) (discussing the pragmatic nature of the new formalism).
[14] *See*, *e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735-44 (2001) (describing and discussing advantages of formalist approach of cotton industry arbitration tribunals).
[15] *Id.* at 1742.

larly, Schwartz and Scott advocate formalist interpretation of certain business contracts, at least as a default position, as a means of promoting efficiency.[16] They believe that a plain-meaning approach, coupled with a "hard" version of the parol evidence rule and strict enforcement of merger clauses, best suits the presumed goals of contracting parties--maximizing the joint gains from transactions.

The second difference relates to the classicists' belief in the ineluctability of legal rules. Classicism taught that judges should apply common law doctrines with relentless logic, without allowing for exceptions based upon new social propositions or the harshness of particular results.[17] For example, classical contract law held that promises lacking consideration were unenforceable.[18] Gift promises lacked consideration; as a result, a court should not enforce a gift promise, even in circumstances where the promisee reasonably had relied on the promise to his or her detriment. People might recoil at the idea of a promisee bearing the loss in these circumstances, but a court could not ignore the rule about gift promises simply because the rule led to a harsh or unfair result in a particular case. Just as classicists denied the role of real-world concerns in the formulation of legal rules, they denied the role of real-world concerns in

[16] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 547 (2003).
[17] Eisenberg, *supra* note 6, at 1752-53 (criticizing this aspect of classical legal reasoning).
[18] I draw this example from Eisenberg. *See id.*

the application of rules as well.

By contrast, New Formalists believe that legal rules have merely presumptive force.[19] When pragmatic or ethical considerations counsel strongly against the application of a rule in a particular case, a court should not insist on applying the rule. For example, Frederick Schauer endorses a "new" version of formalism that he calls "presumptive positivism."[20] Under this approach, legal rules create "presumptive rather than absolute" constraints for courts, "thereby... allowing for the possibility of override in particularly exigent circumstances."[21] Similarly, Randy Barnett's "consent theory" of contract relies heavily on presumptions in explaining the proper limits of objective interpretation and the role of contract defenses. While the parties' consent makes out a prima facie case of contractual obligation, Barnett argues, the case may be rebutted by a showing of circumstances, generally coterminous with traditional contract defenses, that deprive that consent "of its normal moral, and therefore legal, significance."[22]

Third, the classicists' defense of freedom of con-

[19]*See* Grey, *supra* note 3, at 499 (discussing "presumptive" nature of contemporary formalism).
[20]FREDERICK SCHAUER, PLAYING BY THE RULES 197, 203 (1991). *See also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 546-48 (1988) (discussing "presumptive formalism" and suggesting it be called "presumptive positivism").
[21]SCHAUER, *supra* note 20, at 196.
[22]Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986).

tract allegedly sets them apart from New Formalists. Here again, the conventional wisdom draws a distinction between the essentialism of classical contract law and the pragmatism of contemporary scholarship. According to the conventional wisdom, classicists held that freedom of contract was a conceptual imperative, a principle that followed necessarily from a true understanding of contract's nature.[23] This essentialism supposedly led classicists to reject all limits on party autonomy, even limits based on health and safety grounds--to endorse the Supreme Court's holding, in the landmark case of *Lochner v. New York*,[24] that the Constitution prohibits legislation that interferes with parties' right to contract on terms they see fit.[25] The association with *Lochner* casts a reactionary taint on the classicists, and in fact some scholars have suggested that their essentialism masked an anti-egalitarian bias. For example, Morton Horwitz writes that Williston's objectivism acted to "disguise gross disparities of bargaining power under a façade of neutral and formal rules."[26]

By contrast, contemporary defenses of freedom of contract tend to rely on functional arguments. Most of these defenses come from the law and economics per-

[23]*See*, *e.g.*, Mooney, *supra* note 2, at 1133 (discussing the "classical, conceptualist ethic emphasizing... 'freedom of contract' and marketplace economics").
[24]Lochner v. New York, 198 U.S. 45 (1905).
[25]*See* Grey, *supra* note 3, at 494-96 (discussing the "canonical" connection between Langdellism and Lochnerism).
[26]MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 201 (1977).

spective and stress the efficiency gains that result from honoring party autonomy.[27] Contracts increase efficiency by allowing parties to trade goods and services to other parties who value them more highly. As a result, society generally should refrain from interfering with parties' contractual choices; society can better address distributional concerns through tax and transfer measures. Law and economics scholarship does accept regulations that weed out contracts that do not reflect real choice (contracts based on deception or threats, for example) as well as contracts that involve some market failure, such as the presence of externalities. Generally speaking, though, most law and economics scholars hold that the efficiency losses that result from broader limitations on party autonomy outweigh the benefits.

One important strand of law and economics scholarship addresses freedom of contract from the point of view of institutional competence. This scholarship also relies on pragmatic arguments. For example, Michael Trebilcock, a Canadian whose work has been influential in the United States, dismisses abstract inquiries into the proper scope of party autonomy.[28] Such inquiries involve the balancing of a multitude of conflicting social values and are thus likely to be unsuccessful. Rather, scholars should focus on a more

[27]*See* F. H. Buckley, *Introduction*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 1, 7 (F. H. Buckley ed., 1999) ("[T]he intellectual revival of freedom of contract has been led by scholars in the law-and-economics tradition.").
[28]MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 248 (1993).

practical question: determining which government actor seems most likely to reach an appropriate balance among these many social values. For example, Trebilcock writes, courts typically lack the information and expertise necessary to engage in a sensitive evaluation of social conditions. As a result, courts typically should refrain from invalidating private transactions on the basis of wider social values. Regulators, by contrast, are more likely to have "an appropriately systemic perspective."[29] They are thus better equipped than courts to identify those market failures, such as information asymmetries and collective-action problems, that may justify invalidating certain private agreements.

Finally, in today's terms, classical scholarship seems strikingly under-theorized. A good example is the work of Williston. Like other classical scholars, Williston devoted himself primarily to doctrinal analysis--to the identification and development of the principles that underlie judicial decisions and, to a lesser extent, commercial statutes.[30] Williston's work was not merely descriptive; he sought connections among doctrines, criticized incoherence, and suggested ways to harmonize apparently inconsistent precedents. But apart from occasional references to common sense and other intuitive notions, policy arguments did not interest him. Williston largely ig-

[29]*Id.* at 251.
[30]*Cf.* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002) (describing traditional legal scholarship).

nored big-picture questions about the political and economic goals of contract law; he did not look to other disciplines to gain a deeper understanding of the legal system. Moreover, he showed little inclination to do empirical work on the complex ways in which legal rules might interact with commercial practice. "[F]rom the standpoint of legal or social thought," Lawrence Friedman laments, Williston's work amounted to "volume after volume of a heavy void."[31]

By contrast, contemporary formalism seeks a stronger theoretical foundation. Straightforward doctrinal analysis does not appeal to New Formalists; they care much more about explaining the legal regime in terms of functional utility. Moreover, when they make claims about formalism's practical benefits, New Formalists do not rely on commonsense intuitions. Rather, they back their assertions with sophisticated economic models and empirical studies. For example, in defending objective contract interpretation, Schwartz and Scott rely on microeconomics.[32] Bernstein, for her part, has conducted a number of empirical studies of private arbitral regimes that show how a combination of formalist adjudication and informal reputational sanctions can serve the needs of contracting parties.[33]

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[31] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 543 (1973).
[32] *See* Schwartz & Scott, *supra* note 16, at 548.
[33] *See, e.g.*, Bernstein, *supra* note 14, at 1735-45 (discussing cotton arbitrators); Lisa Bernstein, *Merchant Law In a Merchant Court: Rethinking the Code's Search For Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769-71

Some classical scholarship no doubt fits the image that New Formalists have of it.[34] But some does not. For example, Samuel Williston's work has more nuance and balance, and shows more continuity with contemporary scholarship, than commonly supposed. Williston taught at Harvard for about 60 years, starting in 1890. Over the course of his career, he wrote more than 50 articles and several treatises on commercial law, including an influential contracts treatise, *Williston on Contracts*, which appeared in 1920.[35] He drafted several important commercial statutes and served as Reporter on the *Restatement of Contracts*, a monumental project, sponsored by the American Law Institute, which synthesized American contract law in 1932.[36] His impact on American contract law has been enormous and enduring.

Williston's work thus represents an influential strand of classical contract jurisprudence.[37] Yet his

(1996) (discussing feed and grain arbitrators).

[34]I should point out that some new scholarship rejects the idea that classicists were reductive. *See*, *e.g.*, David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQUIRIES IN LAW 541, 541-42, 546 (2003).

[35]SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920). This treatise is currently in its fourth edition. RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 1990).

[36]RESTATEMENT OF CONTRACTS (1932).

[37]Some might argue that the differences between Williston and other classicists suggest that Williston should not be considered a classical formalist at all. But the differences are not so pronounced as to exclude Williston from the classical camp. While Williston did not share the conceptualism of the Langdellians, he did agree on other central tenets of classicism, for example, the desirability of abstract rules and the importance of logic in legal reasoning. His scholarship,

work does not wholly fit the image of tiresome scribbling that ignores all social concerns. When one actually takes the time to read Williston, one sees that the conventional image presents an incomplete picture. While much of his scholarship can strike a contemporary reader as arid and conceptual, there are strong elements of pragmatism as well. Williston tempered an emphasis on formal logic with a concern for the real-world effects of legal rules, an advocacy of economic individualism with a recognition of the need for some market regulation.

I have studied Williston's work in detail elsewhere.[38] Here, I will briefly discuss three important ways in which Williston's jurisprudence shows more subtlety than we typically appreciate. First, Williston's formalism was not essentialist. True, he favored the use of abstract principles in legal reasoning. But he did not favor abstract principles because of their coherence with a "correct" conceptual understanding of contract. Law, he wrote, "is a pragmatic science," one that must be judged by its real-world application.[39] Williston favored formal legal reasoning because he believed that it had important practical advantages.

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like other classical scholarship, was systematic and doctrinal. These points of agreement demonstrate that, despite his rejection of essentialism, Williston is best seen as part of the classical tradition in contract law.

[38]Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

[39]SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 127 (photo reprint 1986) (1929).

For example, Williston argued that general legal concepts promote predictability in commercial relationships.[40] If law were merely a collection of particularized rules without unifying principles, lawyers could not accurately advise clients.[41] Parties could not feel secure about their contractual rights and duties and might be less likely to enter into mutually beneficial agreements. Moreover, uncertainty would promote costly litigation that would drain the resources of the parties and the public at large. Williston frequently pointed out that the success of a legal system depended not only on its capacity to reach acceptable results at trial, but also its capacity to delineate rights and duties without the need for litigation.[42]

Williston recognized that there was a potential practical downside to the use of general concepts in law. Categorical principles could lead to harsh results in particular cases.[43] But he believed that this danger was exaggerated.[44] Legal complexity also could cause hardship, for example, by creating traps for the unwary or opportunities for sharp practice. By adhering

[40]Samuel Williston, *Change in the Law*, 69 U.S. L. REV. 237, 239 (1935) (discussing "systematic jurisprudence").
[41]SAMUEL WILLISTON, LIFE AND LAW 213 (1941) (discussing difficulty of learning and applying a body of law that lacks "connecting threads of principle").
[42]*See*, *e.g.*, Samuel Williston, *Repudiation of Contracts (Part II)*, 14 HARV. L. REV. 421, 438 (1901).
[43]*See*, *e.g.*, WILLISTON, *supra* note 39, at 2-3.
[44]*Id.* at 97.

to general concepts, judges could reduce these potential dangers. Moreover, categorical principles could help rein in willful judges who might be inclined to decide a matter on the basis of personal whim rather than "the general justice of the case."[45] In any event, as discussed below, Williston believed that legal rules should have only presumptive effect; in particularly exigent circumstances, judges should refrain from applying them.

Williston's pragmatism was also evident in the way he derived the general principles themselves. Williston did not often describe his methodology, but one can piece it together from his occasional jurisprudential writings and from the corpus of his work. Williston did not attempt to derive the principles of contract law from metaphysical philosophy. Such an approach would be a waste of time, he thought--"an excursion into cloud-land."[46] Rather, he looked to case law. Judicial decisions provided the raw materials for his systematic jurisprudence.

Williston believed that a scholar must study a body of case law and identify "the principles, whether clearly formulated or not... which underlie the decisions."[47] In a largely inductive process, the scholar must observe the data--that is, read the cases--and,

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[45]*Id.* at 59.
[46]WILLISTON, *supra* note 41, at 203.
[47]Samuel Williston, *The Necessity of Idealism in Teaching Law*, 2 AM. L. SCHOOL REV. 201, 202 (1908).

reasoning upward, discover the general principles that the data reflected.[48] Once identified, the principles served as a kind of canon by which one could judge the correctness of the cases themselves. Sound cases conformed to the principles; unsound cases did not. Williston captured this idea in a phrase he often repeated: "*stare principiis*."[49] Although courts should generally follow precedent in the interests of stability, wrong decisions ultimately should not stand in the way of sound principles.

Nonetheless, Williston did not believe that a scholar could identify legal concepts solely through induction. Various "principled" accounts of doctrine could exist. The scholar had to develop the best account: the one that relied on concepts that were general, uniform, consistent with the body of law as a whole, and, crucially, in tune with real-world needs. Williston made this point repeatedly. The ideal rule, he wrote in 1908, should not "violate sound views of political economy;" it should "conform to the usages or requirements of business."[50] Similarly, in a 1935 article entitled *Change in the Law*, Williston insisted that a legal principle should not only be general and coherent, but "should also conform to social needs

[48]*See* Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1434 (1997) (explaining that classicists believed that the "axiomatic principles of the common law... were to be initially discovered by reasoning inductively upward from the cases").
[49]*See*, *e.g.*, Williston, *supra* note 40, at 239.
[50]Williston, *supra* note 47, at 202.

and not violate what may be called the mores of the community."[51] Indeed, because "social needs" and "mores" change over time, legal principles must themselves evolve. "To the extent that social needs and mores change, legal principles should change" too.[52]

In this embrace of pragmatism, Williston resembled today's New Formalists. Of course, one should not overstate the similarities. Williston focused primarily on doctrinal system-building; he did not give policy arguments nearly the same degree of attention as black-letter analysis. Moreover, compared to New Formalists, Williston was noticeably under-theorized. Williston did not attempt to support his assertions about practical benefits with empirical data or sophisticated economic models. Even his concept of *stare principiis* was more or less intuitive. Williston never attempted to develop a theory that would explain when, precisely, a court should abandon precedent in favor of correct principle.[53] Nonetheless, both in defending an axiomatic jurisprudence and in deriving the axioms themselves, Williston emphasized real-world benefits, not conformity to abstract philosophy or adherence to judicial fiat.

Second, like New Formalists, Williston understood that a rule should not control in circumstances where

[51] Williston, *supra* note 40, at 239.
[52] *Id.*
[53] *See* Grey, *supra* note 5, at 26.

its application would lead to seriously bad social consequences. In explaining this belief, Williston drew a distinction between geometric logic and legal logic, a distinction that will surprise people who hold the conventional view of him. Geometric logic, Williston wrote, is conclusive; its "'arguments aim at demonstrative certainty'."[54] Legal logic, by contrast, is a matter of "[p]resumptions and probabilities;"[55] it indicates the likely result, at least in the absence of serious practical difficulties. So, for example, when one Realist scholar quipped that formal logic was so indeterminate that it could not even definitively resolve a dispute whether "Socrates is mortal,"[56] Williston answered him thus:

> If we can say, almost all men are mortal, though occasionally one may be found who is not, the judicial conclusion in a particular case is likely to be that Socrates is mortal unless it can be shown that there are some peculiar circumstances in the facts of his case rendering the rule that applies to most men inapplicable to him. A great deal of legal and judicial reasoning is like that.[57]

Thus, like New Formalists, Williston maintained

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[54]*See* WILLISTON, *supra* note 39, at 157 n.2 (internal reference omitted).
[55]*Id.* at 157.
[56]*Id.* at 153-54.
[57]*Id.* at 156-57.

that rules should have merely presumptive force: in an appropriate case, logic should take a back seat to "practical convenience" and rough justice.[58] "No one will dispute," Williston wrote, "that logic should be the servant not the master of practical convenience, and that where logic and convenience are clearly at war, logic must yield."[59] Of course, deciding precisely when logic and convenience are clearly at war is a matter of judgment; given the advantages that he believed logic created for a legal system, Williston thought that courts should depart from logic only on the strongest arguments from social policy.[60] But in the end, social welfare, not logic, must control: "law is made for man, and not man for the law."[61]

Third, Williston distrusted conceptual defenses of laissez-faire capitalism.[62] As a pragmatist, Williston understood that freedom of contract could not be the only public value, that law had to strike a balance between party autonomy and other social concerns like public health and safety. To be sure, Williston did not think that courts should attempt to strike this

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[58]WILLISTON, *supra* note 41, at 311; *see* Williston, *supra* note 42, at 438 ("It may be conceded that practical convenience is of more importance than logical exactness . . . ."). I discuss several examples of Williston's preference for presumptive rules, including his embrace of the doctrine of promissory estoppel, in Movsesian, *supra* note 38, at 245-53.

[59]Samuel Williston, Book Review, 35 HARV. L. REV. 220, 221 (1921).

[60]*See* Williston, *supra* note 41, at 438 (arguing that "considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts").

[61]1 WILLISTON, *supra* note 35, § 119, at 256.

[62]*See* Grey, *supra* note 3, at 502 (stating that "Williston gave no support to constitutional liberty of contract") (internal quotations omitted).

balance; he did not think judges should have discretion to settle broad social questions in the context of particular cases.[63] Yet he did not object to legislative attempts to ameliorate the harshness of the free market. Indeed, he occasionally drafted such legislation himself.

Williston's thoughts on the matter appear most clearly in his remarkable article, *Freedom of Contract*, which he wrote in 1921.[64] Given the conventional wisdom about classicism, one might expect a full-throated defense of libertarianism in contract law. In fact, Williston devoted much of the piece to debunking the notion of absolute liberty of contract. During the late eighteenth and early nineteenth century, he explained, "metaphysical and political philosophers" had preached "a gospel of freedom" and laissez-faire economics.[65] This "theorizing" had made a strong impact on American contract law, which had adopted extremely individualistic doctrines about parties' capacity to make agreements free from state regulation.[66]

By the twentieth century, however, the "tide" had turned against freedom of contract, and Williston

[63]*See* WILLISTON, *supra* note 41, at 215 (discussing judicial temptation to make exceptions "to avoid a harsh application of a general rule").
[64]Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).
[65]*Id.* at 366.
[66]*See id.* at 367 (describing the effect of laissez-faire philosophy on the development of contract law).

plainly favored the direction of the change.[67] Experience had shown, he wrote, "that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare."[68] Legislatures must balance the legitimate claims of party autonomy against other social interests like public health and safety. Once legislatures had done so, courts should stay out of the way. Williston denounced the *Lochner* Court's willingness to obstruct "reasonable social experiment[s]"[69] and gave a list of salutary laws that might once have offended notions of liberty of contract, but fortunately did so no longer: rate regulations for common carriers, statutes providing standard terms in insurance contracts, limitations on interest rates that creditors could charge "the necessitous poor,"[70] and even minimum wage laws.[71]

As *Freedom of Contract* demonstrates, Williston's approach to the concept was both pragmatic and institutional: pragmatic in its recognition that freedom of contract must be balanced against other social interests and institutional in its focus on assigning the balancing to the correct governmental actor. This approach resonates with at least some of the current law-and-economics literature on party autonomy,

[67] *See id.* at 374–75 (discussing situations where unlimited freedom of contract does not serve the public interest).
[68] *Id.*
[69] *Id.* at 376.
[70] *Id.* at 375.
[71] For discussion of these examples and others, *see id.* at 374–75, 377–78.

most notably Trebilcock's work, discussed earlier. To be sure, Williston's argument is not as theoretically rich as Trebilcock's. Unlike Trebilcock, Williston did not offer a careful comparison of the perspectives of judges and legislators; he did not explain public regulation in terms of information asymmetries and other market failures. Nonetheless, his approach is quite close in spirit to Trebilcock's, and the affinities should make us wary of dismissing Williston's arguments as excessively conceptual.

Williston's moderation appears, not only in jurisprudential articles like *Freedom of Contract*, but also in his work as a statutory drafter. No concept so typifies freedom of contract as *caveat emptor*, the doctrine that holds that courts will not intervene to rescue buyers who have not taken reasonable steps to protect themselves. Given the conventional wisdom about classicism, one would expect Williston to have enshrined the doctrine in the statutes he drafted. But his statutory work demonstrates uneasiness with *caveat emptor*. One important example involves the provision he wrote for the American Uniform Sales Act on a buyer's remedies for a seller's breach of warranty.

Suppose that a buyer has purchased defective goods from a seller who had warranted their quality. Established law at the time Williston drafted the Sales Act provided that the buyer could keep the goods and sue the seller for damages, measured as the difference in value between the goods as warranted and the goods

as delivered.[72] If the seller had known about the defects, established law also gave the buyer the option to rescind the sale, return the goods, and recover the purchase price.[73] But what if the seller had not known about the defects? The English Sale of Goods Act, which served as Williston's principal model, did not allow the buyer to rescind the contract in those circumstances. American jurisdictions were divided on the question,[74] though the weight of authority apparently favored the English rule.[75]

A drafter who favored an unmitigated right to contract easily could have adopted the English rule for the American statute. But Williston did not adopt the English rule. Instead, he drafted a provision for the Sales Act that allowed rescission even where the seller's misrepresentation had been innocent.[76] He argued that a buyer's right to rescind in these circumstances would create practical advantages. For example, allowing rescission for honest as well as fraudulent misrepresentation would save litigation costs by obviating the need for difficult and time consuming inquiries about the seller's state of mind when he gave the warranty.[77]

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[72]SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 608, at 1009 (1909).
[73]*Id.* at 1010; *see also* WILLISTON, *supra* note 41, at 260–61 (discussing this hypothetical).
[74]WILLISTON, *supra* note 72, § 608, at 1011.
[75]Samuel Williston, *Rescission for Breach of Warranty*, 4 COLUM. L. REV. 195, 211 (1904).
[76]Unif. Sales Act § 69(1)(d), 1 U.L.A. 295 (1950).
[77]WILLISTON, *supra* note 72, § 608, at 1010–11.

More importantly, Williston believed that the rescission remedy promoted commercial good faith. Williston did not feel comfortable leaving parties entirely to fend for themselves in the marketplace. He thought that law should step in when one party sought to take unfair advantage of the other. Williston explained his reasoning thus:

> The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price[?] These are the essential inquiries, and there can be little doubt of the answers... The morality of taking advantage afterward of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring

about the sale.[78]

In the end, Williston wrote, the English rule represented nothing more than "the principle of *caveat emptor*."[79] As a result, the English rule "may well be swept away, as the more obviously barbarous applications of the doctrine have already been."[80]

In his rejection of essentialism, his embrace of presumptive formalism, and his pragmatic approach to freedom of contract, Williston stands much closer to contemporary formalism than we commonly assume. There is, however, one sense in which Williston's work does fit the conventional picture of classical jurisprudence. Compared to New Formalists, Williston was dramatically under-theorized. Where New Formalists rely on empirical data and sophisticated economic models to support their doctrinal prescriptions, Williston made only shorthand references to concerns about rough justice and "practical convenience."[81] The under-theorized character of Williston's scholarship comes through in two examples I have already discussed here: his rather vague concept of *stare principiis*, and his rejection of *caveat emptor* as a violation of roughly defined norms of commercial good faith. There are many others that I have dis-

[78] *Id.* at 1010.
[79] Samuel Williston, *Rescission for Breach of Warranty*, 16 HARV. L. REV. 465, 475 (1903).
[80] *Id.*
[81] *See, e.g.,* Williston, *supra* note 42, at 438.

cussed elsewhere.[82]

Williston's penchant for abbreviated policy arguments, his tendency to describe the effect of legal rules in intuitive terms, can strike a contemporary academic reader as unsophisticated, even banal. We are accustomed to richer accounts, both normative and positive, of legal rules and their operation. Unlike Williston, most scholars today would not think it sufficient to defend doctrine, or explain its effect in the real world, by making shorthand references to undefined notions of "justice" and "practical convenience." Williston's repeated reliance on such vague concepts, his use of common sense as a method of legal reasoning, makes him seem thoughtless and unambitious--a failure, for all his success in formulating a doctrinal system.

One should not be too quick to dismiss Williston and other classicists on this basis, however. Success or failure depends on what a scholar is trying to achieve. Before one can judge a body of scholarship, one needs to understand the scholar's goals and intended audience. The goals of classical scholars differed greatly from those of contemporary scholars. Today, American law professors think of themselves as writing primarily for other academics. Their task, as they perceive it, is to formulate new accounts of law and law's social impact and to defend those ac-

[82]Movsesian, *supra* note 38, at 262-67. Williston's more or less intuitive defense of the parol evidence rule offers a particularly interesting example. *See id*. at 266-67.

counts within the scholarly community.[83] Rather than as adjuncts to the bar, they see themselves principally as members of the broader university world; indeed, they increasingly attempt to map law in terms of other disciplines like economics and political science.[84] They write in an academic idiom, one that prizes theoretical novelty and rigor and argumentative subtlety.

Williston and other classicists understood the enterprise of legal scholarship quite differently. They did not direct their work primarily toward other law professors (given the relatively small number of American law schools at the time, that would have been a narrow readership indeed) but toward practicing professionals.[85] They believed that their most important task as scholars consisted of creating a doctrinal system that attorneys and businesspeople could use on an everyday basis, one that simplified law and made it more comprehensible.[86] They saw them-

[83]*See* Posner, *supra* note 30, at 1321; Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1217 (2002).

[84]*See* Posner, *supra* note 30, at 1321–22 (discussing law-and-economics and contemporary constitutional law scholarship); Sullivan, *supra* note 83, at 1217 (discussing the "law-and" phenomenon); *see also* TAMANAHA, *supra* note 5, ch. 8 (discussing increasingly academic, as opposed to practical, orientation of law professors).

[85]*See* Posner, *supra* note 30, at 1320 (discussing traditional legal scholarship's emphasis on writing for the legal profession); *see also* Sullivan, *supra* note 83, at 1217 (discussing changes in legal scholarship).

[86]*See, e.g.,* WILLISTON, *supra* note 41, at 108 ("It is also part of a teacher's work to a greater or less extent to systematize the law..."); Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 TEX. L. REV. 119, 133 (1942) (discussing classical legal scholarship); Williston, *supra* note 40, at 238-39 (discussing classical legal pedagogy).

selves, not so much as participants in the university world, but as members of the bar.[87] Late in his career, remembering his early Harvard colleagues, Williston gave a description that could apply to him as well. His colleagues, he recalled, "did not conceive of themselves as jurists, but as lawyers…. They felt themselves engaged in a practical profession, and in the training of young men for that profession. As such, they were pragmatists."[88]

Given their goals and intended audience, the classicists' reliance on intuitive justifications seems more plausible. Lawyers rely on rough judgments about fairness and practicality all the time. So do their clients. Even if "business people" do not carefully reason out legal problems, Williston maintained, "they do have an instinct" about their proper resolution.[89] Lawyers and their clients work with law on an operational level, and they typically have little interest in rich theoretical accounts.[90] Particularly in the commercial context, complex and controversial normative accounts of law can have a negative payoff. As Richard Posner has argued, everyday commerce depends on the ability of parties to displace debates about "deep issues" that can "disrupt and even poison

[87]As Richard Posner notes, legal scholars traditionally "identified with the legal profession rather than with their colleagues in other departments of their university. They even dressed like lawyers rather than like professors." Posner, *supra* note 30, at 1315.
[88]WILLISTON, *supra* note 39, at 119.
[89]SAMUEL WILLISTON, PROBLEMS IN THE MODERN LAW OF CONTRACTS 22 (1933).
[90]RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 11-12 (2003).

commercial relations among strangers."[91]

In the end, the differences between classical and contemporary formalism do not relate so much to essentialism, or pragmatism, or moderation with respect to freedom of contract. As Williston's work shows, some influential classicists actually agreed with New Formalists on these matters--or, at least, agreed to a greater extent than we typically realize. The differences relate more to the changing self-image of American law professors, who increasingly define themselves as university scholars first and lawyers second, often a far second. People who view themselves as social scientists are not likely to spend their careers parsing judicial decisions and building doctrinal superstructures; they are not likely to value the intuitive judgments of practitioners.

The new orientation of American legal scholarship presents both promise and threat. Much of the new scholarship is rich and suggestive. Very few of us, I suspect, would like to return to the days of classical jurisprudence, when law reviews were filled with articles endlessly distinguishing and reconciling cases. Nonetheless, there is a danger that, in attempting to employ the tools of other disciplines, we will come to disregard our own comparative advantage as experts trained in law and legal institutions and our obligation to help prepare our students for the world of the professional lawyer. Whether the potential promise of

[91] *Id.* at 12.

the new scholarship outweighs the potential threat, however, is a matter for another symposium.

Proactive Contracting: In Contracts Between Businesses

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I. INTRODUCTION

All transactions are based on contracts even if business people usually think that they do business, not contracts. Contracts define the business, rules and proceedings of the collaborating parties. The starting point of Western contract law is freedom of contract. This might seem to imply that the legal system should further the autonomous will of the parties, but this might not always be the case. The economic and competitive significance of contracting and contract processes makes contracting an important aspect of knowledge management. Businesses have come to recognize this, but they do not necessarily turn to lawyers to manage their contracts. They view their legal contracts less as agreements than as legal documents. Parties need legal contracts in order to win a potential court case or a negotiation in the shadow of a court case, but they seldom see

these legal documents as having anything to do with the business itself.

II. PROACTIVE CONTRACTING

Proactive Contracting is an *ex ante*, future-oriented approach. It is based on the real-life needs of businesses and focuses on launching, managing and implementing successful business actions and relationships. Contracts are seen as tools which can be used to create, express and fulfill the will of the parties. Contracts are linked with corporate goals and strategy. Contracting both inside the companies and between them needs to be based on the interaction of many professionals. Legal, commercial, technical, behavioural and other special knowledge needs to be combined for the good of the businesses involved.

The task of the proactive lawyer is to further contracting, which enables and maintains fruitful collaboration. To be able to carry out this task, a lawyer needs, in addition to legal expertise, to have an understanding of the business concerned and to be able to see which solutions forward the goals being pursued by the contracting parties. A lawyer who does not understand what the business is seeking to achieve is not going to be able to help the business in reaching its goals. Proactive contracting emphasizes the careful charting of needs and goals, risks and potential problems, beforehand, to avoid unnecessary legal risks. Situations in which pro-

fessionals from different disciplines should cooperate will require interaction skills and the ability to communicate.[1] People are influenced by their professional training and other life experiences in ways that make them express themselves and listen to others through different pre-understandings. These differences are often overlooked in practice, so that professionals do not take into account the different assumptions of their audience, which leads to misunderstandings.

The concept of "Proactive Contracting" could not have been born inside the tradition of legal research without wide cooperation with experts in business practice who understand the real-life needs of businesses. Finland has been a great center for the development of "Proactive Law." The point of departure in Proactive Law was Preventive Law.[2] Susan Daicoff[3] uses the term Comprehensive Law to refer to the holistic legal movements (vectors) that generally take into consideration, for example, the reality of life and human nature (like Therapeutic Jurisprudence). Proactive Law has now become one of its vectors. The difference between Preventive Law and Proactive Law is that the former places greater emphasis on the prevention of problems

[1]*See* Soile Pohjonen & Sari Lindblom-Ylänne (Ph.D., educational psychologist), *Challenges for Teaching Interaction Skills for Law Students*, THE LAW TEACHER 294-306 (March 2002).

[2]Introduced by Louis Brown, MANUAL OF PREVENTIVE LAW (New York 1950).

[3]Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in Dennis P. Stolle, David B. Wexler, Bruce J. Winick (eds.), PRACTICING THERAPEUTIC JURISPRUDENCE, LAW AS A HELPING PROFESSION (Durham 2000).

from the legal point of view while the latter is more interested in reaching the desired outcomes by taking a particular activity as a starting point: in this case, particular businesses. To take a practical example from contracting, proactive contracting is the view point of a skilled in-house corporate counsel. She uses her legal expertise to develop contracting practices, in cooperation with other experts, working together to reach the desired goals. This approach has now developed into a "Nordic" School of Proactive Law. Volume 49 of *Scandinavian Studies in Law* will be on Proactive Law.

Proactive Law began with Proactive Contracting, but has now spread to other areas of law.[4] On the social level, many of the difficulties in collaboration are even greater. There has been a great deal of legal discussions about how local and global societies ensure that all voices can be heard in creating systems, as well as in implementing them. How can decision-makers leave room for difference while offering protection and security to all? These interests may be contradictory, which means that the solution can never be a fixed one, but must involve a continuous search for balance. What results systems produce in reality is a question too seldom seriously asked. The legal system is only one system among others and can be affected by many factors. Law has its goals and principles. It does not function in a vacuum but rather as a part of a many-sided whole.

[4] Besides individual articles, our network has published three anthologies on Proactive Contracting, and an anthology on Proactive Law will come out in Autumn, 2005 (anthologies are in Finnish).

What the legal system produces will depend on the reality in which it functions.[5]

III. CONTRACTS AS A TOOL FOR BUSINESS COLLABORATION

Law has many areas of structural freedom, such as contracting, which guides behaviour to some extent but does not fully determine outcomes. How well does existing contract law promote collaboration and the realization of the will of the parties? What is the role of business practice and human nature in legal thinking (or do they have any role at all)? How, in a corporate framework, can law create both a clearly-defined structure and the prerequisites for developing as-yet undefined innovations? The system should take advantage of tacit knowledge[6] and avoid tacit ignorance.[7]

[5] Reflexive Law, created by Gunther Teubner, is an example of an idea to meet social needs by creating self-regulatory mechanisms structured by law, but how exactly they function is not pondered so much. Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV.239-85 (1983).

[6] The concept of "tacit knowledge" is based on the thinking of Michael Polanyiin THE TACIT DIMENSION (Gloucester, Mass. 1966/1983).

[7] Helena Haapio has created the term "tacit ignorance" (as an opposite concept to "tacit knowledge") to describe knowledge that people wrongly imagine to be correct. Helena Haapio is a contract coach who has made a decisive contribution to the emergence of Proactive Contracting. The other "Founding Mothers" were Soili Nystén-Haarala and Soile Pohjonen, both representing the academia. Haapio is active in a number of professional organizations, including IACCM (International Association for Contract and Commercial Management).

If everything goes well, there will be no need to look at the contract ever again after it has been signed. Some parties may see no need to draft a "contract" at all, or will view this document purely as a tool for risk prevention. Parties hope and believe that everything will go well and that they will not have to waste their valuable time on this kind of unproductive activity. This usually means that the management of legal risks and the definition of the scope of the contract are neglected, and this may end up being very expensive. Legal points of view are easily seen as obstructing cooperation and the need for lawyers is not apparent until problems arise.

A. Autonomy in Real Life

The foundations of today's contract law, its principles and values, have been widely discussed. The prevalent view has understood contracts as the expression of a consensus of separate wills. The liberal concept of free will presupposes human autonomy. This assumes that the contracting parties are able to realize their free and conscious will through the freedom of contract. Each individual (*homo oeconomicus*) is supposed to know and be conscious of her will. But if one takes autonomy as the aim, rather than the assumed basis of contracts, then there will need to be some assurance that expressions of the will reflect real knowledge and equality.[8] More re-

[8]Sirkku Hellsten, OIKEUTTA ILMAN KOHTUUTTA, MODERNIN OIKEUDENMUKAISUUSKÄSITTEEN KRITIIKKIÄ 67-69 (Tampere 1996).

cent ways of thinking, such as welfare state-oriented contract law,[9] have questioned the actuality of the autonomy of will (for example) on the part of the weaker party in a contract negotiation and therefore doubted the fairness of the contract. Past attempts to protect the will of the weaker party have been viewed as limitations on the will of the parties, particularly as it may be very difficult for an outsider to define the fairness of a particular transaction without deep knowledge of the wholeness of the relationship. From a legal point of view, free will is usually seen as threatened from the outside, whereas it may quite often be threatened by terms and circumstances of the contract itself.

Proactive Law questions this view of contracts as representing consensus of wills. Even the contracts of equal parties in good collaboration relationships do not often reflect the real will of the parties. People very seldom are able to make contracts that correspond to their will, even in quite normal situations. Whether or not the court uses its discretion or formal "black-letter" interpretation, it will necessarily advance its own rules, rather than the real "objective" will of the parties.

Legal rules and procedures have been developed on

[9]On welfarism in connection to Scandinavian contract law in general, see Thomas Wilhelmsson, *The Philosophy of Welfarism and Its Emergence in the Modern Scandinavian Contract Law*, in TWELVE ESSAYS ON CONSUMER LAW POLICY 3-43 (Wilhelmsson, ed. Tuuli Junkkari, Helsinki 1996. The viewpoint in welfare-state-oriented contract law has often been consumer contracts.

the basis of legal logic, rather than starting with the proactive question: "What kind of methods would produce the desired outcomes in the real world of business and people?" That is, in the praxis of life. In legal discussions, the praxis of life is often non-existent. The only praxis present is the legal praxis. As a research object, law is often seen as an autonomous system of norms separated from society. Modern Civil Law jurisprudence embraced this separation, restricting itself to the interpretation and analysis of legal norms. Life outside of law has no role to play in this kind of legal dogmatism.

When real-life does appear in a legal context, it is usually from the point of view of court decisions: What kind of reality do the decisions promote in the circumstances presumed by the court? Legal "realism" behaves in this way. The emphasis in contract law research and studies has been on the *ex post* legal estimation of contracts. Contract-planning has not been a central topic in contract law, and if studied at all, has usually been seen as the legal planning of a legal contract.[10] The starting point of contract law has not been contracting as an *ex ante* activity of the contracting parties. Not much attention has been paid to preventing problems and improving results, i.e. to contracts as a tool for constructing and maintaining successful collaboration. There has been little empirical research on the reality of contractual relationships or on the use and function of a contract as a tool.

[10] *See, e.g.,* Hugh Collins, REGULATING CONTRACTS (Oxford 1999/2002).

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Contract theory has had very little to do with reality.

The realization of the autonomy of the will of the individuals may best be achieved through negotiations structured to assure that the contract expresses the actual will of the parties. If a contract dispute arises, autonomy of will would require that the parties themselves negotiate or mediate with the help of a facilitator, to reach a solution which corresponds as much as possible to their own will. If the will was unclear, even to them, then further negotiations will be required to achieve clarity. Without such negotiations, the common will cannot be said really ever to have existed at all. Courts that wish to take the autonomy of will seriously have to restrict themselves to facilitating these negotiations. Legal systems should be predictable, but in actual contracts, "predictability" for the parties consists in creating contracts which will not require the intervention of a court. This requires establishing as much as possible in advance what the parties actually want.

In a typical contract situation, where both parties attempt to reach a satisfactory outcome and continue the collaboration or client relationship, the need for legal protection is minimal. What the parties want most of all is for the cooperation to proceed smoothly and that the goal they have set is reached. Much of contract law has been fixated on what is quite an exceptional phenomenon from the point of view of contracting reality. This is not to say that legal protec-

tion, direct or indirect, will never be required, but rather that this is almost never foremost in the minds of the parties. With the tools of the traditional legal system, one cannot often protect the true autonomy of will of the parties. The most common obstacle to the realization of the will of the parties lies within themselves. From the point of view of the interests of the society or third parties, such as consumers, there may be a need for greater legal control, but the will of the parties themselves will only be frustrated by too much judicial application of the law.

1. Did Parties Know What They "Wanted"?

The parties are often not aware of what they have agreed upon (factually or from the legal point of view) or even that they have already (legally) agreed upon something—or even what they actually want to agree. The contract may be incoherent and full of gaps and the parties may have, with their wordings and silences, meant completely different things. *Pacta sunt servanda*, i.e. contracts must be kept, is a central principle of contract law based on natural-law principles, but if it is unclear what has been agreed upon, what contract has to be kept? And what is the will that contracts based on mutual presumptions and "thought-gaps" might be considered to realize?

In contracting, which is seen as cooperation be-

tween people, the manner and quality of interaction are essential elements in success. One of the most important requirements for functioning cooperation is active listening, i.e. asking clarifying questions rather than rapidly interpreting what is said on the basis of one's own suppositions. This is a way of trying to ensure that both parties are talking, even approximately, about the same thing and striving for the same goals. If the parties do not discuss thoroughly what the contract is about, i.e. what they want from the cooperation, what is their goal, what are their working methods, it is very probable that they will have separate and differing views of their own contracts. The result will be misunderstandings, dissatisfaction, and a probable premature end to their partnership. It is difficult to work towards a common goal if there are, in reality; two separate or even several conflicting goals.

Most of us are so used to certain ways of thinking and functioning in certain surroundings, that we do not even come to think that matters might be seen and understood differently. Differences in the suppositions made by people who are attempting to cooperate are often a great surprise to all the parties involved, and can remain unnoticed for a long time if they are not the subject of specific discussion. What in practice complicates matters is that there usually are several parties on each side of the transaction, which often involves two corporations or networks. Usually the people who implement the contracts have not ne-

gotiated them. Communication systems will be necessary not only between, but within the parties. Different professionals might need different kinds of summaries of the contracts. They need different information according to their tasks within the relationship, but also need to understand the importance their role has in the relationship as a whole, including the legal implications.

Defining the scope of a contract is connected with the problems of contracting at many levels. Legally binding rights and responsibilities are an essential part of the scope of the contract and breach of contract or defective performance are defined by the definition of the scope. To reach the goals of the contract, the scope definition is essential in building and maintaining the collaboration. In collaboration, the ideal is that participants should think of themselves as partners and not as opposing sides or parties. In order to make the cooperation work, it is important to define clearly what both parties want from it. Many of the problems in contracting practice have to do with insufficient scope definition and tacit ignorance. The parties may have false assumptions about the contract or the cooperation, as well as about the associated legal questions. In a cooperative project, parties often represent different professions or a culture; which means that their ways of understanding, presumptions, areas of knowledge, use of language, and behaviour are entirely different. There is a grave risk of misunderstanding.

People also get used to certain procedures, for example, the habits and general conditions of a particular business, and begin to experience them as generally-applicable and just. These may be internalized and seldom consciously examined. The parties may not understand the assumptions being made, or the intended purpose of certain contract terms. They may not understand that certain language may be more beneficial for the seller or the buyer. In these cases, the decision of the court, i.e. whether the damages to be paid are, for example, one million euros or nothing, is determined by the fact of whether the contract happened to include a reference to certain conditions or not. The end result may thus have nothing to do with fairness or realizing the will of the parties.

The way in which the legal system frames and fills the gaps in contracts is not often realized by the business partners. Legal aspects are easily seen as a somewhat disconnected area and not as a part of the business contract. Because of their legal knowledge, lawyers are able to see whether a contract has gaps through which legal norms and interpretations with their analogies, precedents and principles are able to become "part of the contract" in a dispute. For non-lawyers, the legal risks connected with offers are often difficult to control and documents or document chains, which are not titled as contracts, may not be understood as contractually. One of the most important tasks of the lawyer in contracting is enabling real

mutual understanding and clarity. A clear contract will not accidentally bind the parties to obligations about which they have no idea, and does not release the contracting parties from obligations which they were meant to have.

B. Enabling Collaboration, Change and Dialogue

Contract law, as it currently exists, is not based on the idea of furthering cooperation but rather on ensuring the enforcement of binding contracts by deciding legal disputes. From the contracting point of view, this leads to contracting where the goal is to make final contracts. These binding documents should, thus, be as perfect as possible. Human cooperation is a developing process in a changing environment, and contract law is beginning to take this into account.

Contracts have traditionally been seen as quite simple one-shot transactions.[11] Long-term contract relationships have more recently become central objects of interest. One example of this is the relational contracting approach.[12] Here, the emphasis is on framework contracts. In these contracts, the wider frameworks of the relationship are contracted loosely to be adapted to continuously changing circumstances.

[11] Traditionally, contract law has also focused more on transactions concerning concrete things rather than transactions for services, which are becoming more prevalent and require long-term cooperation.

[12] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, AM. SOCIOLOGICAL REV. 55-67 (1963); Ian R. Macneil, *The Many Futures of Contracts*, S. CAL. L. REV. 691-816 (1974).

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Empirical research has revealed that in practice, business is not based on asserting one's own benefit and distrust of the other partner, but rather on trust and flexibility.[13] When the parties are willing to continue their cooperation, they flexibly aim at attaining *win-win* and *in casu* solutions i.e. solutions that are satisfactory to both parties in that particular situation. This is a precondition for continuing cooperation relationships. In this kind of thinking, conflicts are part of the cooperation and they are solved using the same *win-win* mentality. The starting point of traditional legal dispute resolution has not taken this into account. Instead, the emphasis has been on rigid principles set by the legal system. The end result is that one party wins and the other party loses.

In long-term contracting, detailed contract clauses (if they exist at all, in short or long-term contracting) are only part of the whole contract. In long-term human relationships, the parties usually trust each other and the relationship depends upon shared benefit. The relationship has gained intrinsic value. In traditional legal thinking, marriage and not business relationships has represented the human and personal relationship based on trust where the relationship itself has often been seen as more important than the individual interests of the parties. In a contractual relationship, the individual will of the parties and their

[13] Besides the work mentioned above, see also Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507-28 (1977) [hereinafter Macaulay, *Elegant Models*].

own interests have been seen to have the priority and the relationship itself has not been seen as having intrinsic value. This is a mistaken conception of reality.[14]

Both starting points (trust and distrust) have their own dangers if they are too one-sided. When the starting point is distrust, details and obligations and stiff formality will be emphasized. The end result may be that neither party does anything more than what is strictly required according to the clearly-detailed contract, which means that the cooperation becomes slow and expensive. When the starting point is trust, sometimes the parties will be too slow to face conflicts, which may keep the goals of the enterprises unclear, which could also make cooperation slow and expensive. When the conflicting interests are great enough, it may be too much to expect that the parties will retain a spirit of flexible cooperation.[15] In order to make the contract work to facilitate cooperation, it should provide structured frameworks for cooperation and detailed enough clarifications of the meanings and the goals to which the parties wish to engage themselves. The structures of change management are of essential importance. Changes are a common and natural part of collaboration. However, in contract law they are seen as exceptions. This attitude prevents them from being prepared for adequately. Not

[14] *See* Soile Pohjonen, *Partnership in Love and in Business*, FEMINIST LEGAL STUDIES 47-63 (2000).
[15] Macaulay, *Elegant Models*, *supra* note 13.

all changes can be avoided or fully prepared for in advance. Leaving gaps can have unexpected consequences. The possible consequences have to be considered, so that they will fit into a usable framework.

Law is usually seen as something which exists already and is found by or imposed upon its subjects (natural law, positive law, legal principles, stare decisis and so on). Law has been the art of making court decisions. Accordingly, legislation (frozen contracting on the social level)[16] has not until recently been a very significant object of legal research.[17] Law is by nature frozen, final, even if it does change. If law is, on the other hand, seen as processes of dialogue as it should be, the final goals and methods can never be fixed. They change unavoidably along with the circumstances. Different cultures, religions and times create different kinds of legal systems and logic. H. Patrick Glenn says of Hindu law that "its real mission in life is to float".[18] It tolerates change and diversity.

Argumentation theories (such as those of Chaim Perelman) represent legal applications of dialogue. This dialogue is based on convincing and consists of arguments and counter-arguments. The most gener-

[16] Compare law as "frozen politics", Roberto Mangabeira Unger, THE CRITICAL LEGAL STUDIES MOVEMENT 92 (1983).

[17] Regulation theory; see, e.g., Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite (eds.), REGULATING LAW (Oxford 2004) for an example of a more realistic and many-sided approach to legislation, where legislation is seen as a way of regulating society. How different factors interact in different realities would need much more attention.

[18] H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 253 (Oxford 2000).

ally accepted argument is presumed to win. In a contrasting Bohmian dialogue (as explained by David Bohm), the idea is to listen so that all voices would be heard and respected, so that systems would thus be based on the various realities. This amounts to "thinking" together.[19] To understand others is more important than trying to convince them. Noone is expected to be convinced by anyone; different understandings are allowed to remain. This kind of dialogue is a relation-oriented state in which something new can develop. In both of these types of dialogue, the purpose is to achieve, together, new understanding.

If law is seen as a process of learning and enabling it should be understood as created through dialogue. In a process, changes are natural. In project management, weak signals have been much discussed, and how to be sensitive to them. If we see rules and methods as final, we are not responsive to the warnings or new innovations towards which weak signals may point. It is no wonder that interaction, dialogue, creativity, skills and proactivity have been much discussed lately. The analytical approach based on a rational human image has proved to be one-sided. Human nature, feelings, the nature of knowledge and learning deserve a broader perspective. Similar innovations are already occurring in science and business, which are trying to discover in which surroundings

[19]The book by William Isaacs offering practical guidelines in the spirit of Bohmian dialogue is called DIALOGUE AND THE ART OF THINKING TOGETHER (New York 1999).

creativity flourishes best. Science needs creativity, not only in research, but also in its application. Contracts should also enable the creative process, for example, in product development. Contracting is a search for a dynamic balance between binding rules and flexibility. In knowledge-creation,[20] precise language, for example, is not always productive but metaphors convey ideas better and leave more room for innovations.

When the focus of interest in research begins to fall more on processes, which are not expected to have a firm core or essence, reality no longer appears to be clearly defined. In a corresponding way, corporations will no longer be seen necessarily or only as stable organizations, such as the vertical corporations inherited by the younger generation from the older generation, organizations which produce almost all their own products and services. Nowadays, corporations are seen as almost continuously changing forms of collaboration, as indeed they are. Corporations are not necessarily meant to be long-term, and their own share in producing their own products may be very small. When moving from vertical organizations to horizontal networking, more attention has to be paid facilitating cooperation in the contract themselves. Different types of networks and more-or-less temporary working groups (knotworking)[21] are examples of

[20] *See, e.g.,* Ikujiro Nonaka and Hirotaka Takeuchi, THE KNOWLEDGE-CREATING COMPANY (New York 1995).

[21] Yrjö Engeström, Ritva Engeström and Tarja Vähäaho, *When the Center Does*

forms of cooperation which have begun to arouse more interest also. These forms of cooperation do not necessarily have any core. In today's world, corporations seldom manage by themselves so the need for permanent partnerships is increasing. Partnerships often include maintaining the relationship between jobs. When corporations outsource their functions, an increasing amount of these will be governed by contracts. Employees and employers become contracting parties.

The legal logic which identifies one party or the other as "guilty" or "innocent" is not the logic of cooperation. It is very difficult to select the "guilty" party in cooperation processes which have been planned and realized together. Common goals are achieved by future-oriented flexibility. In cooperation, it is more important to reach the desired result than to follow particular procedures. To ensure the continuity of business, it is necessary that the contracting parties sincerely work together for the common benefit. As long as it is more profitable and desirable to continue the cooperation than settling the relationship in a final way, objective understandings of who was right and who was wrong are not very significant. The legal system is based on the logic that one party or the other is "right," i.e. whichever wins the legal dispute according to the rules and principles of the legal system. In traditional legal think-

Not Hold: The Importance of Knotworking, in Seth Chaiklin, Marianne Hedegaard, Juul Jensen (eds.), ACTIVITY THEORY AND SOCIAL PRACTICE: CULTURAL-HISTORICAL APPROACHES (Aarhus 1999).

ing, the parties are seen as opposing sides. In more recent contract-law thinking, they are more often seen as cooperating partners. This change in point of view focuses on the responsibilities that arise from cooperation. The obligation of loyalty is one expression of this. In the Finnish legal literature and court practice, this obligation has become a central principle in the legal system.

1. Court Promoting Loyalty

If we find it desirable that the parties should look out for each other's interests, shouldn't the courts do so too? Courts clarify the duty of care that each party has toward the other. This requires courts to be well-informed about what is common practice in a wide variety of fields. This can raise very difficult and technical questions about what should be considered as adequate care in different professions. Courts will have an effect on standards even in cases which are never litigated, since bargaining power depends on what would happen if one went to court.[22]

In a quite recent decision by the Finnish High Court (KKO 2001:128) A owned a partnership share in a limited partnership company and had given an assignment to a firm of accountants to draft a document concerning transfer of ownership to another company. The High Court considered that the firm of account-

[22] *See* Robert H. Mnookin, *Bargaining in the Shadow of Law: The Case of Divorce*, CURRENT LEGAL PROBLEMS 65-105 (1979).

ants should have had the obligation to warn A about the tax consequences of the transfer, even if the assignment had not included estimating the tax consequences. The firm of accountants was obliged to pay A the sum of FIM 244 574 with interest (for delay). The case report reveals that the invoice for the assignment had been FIM 800 and that the representative of the firm of accountants had knowledge of the rearrangements of A's entrepreneurship where the company had used as an expert the services of a law office specializing in business law in Helsinki.

Some of the circumstances surrounding this case highlight interesting questions at a general level. If a company purchases expert services from many companies, are the responsibilities of a company which has been assigned to draft one document or routine matter, and the responsibilities of another company which has been retained to provide comprehensive consulting services equal? Do they all have responsibility for everything, or does the substance and price of the services have an effect in sharing the responsibilities? In this case the problems could have been avoided by a contract in which the limits of the assignment and the associated responsibilities were clarified through a clear scope description and by announcing that the client has the responsibility for establishing the tax consequences, and by defining the upper limit of damages collectable from the firm of accountants.

Proactive Contracts Between Businesses

Naturally, there is reason to stress that the expert who takes an assignment to draft a document should always discuss objectives with the client in a thorough manner. Clients are seldom capable themselves of deciding what measures should be employed to achieve the desired goal. The client may be asking for a useless document or not understand the effects of for what she has asked. One specific document may be drafted at little cost, but the long discussions and many-sided assessments of the situation and the connected professional responsibility concerning the facts and use of the document would suggest setting a price for professional services which takes into account the time and skill required to understand all the implications of the transaction.

Those giving legal advice or entering into agreements often incur greater responsibility than they ever imagined or took into account. If the lawyers (for example) considered the full scope of their responsibilities, they might have charged more for services. If the mandatary (e.g. a firm of accounts in the case being discussed) had realized the scope of its responsibilities, it would have been more careful to have insurance in place against the risks of their tacit obligations. To protect oneself against tacit obligations, it becomes wise to agree upon very strict limits to one's obligations. The result may be not only greater clarity, but also a stiffening of the contract culture and a reduction in levels of loyalty and flexibility. For example, it may become wise to avoid even informal discussions so that they won't be interpreted as expert advice and cause liability.

Soile Pohjonen

IV. THE RESEARCH OF CONTRACTING

Warren G. Bennis and James O'Toole argue in their article, "How business schools lost their way," (Harvard Business Review, May 2005, 1-9) that business schools are too focused on "scientific" rigor research, which isn't often useful in the real world. "When applied to business—essentially, a human activity in which judgments are made with messy, incomplete, and incoherent data—statistical and methodological wizardry can blind rather than illuminate." They find it "necessary to strike a new balance between scientific rigor and practical relevance." The same arguments apply in the case of Proactive Law. The authors praise law schools for being practice oriented and connected to real-world issues. This is probably true if law is the art of arguing in courts, but if it is seen more as a comprehensive planning and taking care of the affairs of people who do not live in court rooms, the situation is often different.

There needs to be a deeper and wider interdisciplinary thinking in research on project and business management (or rather leadership), i.e. contracting. The legal aspect of contracting has often been seen as separate from the deal itself. The research done on the area of business contracting is fragmented and there is a lack of studies taking a holistic theoretical approach combining different points of view and understandings. This is the challenge which Proactive

Contracting seeks to meet. Our network has been interdisciplinary from the very beginning and the role of professionals with practical experience has been essential. Without a process of thinking together, there is a danger that we will only adopt from others selected pieces of information and understanding, interpreting them through our own pre-understanding of the situation. There is a need for legal thinking that serves the purpose of business collaboration (by furthering success) better than the traditional approach, which has had its focus on court decisions arising from contracting failures. The goal in Proactive Contracting is to analyze what kind of legal thinking and frameworks as well as contracting structures and skills would facilitate successful collaboration and enable innovations. The procedures in particular circumstances have to be created to suit those circumstances. In addition to accommodating technology and economics, legal research needs to cooperate with other disciplines studying human and organizational behaviour and the use of language.

The practical aim of Proactive Contracting is to enable better contracting by increasing mutual understanding, and to produce better contracting methods. Various contract templates, interactive internet programs and project models exist that show how a business project should proceed. They offer many new kinds of useful potentialities but the problem sometimes is that in the realities of business activity and human behaviour, the ideal working methods may

feel difficult to apply. Sometimes, they cannot be followed. At other times, they could and should, but will not, if the parties are not conscious of the reasons why the ideals are beneficial and why they may feel unnecessary or uninviting. The logic of the models is usually apparent only to those who have learned their meaning in experience. To others, they are skeletons whose purposes may not reveal itself, or which may even cause misunderstandings. All models are created by experience from particular contexts, and may not be well suited to other kinds of circumstances.

A central problem often is that contracts and business are seen as separate realities. For example, the link between contracting and business project execution has not been an object of wide interest, especially from the project management viewpoint. Contracting and business processes are, however, inevitably intertwined: agreeing about what to do cannot be separated from doing it. The expertise of a lawyer alone cannot secure the desired goal. Cooperation with other experts, for example, with engineers who know the product and the scope of the contract, is required. All the legal consequences are based on the scope. On the other hand, the quality of the product developed in a business project and the success of the delivery are very much dependent on the quality of the three c's: contracting, cooperation and communication. Contract as a tool cannot efficiently serve its purpose without an understanding of the real circumstances in which the contract is supposed to function.

Proactive Contracts Between Businesses

Proactive Law is also about modeling: skillful experts have always practiced it. Now it may be made available to others and consciously developed further. In a globalizing world, the need for structures and methods, which facilitate collaboration and understanding between different people, is growing rapidly.

Proactive Law and Contracting invite various different participants in a contract to a process of thinking together: both about the basis and suitability of principles of law and about its proper role in the societies and activities of human beings. There will be interesting opportunities for comparative research projects as well. Since legal, contractual and corporate cultures vary in different countries applying the techniques of Proactive Contracting across cultures would offer opportunities for learning and creating something new together.

Restrictions on Class Action Settlement Agreements

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The overwhelming majority of lawsuits filed in the United States never go to trial. Many are terminated by judicial decisions, such as dismissal for various jurisdictional defects, or for failure to state a claim, or by summary judgment.[1] By far the most common way that lawsuits are terminated, in perhaps as many as two thirds of all cases, is by a settlement agreement between the parties involved.

The historical model in American Jurisprudence has been that of a disinterested judge, who neither encouraged nor discouraged the parties to settle. However, crowded court dockets and an urge to promote judicial economy have led to more active case management by many judges, who are more willing to encourage or push the parties toward settlement.

[1] Fiftal, "*Respecting Litigants" Privacy Rights and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 Case W. Res. L Rev. 503 (2003).

One judge has gone as far to say that "a bad settlement is almost always better than a good trial."[2] Some criticize judges who, for their own convenience, put too much pressure on parties to settle when it may not be in the parties' best interests.

In most cases, parties are free to reach an agreement without any judicial supervision or approval, or in fact, any involvement by the judge at all. If the Plaintiff and Defendant agree to settle, the Plaintiff merely files a notice of voluntary dismissal, which does not require a court order.[3] The agreement between the parties is usually reduced to writing, and also does not require court approval. The only way a court might eventually become involved is if one party fails to live up to the agreement. Then the other party may file a breach of contract lawsuit to enforce the agreement. In this enforcement action, the settlement agreement is treated as any other contract. As long as there was a bargained for agreement between competent parties, then it will be enforced by the court. The court will not review the terms of the agreement for fairness and will only refuse to enforce it if it is illegal or contrary to public policy.

Sometimes the parties prefer an alternative procedure where the private agreement is embodied in a court order. The advantage of this method is that if

[2] *In re Warner Communications Sec. Litig*., 618 F. Supp. 735,740 (S.D.N.Y., 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).
[3] F.R.Civ.Pro. 41.

one of the parties is in breach, a new lawsuit is not necessary. If the parties want their agreement reduced to a court order, they must have the approval of the judge. However, the standard for approval is still the very broad contract standard. The court will generally approve any voluntary agreement reached by the parties, without inquiring into the terms and fairness of the settlement, as long as it is not illegal or in contravention of public policy.

The main category of cases in which court approval of settlements is required, and in which the court will examine the fairness of the settlement, are those in which the case is being brought by one person in a representative capacity for another or others. Suits brought by parents or guardians on behalf of children or incompetent persons fall within this category.

A much more controversial kind of case that falls within this category is the class action lawsuit. Class actions are lawsuits brought by representative parties on behalf not only of themselves, but also of others similarly situated. Historically, class actions were the invention of equity and were usually available only in the limited circumstances where joint or common rights were being asserted.[4] The Federal Rules of Civil Procedure, particularly the 1966 Amendments, significantly expanded the scope of class actions by

[4] *See* Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 Me. L. Rev. 223, 224 (2004); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)

facilitating their being brought in suits for damages, where persons had similar, but separate claims.

Numerous nationwide "consumer" class action suits have sprung from this, brought against corporate defendants on behalf of thousands or even millions of persons claiming to have been overcharged, or defrauded or otherwise harmed financially. These nationwide consumer class actions have been criticized first, because they often provide "little if any meaningful recovery to the class members, and simply enrich class counsel," and second because: "corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices."

From its inception, Rule 23, and the numerous state rules that have been modeled on it, has required court approval of "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." The purpose of this provision is to protect the rights of the unnamed plaintiffs who may be bound by the results of a lawsuit in which they did not participate. These absent class members may lose the right to sue on their own. Approval is deemed necessary to ensure that the representative plaintiffs would not reach an agreement with the Defendant that benefits mostly those representatives or their attorneys to the detriment of the un-named class members. Critics have maintained, however, that the approval process has not provided sufficient protection

against unfair settlements.

Amendments to the Federal Rules of Civil Procedure passed in 2003 were designed to ameliorate this problem, by adding additional procedural safeguards to the class action settlement approval practice, such as requiring a court hearing or specific finding that the settlement is "fair, reasonable and adequate." These amendments have not satisfied the critics of class action settlements, however, in part because the majority of consumer class-action cases are brought in state, rather than federal court.

This is the result of several Supreme Court cases that have made obtaining federal jurisdiction in class actions which are not based on federal law difficult to achieve, either for plaintiffs in the first instance, or for defendants who might wish to remove a case from state to federal court.[5] First, since complete diversity of citizenship is required between all named plaintiffs and all defendants, plaintiffs can often manipulate the named parties so that there is one defendant from the same state as one plaintiff, thus frustrating any attempt to remove by the defendant. Also, the Supreme Court has not allowed aggregation of the amount in controversy; the claim of each plaintiff must exceed the 75 thousand dollar requirement.

Additionally, plaintiffs often have a wide choice of

[5] *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co*., 414 U.S. 291 (1973).

which state court in which to bring the action. Since these cases usually involve plaintiffs from every state and corporate defendants who do business in every state, it is possible to have valid personal jurisdiction and proper venue in many districts in many states. Critics claim that plaintiffs have "gamed" the system by filing class actions in particular states or districts where judges are known to be lax both in applying the requirements to certify a class and also in scrutinizing the fairness of any proposed settlement.

The Republican Congress' recent response was to pass the Class Action Fairness Act of 2005. The most important part of this legislation (and the part that got major play in the main-stream press) greatly expands the jurisdiction of federal courts in large class actions (over 5 million dollars), giving defendants the right to remove most such cases from state to federal court. It also contains significant new restrictions, both substantive and procedural, on the approval of class action settlements. Congress' hope is that the combination of channeling most consumer class actions into federal court, where the judges are viewed as more punctilious in applying the class action criteria, along with the new settlement restrictions, will significantly reduce what they perceive as class action abuse. The act also directs the Judicial Conference of the United States to monitor class action settlements and attorney fee awards and to report back to Congress with recommendations on ways "for ensuring that attorneys' fees are awarded in a fair and reasonable

way."[6]

The Senate report contains an anecdotal list of "horror stories;" cases in which plaintiff's attorneys have walked away with millions of dollars in fees, leaving plaintiff's with mostly unwanted coupons of 25 or 50 dollar discount for future purchases from the defendant. In one "infamous" case cited, a class action suit was brought on behalf of consumers from many states against the Bank of Boston, alleging that they had failed to credit their customers with interest from their escrow accounts.[7] The Alabama settlement awarded less than 10 dollars to most members of the class and 8.5 million dollars to the attorneys. To add insult to injury, the attorneys' fees were deducted directly from the Plaintiffs accounts, so that many of them received a credit of 10 dollars and a debit of 80 dollars. This result was viewed as so unfair by the Vermont Supreme Court that it refused to allow enforcement of the judgment against Vermont citizens.[8]

This kind of case (where the class members actually end up losing money) is probably very rare and not really the problem. What are more common are cases where consumers are awarded coupons for further discounted merchandise from the defendant. Although some courts are skeptical of this kind of relief

[6] 108 Senate Report 123 (July 31 2003).

[7] *Kamilewicz v. Bank of Boston*, 92 F.3d 506 (7th Cir 1966).
[8] *State v. Home Lending*, 175 Vt. 239 (2003).

(a federal court refused to approve a settlement giving plaintiffs coupons for one thousand dollars off their next General Motors truck on the grounds that it was nothing more than a "sophisticated sales promotion" for the company[9]), many such settlements have been approved. In most of these cases, the attorneys' fees, although often very large, do not exceed a reasonable percentage of the total amount of the award. The problem is, however, that many of the coupons are never redeemed, so the fees can end up being quite large compared to the benefits actually received by the plaintiffs. The amount of attorney's fees often also bears no relationship to the amount of time or effort expanded by the attorneys. If the case settled during or close to trial, then attorney time could be considerable. But many cases settle much earlier in the process. In some cases, referred to as "settlement" class actions, an agreement is reached before the suit is filed, and approval of the settlement is requested at the time of filing.

Although it is unclear just how widespread the problem is, there are certainly numbers of consumer class actions where very little in tangible benefits are received by the plaintiffs. Many consumer advocates, however, would not consider these suits as failures. The threat of expensive class action litigation is a very powerful disincentive for large corporations to injure or defraud large groups of otherwise helpless consumers. In the Senate debate, Senator Biden

[9] *In re GM Trucks*, 55 F.3d 768, 807 (3rd Cir. 1995).

stated:

> [The bill] will make it far less likely that class actions will be brought, far less likely that corporations will be deterred from taking action contrary to the public interest, and far less likely that business will redress injuries their products have inflicted. Consumers will suffer the consequences.[10]

> This justification is dependent, however, on the view that the majority of class action suits are well founded. Detractors believe that many such suits are frivolous, brought for the purpose of blackmailing a corporation into settling, rather than risking a trial and judgment, which even though unlikely, could bankrupt the company. If such a lawsuit has even a 5 percent chance of success, a prudent corporate attorney must consider settlement, especially if the settlement involves mostly coupons for future goods, and the only real payout is to the attorneys. In a perfect world, one might hope that threats of government enforcement actions would provide the needed deterrence to protect consumers from corporate wrongdoing. But a combination of factors, such as insufficient resources, inadequate maximum fines, and

[10] 108 Senate Report 123 (July 31 2003).

> political considerations, has kept government enforcement from playing its proper role in many instances.

Congress' response to this perceived problem was to impose some limitations on settlements in those class actions either filed in or removed to federal court. When any settlement provides for a recovery of coupons to class members, attorneys' fees must be based on the *actual value* to the class members of coupons that are *redeemed*. This will be a change in the current practice, at least of some courts, of approving settlements in which the fees are based on the *face value* of all coupons *distributed*. The court is authorized to receive expert testimony on the actual value of the coupons to class members.

This will quite significantly lower the amount of fee awards that may be approved in such cases. It will also delay payment of the fees until the period for redeeming the coupons has passed. This restriction only applies to the portion of the fees attributed to the award of coupons, leaving the court free to allow additional fees for the awarding of equitable relief. There is also a provision for allowing fees to be based, rather than on the value of the coupons to the class members, on the amount of time that was actually expended by counsel while working on the action. Even though the provision allows for the use of a multiplier (for risk of loss or complexity) of the attorneys' normal hourly rate, it will often be not nearly

as lucrative as many previous settlements.

It remains to be seen whether the combination of federal jurisdiction and restrictions on coupon settlements will have the desired effect of limiting the perceived abuses. The restrictions do seem to make such coupon settlements far less attractive to class action counsel. They apply, however, only in cases of coupon settlements, and not to cases where class plaintiffs receive small *monetary* awards, while counsel receives huge fee awards. It may be possible, therefore, for counsel to evade the coupon restrictions by replacing them with settlements involving small monetary awards.

There is a restriction in such cases, but it is quite narrow. It provides that in a case in which any class member is obligated to pay sums to counsel that would result in a net loss to the member, the court must make a finding that *non-monetary* (i.e. equitable) relief to the class member *substantially outweighs* the monetary loss. This restriction only applies, however, in cases where the fees are paid by the class members themselves, and therefore, could be avoided by having the agreement structured to have *the defendant* pay a significant amount of attorneys' fees, while awarding nominal amounts to the individual class members. Such settlements would still, however, be subject to the present requirements of Rule 23 that any settlement agreement be "fair reasonable and adequate."

The Act also requires that the defendant give notice of any proposed settlement to an "appropriate state official" (the person who has primary regulatory responsibility with respect to the defendant) in each state in which any class member resides. No settlement may be approved any earlier than 90 days after such notice is given. Although the Act does not impose any obligations on the state officials, the hope is that state officials will protect the rights of unnamed plaintiffs in their state, especially where class members in one state may end up being bound by the results of a class action taking place in another state. It is easier for state officials to protect their citizen rights before, rather than after a settlement has been approved and reduced to judgment, since the courts of each state is required to honor the judgments of courts in other states. Therefore, the courts of one state may be required to enforce, against their own citizens, a settlement agreement approved by the courts of another state, even if they feel that it is unfair. In order to set aside a settlement approved by another state, a court must find *Constitutional* grounds to find the judgment invalid. This is what the Vermont Supreme Court did in the case in which it refused to enforce an unfair settlement agreement approved by an Alabama Court. But merely being unfair, or even very unfair, does not make the judgment unconstitutional. As long has proper procedures have been followed to comply with the Due Process Clause, the judgment is valid and must be enforced

throughout the United States.

Opponents of the Act argue that the statute was unnecessary, while proponents believe that although it is a good start, it does not go far enough in curbing abuses. It is too early to tell what the actual effect of the Act will be. Since the Act only applies to lawsuits filed after its passage, it may take some time to determine its actual effect. The Act mandates that the Judicial Conference of the United States report to Congress within 12 months, with recommendations for best practices to ensure that class action settlements are fair, benefiting mostly the class members, and not providing any unearned windfalls to the attorney's involved. It is likely that further changes will be proposed and introduced in Congress.

What are the implications of the American-style class action for the rest of the world, and particularly for Europe? Obviously, any foreign company doing business in or with the United States may end up as a defendant in such a suit if proper jurisdiction and venue can be obtained over them in an American court, and therefore, international business lawyers must be familiar with them.

But what are the chances that the American-style class action device will spread (or as one writer has put it, "metastasize"[11]) beyond the United States?

[11] Rowe, *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 Duke J. Comp. & Int'l L. 125 (2003).

Although such suits are not common outside of the United States, several countries, including Canada, Brazil, China, and Indonesia, have developed some form of collective actions for damages on behalf of private parties.

The 1998 European "Directive on Injunctions for the Protection of Consumers' Interests"[12] required member states to provide for representative actions for the protection of the rights of consumers. The directive established minimum standards for "group litigation" on behalf of groups of similarly situated people, brought by group representatives, such as consumers' organizations. Yet the kind of representative action envisioned by the directive and established by most European countries differs vastly from the American style class action.

First, the emphasis of the directive and of the response of most constituents is on forward-looking injunctive relief rather than damage actions. Although a few member states do allow for the payment of damages in certain situations, these are not meant for the benefit of individuals who have been harmed by the defendant's actions. Such damages might be nominal or symbolic,[13] or might involve payment into the public purse or to a beneficiary designated under

[12] 98/27/EC, OJ L166, June 11, 1988.

[13] France and Greece, *see* Koch, *Non-class Group Litigation Under EU and German Law*, 11 Duke J. Comp. & Int'l L 355, 359 (2001).

national legislation. Second, there is no method of "self-appointment" of individual, representative plaintiffs who will bring suit on behalf of all affected consumers. Suits are to be brought by recognized consumer organizations.

An example of implementation of the directive can be taken from Germany. The legislative response there was to provide for an institutional action called a *Verbandsklage*. This is a right of action allowing consumer groups and trade associations to bring suits for injunctive relief, not to protect individual consumers, but the public generally.[14] In order to be eligible to bring such suits, the organizations must be placed on a list drawn up by the Federal Administrative Office and communicated to the EC-Commission.[15] This right of action was originally a part of the Standard Terms Statute, but since 1 January 2002 has been governed by the Law of Actions for Injunctions for Violations of Consumer and Other Law.[16]

Many such representative complaints are resolved without the filing of lawsuit, using a "warning procedure" in which the consumer group sends a formal cease and desist letter to the potential defendant. If the recipient makes a legally binding agreement to comply, then the matter need not go to court. If the

[14] *See* Maxeiner, *Standard-Terms Contracting in the Global Electronic Age*, 28 Yale J. of Int. Law 109 (2003).
[15] Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 419 (2002).
[16] Maxeiner, *supra* note 14, at 157.

demand is rejected, the plaintiff may sue, and if it wins, recover the costs of the suit. Public funding by the EU for consumer groups to bring representative suits, along with limitations on the amount of costs such groups have to pay if they lose a case should help facilitate their availability.

Such representative actions may provide an attractive alternative to class actions, especially in cases involving small amounts of individual damages or negligible harm to large numbers of consumers. In such cases, the salutary effect of bringing the defendant's conduct into line may be obtained more easily, quickly, and with lower costs for the defendant, for the courts, and for society in general. In fact, it could be argued that the only ones who lose out are the prospective class-action attorneys who will not earn their large fee awards. There is every reason to believe that consumer organizations can represent the interests of consumers generally every bit as well, if not better, than a handful of self-selected consumers and their attorneys.

There are some caveats to declaring the representative action superior to the class action. Most importantly, since it brings no monetary relief to individual consumers, it will not normally be suitable when significant amounts of individual damages are allowed. Of course, as individual damages get greater and greater, at some point they become large enough so that individual damage actions against the defendant

are feasible. There is, however, some range of cases where damages, while quite significant, would not justify an expensive lawsuit against a large, well-funded corporation. In such cases, an American-style class action may be a reasonable alternative. One other possible advantage to the class action is that the fear of such actions can have a stronger deterrent effect on the conduct of large corporations, keeping them from engaging in the illegal conduct in the first place. This, however, is balanced by the possibility that representative actions can put an end to the activities more quickly.

There are a number of reasons, aside from a tradition of public, rather than private enforcement of rights, and the fear of and hostility toward the excesses and abuses of the American-style class action, which make it unlikely that such suits will ever become commonplace in Europe. These include the limited availability of damages, the loser pays rule for attorneys' fees, and the absence of contingency fee payments. Without the prospect of recovering a percentage of a large damage recovery, there is little incentive for private attorneys to bring group actions. And the fear of having to pay the defendant's attorney's fees makes it much too risky for plaintiffs, or their attorneys to bring a suit to vindicate the rights of others.

So European corporate executives can sleep at night, without having to worry about being sued for

billions of Euros by tens of thousands of injured or disgruntled consumers, and American executives can take some solace from the fact that at the very least, they can now remove such cases to federal court. The approaches to group or representative litigation in America and Europe are quite divergent. Yet on both sides of the Atlantic, the legal system is struggling to find a way to protect consumers from harm and deter corporations from causing harm, without needless expense and disruption of legitimate commerce.

Representing and Reasoning about Agreements… More Agreeably

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I. INTRODUCTION

For the purposes of this article, an agreement will be defined as a contract between parties enforceable in a court of law.[1] As such, an agreement should ideally safeguard the interests of all the parties so that it is a fair agreement. By and large, the current approach to agreements in many areas is to use existing forms with slight modifications that reflect nuances of the current situation. This seems to be the case with property leasing agreements; property purchase agreements; several commercial contracts, such as

[1] http://www.dictionary.law.com

copyright and trademark agreements; and court agreements. Sometimes, however, there seem to be extensive negotiations before agreements are drafted and accepted by all the parties, as in the case of international bilateral and multilateral agreements. This paper will revisit the usual "give less, take more"[2] view of negotiating to consider:

1. Can the parties involved in a negotiation follow a systematic approach to drafting an agreement that is agreeable to both of them?
2. Having drafted an agreement, can the parties involved determine how "good" the agreement is by developing a numeric score for the objectives of the agreement such as, for example, fairness?

Our motivation in studying these problems stems from the following observations:

1. negotiation is an essential element of an agreement or contract formation[3]
2. lawyers spend almost 43% of their time in negotiation related activities[4]
3. almost 99% of the cases started in courts are settled by negotiation between parties before a formal court action is even started[5]

[2] Douglas N. Walton, LEGAL ARGUMENTATION AND EVIDENCE 165 (2002).
[3] *See* Robert Cooter & Thomas Ulen, LAW AND ECONOMICS 188 (1997)
[4] *See* G. Nicolas Herman, Jean M. Cary, & Joesph E. Kennedy, LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 3-4 (2001).
[5] *See* Herbert M. Kritzer, LET'S MAKE A DEAL 3 (1991).

4. for each lawyer involved in litigation there are ten lawyers involved in negotiation[6]
5. negotiation, as the central part of diplomacy, is expected to be an important process for resolving international conflicts[7]
6. negotiations can become complex,[8] for example, during multi-billion dollar negotiations in industry[9] or during the development of international environmental agreements[10]
7. sometimes agreements need to be renegotiated due to changed circumstances.[11]

Our approach to answering the two questions posed in the beginning of this section is to develop a software program that will assist the lawyers and legal experts in the following ways:

1. helping the lawyers keep track of the current state of negotiation for all parties involved
2. providing the lawyers with a competitive edge during a complex negotiation process by serving as a "strategy and tactics assistant" – when

[6] We thank Dr. Vern Walker of Hofstra University Law School for this observation.
[7] *See* P. Terrance Hopmann, THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS 4 (1996).
[8] *See* Eric Brousseau and Jean-Michel Glachant, THE ECONOMICS OF CONTRACTS: THEORIES AND APPLICATIONS 213-41 (2002).
[9] *See* Kritzer, *supra* note 5, at 6-7.
[10] *See* Lawrence E. Susskind, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 3-8 (1994)
[11] *See* Norbert Horn, ADAPTATION AND RENEGOTIATION OF CONTRACT IN INTERNATIONAL TRADE AND FINANCE 101-02 (1985).

the criteria for success are complicated and the clauses are also complicated, it may be difficult for lawyers to keep all the strategies and tactics in mind

3. helping the lawyers to play the competitive game of negotiating by helping them see the whole board
4. helping to simulate hypothetical cases by letting lawyers try out possible scenarios and helping choose the best strategy before negotiating with their opponents
5. use as a pedagogical tool so that students learn the negotiation process by practicing against the software.

It may be noted that the proposed software is different in intent and purpose from the common word-processor software used to develop contracts using the "copy-and-paste" technique[12] whereby terms from previous contracts are copied into the new one with slight customization (if needed). The intent of the planned software is to capture the various elements of the negotiation process in its entirety during the *process* of negotiation; the purposes served by the software are given above. The software will be based on the Legal Measurement Framework called Nomus[13] that helps to direct the negotiation process toward an agreeable agreement and to quantitatively evaluate an

[12] *See* Hugh Collins, REGULATING CONTRACTS 149 (1999).
[13] *See* N. Subramanian & L. Chung, *Measuring Evolvability of Legal Personality*, 11 IUS GENTIUM 79 (2005).

existing agreement for achievement of objectives, such as "fairness" or "goodness." Nomus has been previously introduced and will be briefly described here for the benefit of the readers. The application of Nomus in this paper is a bit more "formal" in the Computer Science/Software Engineering/ Artificial Intelligence sense and is intended to help build a tool to "assist" legal experts during the negotiation phase.

II. CONVENTIONAL APPROACH TOWARD NEGOTIATION

Before the approach to representing and reasoning about agreements is discussed, it is important to explain the conventional approach to this process. An example construction contract will be used for discussing the conventional approach to negotiation for contract formation. The parties involved are the hypothetical Republic of Papagania and Zedco Industries. The details of the circumstances for the Republic of Papagania are given in Appendix B and those for the Zedco Industries are given in Appendix C. We will follow the steps given in section 12.03 of Herman's, *Legal Counseling and Negotiating: A Practical Approach* in order to prepare for negotiation. The following will need to be done by the negotiators for both Papagania and Zedco.[14]

[14] For simplicity's sake we have concentrated on only a few of the important steps given in section 12.03 of Herman's, *Legal Counseling and Negotiating: A Practical Approach*. *See supra* note 4 and accompanying text.

1. Make a list of information to obtain from the other side, the information to reveal to the other side, and the information to protect. Thus, Zedco will be interested in knowing all about PNCSL, the government's credibility, the general law and order situation in Papagania, the conditions of the World Bank financing, the information about the competitor's offer (if any) and the reasons for selecting Zedco. Papagania, on the other hand, will be interested in the past history of Zedco in completing construction projects, the cost of such projects in general, as well as national and international accreditations of the bidders including Zedco. Some of the information may be obtained from the other side (for example, Papagania could ask Zedco to provide a list of past construction projects) and some of the information is protected by both sides.
2. Make a list of each party's interests and objectives and rank them as primary, secondary, etc. Some of these can be discerned from the documents obtained in step 1 while some of these can be obtained from the client. Then in consultation with the client, these interests and objectives need to be ranked. For Zedco, the primary interest would be to expand its operations into a new country and its primary objective will be increasing its profits. The secondary objectives will be to receive timely pay-

ment and protection of its equipment and personnel. For Papagania, the primary objectives will be ensuring timely completion of the project and its primary interest will be ensuring that national secrets are protected.

3. Make a list of possible solutions for each party. The possible solutions will, in our opinion, be draft clauses and their underlying rationale for each party.
4. Repeat the above steps as often as needed during the negotiation process.

The result of the first three steps will be the list of objectives for Papagania and Zedco and a list of clauses. These lists appear, presumably, as blocks of informal statements. Thus, for example, the objectives for Papagania could be:

1. The contract should be good.
2. The contract should be fair to PNCSL.
3. The contract should protect the interests of PNCSL.
4. The technology used should be transferable.
5. The project schedule should be reasonable.
6. The compensation should be reasonable.

The objectives for Zedco could be, for example:

1. The contract should be fair.
2. The payment schedule should be acceptable.
3. The physical assets and personnel should be protected.

4. The contractual obligations should be executable within the time expected.
5. The contract should be enforceable.
6. The contract should be legally binding.

What is apparent in these lists is that ambiguities could exist in the statements contained within the lists. Thus, what does it mean to say "The contract should be good" or "The contract should be fair?" Also, there could be ambiguities in the relationship among some of the statements. Thus, for example, how are the statements "The technology used should be transferable" and "The contract should protect the interests of PNCSL" related, if at all? Also, let us assume that clauses were drafted during negotiation. For example, the clause for technology transfer was drafted as:

> Zedco shall train the personnel of Papagania in the maintenance procedures for the piers and the warehouse including the use of any equipment procured for this purpose.

What is the rationale for this clause? What are the arguments in favor of or against this clause? And what objectives does this clause satisfy, if any? Such questions reveal that several problems exist in the current mode of capturing and recording decisions made during the process of negotiation.

One important point that needs to be noted is that there are several lists that are developed during the process of negotiation; the status of negotiation is not recorded anywhere at all and most probably retained (if at all) only in the minds of the parties involved. Another important point to note is the documentation of rationales for offers and concessions. These, too, seem mostly to be in the minds of the negotiators and not captured for future reference anywhere else.

III. SUITABILITY OF NOMUS TO REPRESENT AND REASON ABOUT AGREEMENTS

Negotiations usually take place before an agreement or contract is signed. Many negotiations usually proceed through a series of meetings toward a complete agreement.[15] The goal of the negotiation dialogue is to "make a deal" by trading concessions so that all parties in the negotiation get most of what they want.[16] Dialectical reasoning helps to analyze the process of negotiation so that the negotiations move toward the goal of reaching an agreement.[17] In dialectical reasoning, arguments are used to support claims.[18] Each argument, in turn, could have a chain of valid or invalid inferences.[19] That is, there is synergy in favor of some of the points of negotiation and

[15] *See* Michael Firmston, TAKAO NORISADA & JILL POOLE, CONTRACT FORMATION AND LETTERS OF INTENT 267 (1998).
[16] *See* Walton, *supra* note 2, at171.
[17] *See Id.* at 151–165.
[18] *See id*. at 163.
[19] *See id.* at 164.

conflicts in favor of the others. Nomus provides a measurement framework for legal systems and one of the important steps in the measurement[20] is the development of the Concept Interdependency Graph (CIG). CIG helps to capture diagrammatically the various elements involved in dialectical reasoning as shown in Figure 1. In Figure 1, arrows annotated with "- -" indicate conflicts (or negative arguments) while arrows annotated with "++" indicate synergies (or positive arguments). This is because Nomus is based on the NFR Framework and the NFR Framework is, in turn, based on dialectical reasoning.[21] Therefore, Nomus is well suited to be used in situations where dialectical reasoning is used such as during the process of negotiation. The CIG captures the goals of the agreement as legal concepts,[22] the various clauses being negotiated as operationalizing concepts, and the justifications for the clauses (the arguments) are captured by claim concepts. The diagrammatic capability of CIG is similar to the intent of argument diagramming,[23] but in our opinion, CIG can capture several other concepts besides arguments. By stopping at stage 1 of the Nomus process,[24] Nomus can be used to represent, evaluate (reason about) and develop agreements during the process of negotiation. However, by applying all the three steps of Nomus one

[20] *See* section A1 of Appendix A.
[21] *See* L. Chung, B.A. Nixon, E. Yu and J. Mylopoulos, NON-FUNCTIONAL REQUIREMENTS IN SOFTWARE ENGINEERING 8 (2000).
[22] See section A2 of Appendix A for the process of CIG development.
[23] See Walton, *supra* note 2, at 338.
[24] Given in Figure A6 of Appendix A.

can come up with numerical scores for the goals of the negotiation process.[25] The process of generating numeric scores is similar to the intent in Cooter and Ulen's, as well as Kritzer's works of using game theory to come up with numbers; however, the dialectical reasoning used by Nomus in generating numbers is intuitive. Therefore, Nomus can be used to represent and facilitate reasoning about agreements.

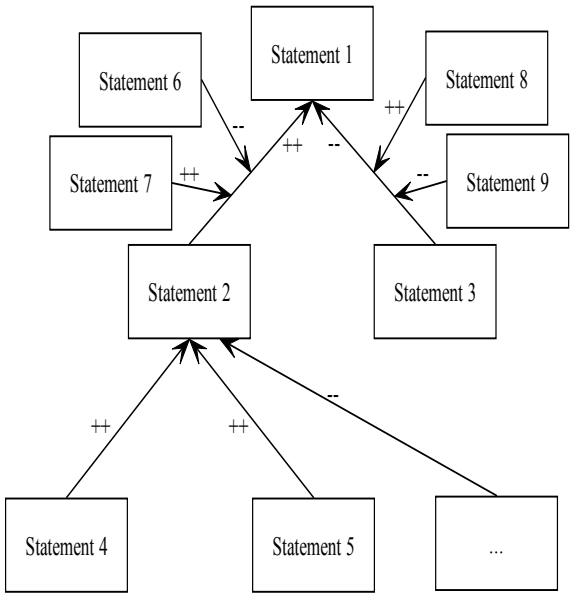

Figure 1 Representing a dialectical reasoning process, using arguments and counter-arguments.

[25] In a manner similar to that used to measure evolvability of legal personality. *See* Subramanian, supra note 13, at 79.

Representing Agreements...More Agreeably

While agreements are generally expected to be acceptable to all parties, such agreements can fall into one of the following four categories:

1. agreeable agreements
2. agreeable disagreements
3. disagreeable agreements
4. disagreeable disagreements

An agreeable agreement is agreeable to all parties: the concerned parties agree to the agreement and to the reasons behind the agreement, which can then be signed and put into effect. In an agreeable disagreement, the concerned parties can agree that they do disagree and discover why they disagree, which will be a concrete basis for taking appropriate next steps. A disagreeable agreement is seemingly an agreement, but the concerned parties cannot come to a consensus that it indeed is an agreement. A disagreeable disagreement is seemingly a disagreement, but the concerned parties cannot even determine if they disagree. Nomus uses evidential reasoning (or dialectical reasoning) when categorizing an agreement in one of these four categories – positive evidence reinforces the categorizing while negative evidence weakens the categorizing (we may then need to categorize the agreement differently). Usually, evidences or counter-evidence form a chain, which can be documented in writing (if at all) and the resulting document could be voluminous; if this chain were to be represented pictorially it would become much easier for others to follow the chain and appreciate its strengths and weaknesses. Nomus uses the CIGs to

provide visual representation for this chain of evidence and counter-evidence. But the most important benefit from Nomus, in our opinion, is that all this knowledge can be used to generate software-assisted agreeable agreements.

IV. USING NOMUS TO DIRECT THE NEGOTIATION PROCESS TOWARDS THE GOAL

"Negotiating" involves the processes and techniques used in trying to resolve common problems with another party in order to reach a satisfactory agreement.[26] Each negotiation process seems to have the goal of reaching the "best result they (the negotiators) reasonably expect to achieve in the negotiation."[27] Usually, "people transact business for the purpose of gaining goal satisfaction."[28] One important step in negotiation is to make a list of each party's objectives (or goals)[29]; that is, what each party specifically wants out of an agreement. These goals and objectives are represented by legal concepts in the Nomus Concept Interdependency Graph (CIG). In order to clarify (or better understand) these goals and objectives one needs to gather more information, perhaps by asking questions.[30] The clarifications are captured in the CIG for the legal concept decomposition. Another suggestion made by Herman, in *Legal*

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[26] *See* Kritzer, *supra* note 5, at 4
[27] *See* Herman, *supra* note 4, at 235.
[28] *See* Chester L. Karrass, THE NEGOTIATING GAME: HOW TO GET WHAT YOU WANT 124 (1992).
[29] *See* Herman, *supra* note 4, at 231-32
[30] *See* Gerard I. Nierenberg, FUNDAMENTALS OF NEGOTIATING 109 (1973).

Counseling and Negotiating: A Practical Approach is that the objectives be ranked; thus, there are primary objectives, secondary objectives, and so on. The ranking of objectives is captured by the prioritization of concepts in a CIG. The issues[31] considered during the negotiation process are captured as operationalizing concepts in the CIG. The clauses in an agreement are represented by operationalizing concepts in the CIG. The issues could also be ranked in importance[32] and this ranking captured by prioritizing operationalizing concepts. The satisfaction or dissatisfaction of the parties with the clauses in an agreement is captured by their contributions in the CIG. The arguments for satisfaction or dissatisfaction are captured by the claim softgoals in the CIG. Therefore, all the elements involved in the negotiation process can be captured in a CIG. CIG gives a pictorial representation of the current state of negotiations and the overall achievement (or the lack thereof) of the objectives of the parties to the agreement. The CIG also helps to move the negotiation process in the direction of satisfactory agreement by helping the concerned people view the reasons for the current impasse (if any) and what needs to be done to overcome the status quo. This way the agreement moves from an agreeable disagreement to an agreeable agreement. It may be difficult to overcome the impasse, such as, for exam-

[31] *See* David Churchman, NEGOTIATION: PROCESS, TACTICS, THEORY 1-2 (1995).

[32] *See* Nierenberg, *supra* note 32, at 52 ("Some negotiations have many issues; some issues are broader than others. With the resolution of the broader, more important issues, some of the minor ones seem to disappear or be resolved.")

ple; when negotiations for a labor contract fail. This is an example of a disagreeable agreement. The steps for using Nomus to direct the negotiations towards the goal of agreeable agreement are:

> Step 1: Determine the goals of the parties in the agreement and document them as legal concepts in the CIG. It is quite possible that the goals will be vague or ambiguous, in which case, find out the meaning(s) of the goals and document them as legal concept decompositions in the CIG. The decompositions may be AND, OR, or EQUAL decompositions; that is, the clarifications for the goals may be inclusive, exclusive or simply a refinement.
>
> Step 2: The issues for negotiation become operationalizing concepts. Issues may be ambiguous, so they may need to be clarified. This will result in operationalizing concept decomposition. Develop (draft) the clauses for the agreement for the different issues under consideration and represent the clauses in the CIG as operationalizing concepts.
>
> Step 3: Rank the objectives and the issues. Usually, some objectives are more important than the others and some is-

sues (and perhaps the related clauses) may be more important than the others. Capture these important objectives as priority legal concepts in the CIG (using the "!" annotation next to the concept); capture these important issues as priority operationalizing concepts in the CIG (using the "!" annotation).

Step 4: Determine from the parties whether the clauses satisfy the objectives (or the clarified objectives) and based on their answers (for example, "yes," "no," "not sure," "perhaps," etc.); determine the contribution of the clauses to the various objectives. The contributions could be one of four types: MAKE, HELP, HURT, and BREAK. Document the reasons for the contributions in the claim softgoals, as the reasons are provided by the parties to the agreement.

Step 5: Determine from the CIG what clauses are not positively satisficed; the clauses that make HURT or BREAK contributions are not positively satisficed. From the claim softgoals attached to these negative contributions determine what could be done to change the contributions to a positive one (HELP or MAKE). This may involve changing of

clauses (modification of operationalizing concepts), further clarifications of objectives (modifications of legal concept decomposition), or changing the rank of objectives/clauses (changing the priorities of legal concepts and operationalizing concepts). Steps 1 through 4 may need repeating.

Step 6: Determine if an agreeable agreement has been reached. If so the negotiation process is done. If there is an impasse despite several rounds of negotiations, then there has been a disagreeable agreement and the parties may need to revisit their objectives.

The application of these steps is given in the next section for an example construction contract. An interesting point has been raised regarding Nomus:[33] the number of factors (for objectives and issues) could become very large. Nomus is there only to assist lawyers, and the creative, hard work must still be done by the lawyers. The number of factors used by Nomus will be as many as the lawyers decide should be used.

[33] We thank Prof. Mark Movsesian of Hofstra University Law School for this observation.

V. APPLICATION OF NOMUS TO REPRESENT AND REASON ABOUT AGREEMENTS

We will use the example construction contract discussed in Section 2 to illustrate the application of Nomus, the details of which are given in Appendix A. As mentioned the parties involved are the hypothetical Republic of Papagania and Zedco Industries. The details of the circumstances for the Republic of Papagania are given in Appendix B and those for Zedco Industries are given in Appendix C. The Nomus approach is to upgrade the lists that are developed during the conventional negotiation process into a well defined structure called the Concept Interdependency Graph (CIG) where the lists become legal concepts and the operationalizing concepts, and the rationales become claim concepts. The progress of negotiation is captured by the contributions. The CIGs also help to keep historical records for future reference.

We will now apply Nomus to represent and reason about this construction contract. This contract is an example of an agreeable agreement. The intention (the overall goal) during negotiation is to generate a good agreement. The decisions taken during the negotiation for this agreement are captured by the CIG. The process of development of the CIG is discussed in Appendix A and given in Figure A2. The first step in the creation of CIG is to decompose the legal concepts for the problem, which in this case, is the development of an agreement. The goal of the negotia-

tion process is assumed to be, the development of a "good" agreement. This is captured in the CIG[34] of Figure 2 by the topmost concept (indicated by the cloud shape) named Good[Agreement]. The naming convention for softgoals is as follows:

> Type [Topic1, Topic2]: where *Type* is a legal concept (e.g., good, fair, enforceable, agreeable, etc.) and *Topic* is the artifact to which *Type* applies (e.g., agreement, contract, law, etc.). However, what does "good" mean? In the context of this construction agreement we assume that "good" means legally binding, fair and enforceable to all parties in the agreement; these concepts are captured by the legal concepts Legally Binding [All Parties], Fair [All Parties], and Enforceable [All Parties], and the fact that all these sub-concepts are needed to satisfice[35] the parent concept is indicated by the AND-contribution which is represented by a single arc between the three child concepts (this is also called AND-decomposition). The concept Legally

[34]The CIG of Figure 2 gives one possible and perhaps a simple decomposition for "good" agreement – several others may be possible for this agreement itself and the most appropriate that meets the requirements of all concerned is usually chosen.

[35] Nomus framework uses the concept of satisficing which means "good enough;" satisfaction is a stronger concept while satisficing means satisfaction within a range. This concept is described in greater detail in Appendix A.

> Binding [All Parties] has been AND-decomposed into Legally Binding [Papagania] and Legally Binding [Zedco] since Papagania and Zedco are the two parties involved in this agreement. In a similar manner the concept Fair [All Parties] has been AND-decomposed into Fair [Papagania] and Fair [Zedco]. Likewise, the concept Enforceable [All Parties] has been AND-decomposed into Enforceable [Papagania] and Enforceable [Zedco]. The legal concept Fair [Papagania] has been AND-decom-posed into Protectability [Interests, Papagania] and Acceptability [Papagania], which refer to (respectively) the protectability of Papaganian interests and overall acceptability to Papagania. Similarly, the legal concept Fair [Zedco] has been AND-decomposed into the legal concepts Protectability [Interests, Zedco] and Acceptability [Zedco]. The concept Protectability [Interests, Papagania] has been AND-decomposed into the concepts Transferability [Technology] and Confidentiality [Information], which refers to, respectively, the transferability of the technology used and developed by Zedco to Papagania, and the confidentiality of all information pertaining to the construction project. The concept Acceptability [Pa-

> pagania] has been AND-decomposed into Completability [Project] and Acceptability [Com-pensation], which refer, respectively, to the ability of Zedco to complete the project on schedule, and to the acceptability by Papagania of the compensation required by Zedco in order to complete the project. The legal concept Protectability [Interests, Zedco] is AND-decomposed into Protectability [Physical Assets] and Protectability [Personnel] which, respectively, refer to the protectability of Zedco's physical assets used for the project, and to the protectability of Zedco's personnel involved with the project. The legal concept Acceptability[Zedco] is AND-decom-posed into the legal concepts Executability [Contractual Obligations] and Acceptability [Payment Schedule], which, respectively, refer to the ability of Zedco to execute the contractual obligations, and to the acceptability by Zedco of Papagania's payment schedule for the project. This completes the first step in the CIG development.

The second step in the CIG development is the decomposition of the operationalizing concepts for the problem (the development of the agreement, in this case). The operationalizing concept decomposi-

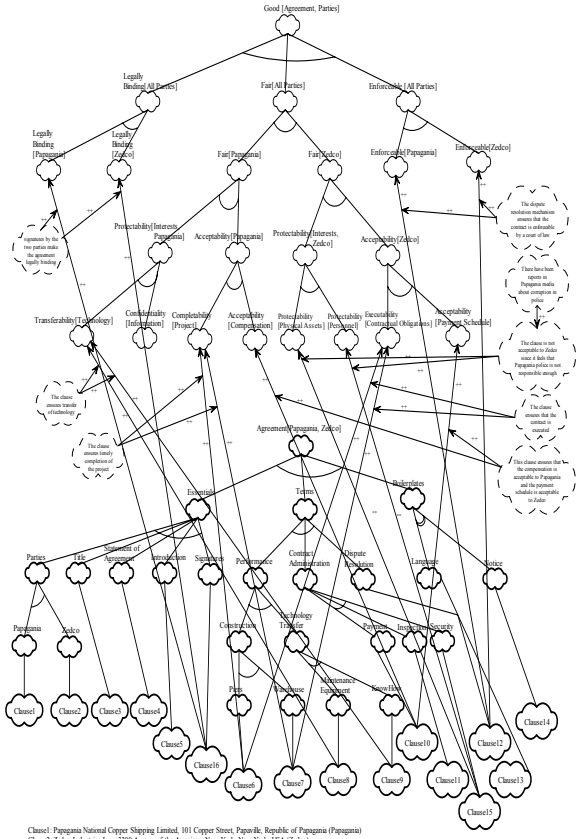
tion is shown at the bottom of Figure 2 (by the dark-bordered clouds). The operationalizing concept of interest during agreement negotiation is Agreement [Papagania, Zedco] which refers to the agreement between Papagania and Zedco (the goal of the negotiation process). An agreement has at least three components: essentials, terms, and boilerplate clauses,[36] which are captured in Figure 2 by the AND-decomposed operationalizing concepts Essentials, Terms, and Boilerplates. The essentials include parties, title, statement of agreement, introduction, and signatures, which are captured, respectively, by the operationalizing concepts (which are AND-decomposed) Parties, Title, Statement of Agreement, Introduction, and Signatures.

Terms for an agreement vary depending on the context of the agreement and for this agreement the terms of interest include performance under the contract, contract administration, and dispute resolution, which are captured, respectively, by the operationalizing concepts Contract, Contract Administration, and Dispute Resolution (again these operationalizing concepts are AND-decomposed). Boilerplates are clauses found in most agreements and the clauses related to language and notice were cho- sen as the most important for this agreement, which are (respectively) captured by the operationalizing concepts Language and

[36] *See* "Conventional Elements of Commercial Contracts," International Development Law Organization, Online Library, http://www.idli.org/OnlineLib/drafting.htm.

Notice (another AND-decomposition). The operationalizing concept Parties is AND-decomposed into the two parties involved in this Agreement: Papagania and Zedco. Performance of Zedco under the agreement involves construction and the transfer of technology after construction. These are captured by the AND-decomposed operationalizing concepts Construction and Technology Transfer. Construction involves the construction of the three piers and a warehouse. These are captured in Figure 2 by the AND-decom-posed operationalizing concepts Piers and Warehouse. The technology transfer includes transfer of equipment related to maintenance of the construction and the procedures on how to utilize the equipment for proper maintenance. Both of these are represented by the AND-decomposed operationalizing concepts Maintenance Equipment and Knowhow. Contract administration involves payment by Papagania to Zedco, frequent inspections of the project progress by Papagania, and provision of security for the project; these are represented (respectively) by the AND-decomposed operationalizing concepts Payment, Inspection, and Security.

Representing Agreements...More Agreeably



Clause1: Papagania National Copper Shipping Limited, 101 Copper Street, Papaville, Republic of Papagania (Papagania)
Clause2: Zedco Industries Inc., 3300 Avenue of the Americas, New York, New York, USA (Zedco)
Clause3: Construction Contract
Clause4: The parties agree to the following terms and conditions.
Clause5: This agreement made on 20th April 2005 between Papagania and Zedco
Clause6: Zedco shall construct three piers (hereinafter called the project) in the Papallay harbor as per the specifications developed by Papagania. The construction shall be completed within eighteen months from the date the agreement is signed.
Clause7: Zedco shall construct a warehouse (hereinafter called the project) in the Papallay harbor as per the specifications developed by Papagania. The construction shall be completed within twelve months from the date the agreement is signed.
Clause8: Zedco shall procure on behalf of Papagania all equipment needed for the maintenance of the piers and the warehouse upon completion of their respective construction.
Clause9: Zedco shall train the personnel of Papagania in the maintenance procedures for the piers and the warehouse including the use of any equipment procured for this purpose.
Clause10: The payment for the services performed by Zedco will be done in installments based on the quantum of project completed; the payment will be paid for every 10% of the work completed or every three months whichever comes earlier. The quantum of project completed will be determined based on inspection by Papagania.
Clause11: Papagania reserves the right to inspect the project any time during the construction. Zedco will be given at least 24 hours notice of the inspection.
Clause12: Any dispute arising during the execution of the contract will be settled by the courts of law in Papagania.
Clause13: Upon signing, this agreement will be translated into Spanish language, the official language of Papagania. The English and Spanish versions are equally valid and binding. Both must be taken into account when interpreting this agreement.
Clause14: Any notice that is to be given under this agreement must be in writing and must be delivered to the party who is to receive the notice at the address given in clauses 1 and 2 of this agreement.
Clause15: The security for equipment and personnel shall be provided by Papagania police.
Clause16: Signature and Date: _____ (Papagania) _____ (Zedco).

Figure 2 The Concept Interdependency Graph (CIG) for Construction Contract Negotiation

Now we need to consider the representation of the clauses in the agreement: each clause is represented by a corresponding operationalizing concept. The various clauses developed during the negotiation are shown in Figure 2 as operationalizing concepts. Each clause fits into one of the categories of the agreement and the various clauses are shown as refinements to one of the operationalizing concepts. The operationalizing concept representing a clause is shown with a cryptic name, for example, Clause1 while the actual words of the clause are given in detail at the bottom of Figure 2.

The next step is the assignment of priorities during which different legal concepts and operationalizing concepts are ranked in priority. For simplicity's sake, we have assumed all concepts to be of the same priority for this agreement.

The final step is to determine how the various clauses meet the requirements for a "good" agreement. This involves determining whether or not each of the clauses satisfice the legal concepts at the top of Figure 2, and based on this determination, each of the legal concepts (usually the bottom-most or the leaf legal concepts) receive contributions from the clauses that can be one of four types: MAKE (represented by an arrow annotated with "++"), HELP (represented by an arrow annotated with "+"), HURT (represented by an arrow annotated with "-"), and BREAK (represented by an arrow annotated with "- -"). During ne-

gotiation it is determined that the clauses given in Figure 2 strongly positively satisfice the legal concepts and the justification for this determination is captured by the claim concepts (cloud shapes with broken-line borders) attached to each contribution. Thus, for example, Clause 6 (which states: *Zedco shall construct three piers (hereinafter called the project) in the PapaBay harbor as per the specifications developed by Papagania. The construction shall be completed within eighteen months from the date the agreement is signed*) makes a MAKE-contribution to the legal concept Completability [Project] due to the reason captured by the claim concept attached to this contribution, and this claim concept states: *The clause ensures timely completion of the project.* The reasons may be laws as well. That is, the particular clause affects the law of the land and therefore is or is not acceptable. Based on these contributions it can be determined how "good" the agreement is using the label propagation rules of Nomus, given in section A.2 of Appendix A. By rule R2, the legal concepts Protectability[Physical Assets] and Protectability [Personnel] are denied, while by rule R1, all other legal concepts are satisficed. By rule R4, the parent legal concept Protectability [Interests, Zedco] is denied (since both its children are denied), while all other parent legal concepts are satisficed. Continuing up the CIG, by rule R4, the parent legal concept Fair [Zedco] is denied since one of its children (Protectability [Interests, Zedco]) is denied. Again, by rule R4, the legal concept Fair [All Parties] is denied, and

by the same reasoning, the root legal concept, Good [Agreement, Parties] is also denied. This means that the agreement with the clauses as drafted is not good for the parties. Why is this agreement "not good" for the parties? The CIG also helps to reason about weaknesses and helps to improve the weaknesses as discussed below.

In the CIG of Figure 2, most of the clauses strongly positively satisfice the legal concepts. However, there are two legal concepts that receive BREAK contributions from the same clause, Clause 15:

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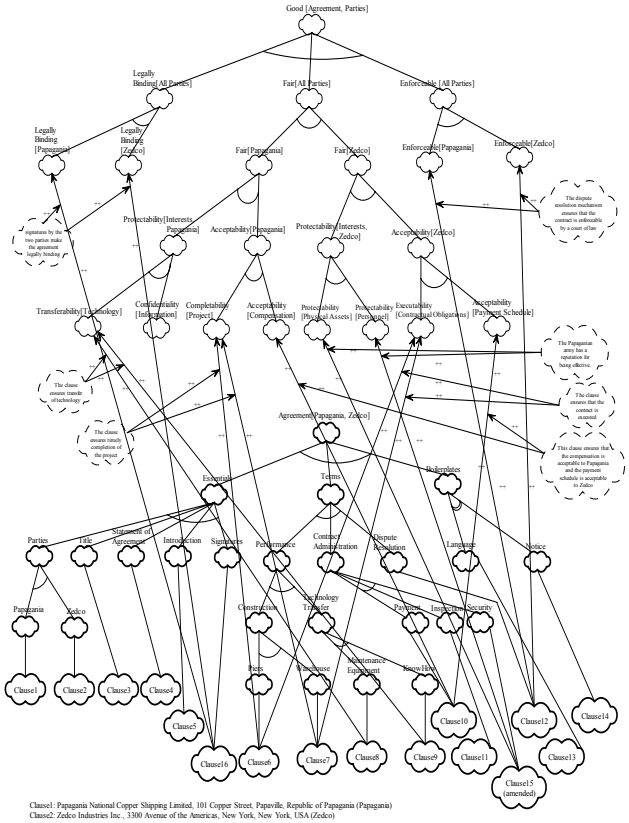

Clause1: Papagania National Copper Shipping Limited, 101 Copper Street, Papaville, Republic of Papagania (Papagania)
Clause2: Zedco Industries Inc., 3300 Avenue of the Americas, New York, New York, USA (Zedco)
Clause3: Construction Contract
Clause4: The parties agree to the following terms and conditions.
Clause5: This agreement made on 20th April 2005 between Papagania and Zedco
Clause6: Zedco shall construct three piers (hereinafter called the project) in the Papallay harbor as per the specifications developed by Papagania. The construction shall be completed within eighteen months from the date the agreement is signed.
Clause7: Zedco shall construct a warehouse (hereinafter called the project) in the Papallay harbor as per the specifications developed by Papagania. The construction shall be completed within twelve months from the date the agreement is signed.
Clause8: Zedco shall procure on behalf of Papagania all equipment needed for the maintenance of the piers and the warehouse upon completion of their respective construction.
Clause9: Zedco shall train the personnel of Papagania in the maintenance procedures for the piers and the warehouse including the use of any equipment procured for this purpose.
Clause10: The payment for the services performed by Zedco will be done in installments based on the quantum of project completed; the payment will be paid for every 10% of the work completed or every three months whichever comes earlier. The quantum of project completed will be determined based on inspection by Papagania.
Clause11: Papagania reserves the right to inspect the project any time during the construction. Zedco will be given at least 24 hours notice of the inspection.
Clause12: Any dispute arising during the execution of the contract will be settled by the courts of law in Papagania.
Clause13: Upon signing, this agreement will be translated into Spanish language, the official language of Papagania. The English and Spanish versions are equally valid and binding. Both must be taken into account when interpreting this agreement.
Clause14: Any notice that is to be given under this agreement must be in writing and must be delivered to the party who is to receive the notice at the address given in clauses 1 and 2 of this agreement.
Clause15(amended): The security for equipment and personnel shall be provided by Papagania army.
Clause16: Signature and Date: _____ (Papagania) _____ (Zedco).

Figure 3 Amended CIG for the Construction Contract Negotiation

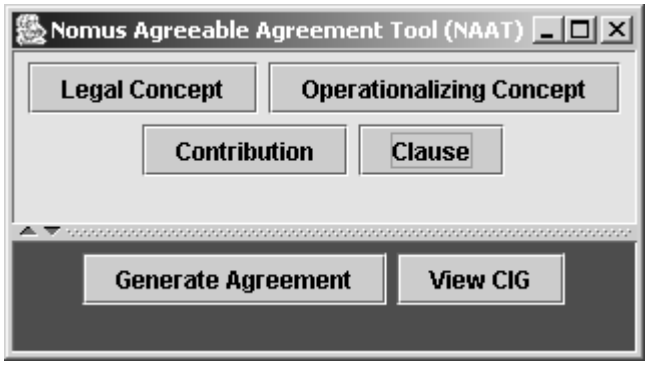

Figure 4 The Main User Interface for
Nomus Agreement Assistant Tool (NAAT)

Protectability [Physical Assets] and Protectability [Personnel]. Clause 15 states: *The security for equipment and personnel shall be provided by Papagania police*, and this is not acceptable (indicated by the BREAK contribution) to Zedco because of the reasons in the attached claim concept which states: *The clause is not acceptable to Zedco since it feels the Papaganian police force is not responsible enough....* The reason for this feeling among negotiators representing Zedco is captured by the supporting claim concept that states: *There have been reports in the Papaganian media about corruption in the police force.* Therefore, the negotiation has to proceed in a direction that will ensure that these BREAK contributions do not exist. For example, the Zedco team may insist that the security for equipment and personnel be provided by the more responsible Papagania army or by an industrial security firm from the USA; the latter may not be acceptable to the Papagania team

since it will involve increased costs to Papagania (affecting the contribution to the legal concept Acceptability [Compensation]) and so the Papagania team may choose to accept a proposal to provide security with its army. This change will be reflected by the amended Clause 15 which now states: *The security for equipment and personnel shall be provided by the Papaganian army*. This modification will be reflected in an amended CIG (Figure 3) and this way CIGs help to keep a historical record of the negotiation progress. Therefore, if any clause does not positively satisfice a legal concept (that is, the contribution to the legal concept is either HURT or BREAK), then based on the reason for the contribution the negotiation can proceed in the direction that addresses this negative contribution. Some give and take during this process may affect other contributions, but overall, this process will help to make sure that all the legal concepts are satisficed positively[37] by the clauses in the agreement. By applying the propagation rules[38] as before to the CIG of Figure 3, we can find that the root legal concept Good [Agreement, Parties] is now satisficed, that is, the agreement is good to both parties.

Another point to note in Figure 2 is that some of the clauses do not make any contribution to the legal

[37] During the negotiation process it must be ensured that at least all the top priority concepts are positively satisficed; some low priority concepts may be unsatisficed if it is acceptable to all parties (this also means that those clauses that do not positively satisfice may not appear in the final agreement).

[38] Given in section A.2 of Appendix A.

concepts. This is because these clauses are usually standard in almost all agreements or because these clauses are not relevant to the legal concept decomposition. In either case, there is no opposition to these clauses being included in the agreement.

VI. SOFTWARE-ASSISTED CAPTURE OF AGREEMENTS

One of the biggest advantages in using Nomus is that several of the steps involved in operating Nomus can be software-assisted. That is, a software program could be developed that will help to keep track of all the issues affecting the negotiation process. This includes CIG development so that one need not draw the CIG using paper and pencil. In order to illustrate this point we developed a software program called Nomus Agreement Assistant Tool (NAAT) to assists the lawyers and legal experts in the following ways:

1. NAAT helps capture the objectives of the parties to the agreement and the decompositions of the objectives.
2. NAAT helps capture the clauses of the agreement and their categories.
3. NAAT helps capture the satisfaction/dissatisfaction of the clauses with respect to the objectives and their decompositions.
4. Based on the above information NAAT automatically generates an agreement that has the

acceptable clauses listed in the form that is acceptable in contracts.
5. NAAT helps view the CIG.

The main user interface for NAAT is shown in Figure 4. There are several other user interfaces for helping perform the above activities. We entered the details of the CIG in Figure 3 and the contract generated by NAAT is shown in Figure 5.

NAAT has been developed using the Java programming language and uses MySQL as the database management system. NAAT runs on the Windows platform.

We would now like to discuss how the NAAT program helps lawyers and legal experts do a better job:

1. The current state of the negotiations can be captured in a CIG and NAAT helps to store and retrieve information about a CIG, which holds all the pertinent information; therefore, the NAAT helps the negotiators to keep track of the current state of negotiation.
2. Lawyers and legal experts do not need to keep any of the factors involved in the negotiation in mind – if they want to develop strategies and tactics, even these can be stored in the form of a CIG and hence in the NAAT program; this gives the negotiators a competitive edge during complex negotiations.

3. The program can help the negotiators view the complete CIG at any time thereby giving them the complete picture of the current state of the negotiations.
4. By changing some of the factors, clauses, and contributions, the negotiators can determine what could happen during the process of negotiation – this way the negotiators could play a "what if" game against the software and choose the best negotiating strategy against their opponents.
5. Of course, students can use the NAAT program to learn the negotiation process by practicing against the software: they could create artificial conditions, clauses, and contributions, and determine what form the contract will take based on these artificial settings; they may then modify these settings and observe what will happen to the agreement. This way, students may practice against the software.

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Construction Contract

THIS AGREEMENT made on 20th April 2005

BETWEEN

Papagania National Copper Shipping Limited, 101 Copper Street, Papaville, Republic of Papagania (or referred to in this agreement as "Papagania")

AND

Zedco Industries Inc., 3300 Avenue of the Americas, New York, New York, USA (or referred to in this agreement as "Zedco")

THE PARTIES agree to the following terms and conditions.

Zedco shall construct three piers (hereinafter called the project) in the PapaBay harbor as per the specifications developed by Papagania. The construction shall be completed within eighteen months from the date the agreement is signed.

Zedco shall construct a warehouse (hereinafter called the project) in the PapaBay harbor as per the specifications developed by Papagania. The construction shall be completed within twelve months from the date the agreement is signed.

Zedco shall procure on behalf of Papagania all equipment needed for the maintenance of the piers and the warehouse upon completion of their respective construction.

Zedco shall train the personnel of Papagania in the maintenance procedures for the piers and the warehouse including the use of any equipment procured for this purpose.

The payment for the services performed by Zedco will be done in installments based on the quantum of project completed; the payment will be paid for every 10% of the work completed or every three months whichever comes earlier. The quantum of project completed will be determined based on inspection by Papagania.

Papagania reserves the right to inspect the project any time during the construction. Zedco will be given at least 24 hours notice of the inspection.

The security for equipment and personnel shall be provided by Papagania army.

Any dispute arising during the execution of the contract will be settled by the courts of law in Papagania.

Upon signing, this agreement will be translated into Spanish language, the official language of Papagania. The English and Spanish versions are equally valid and binding. Both must be taken into account when interpreting this agreement.

Any notice that is to be given under this agreement must be in writing and must be delivered to the party who is to receive the notice at the address given at the beginning of this agreement.

Signature and Date: _____ _____
Papagania Zedco

Figure 5 Agreement Generated
Using the NAAT Software

VII. EVALUATING AGREEMENTS

One of the strengths of Nomus is that it can help generate numerical scores for the extent to which an agreement meets its objectives. This application of Nomus is very similar to the application of Nomus to measure the evolvability of legal personality.[39] Without going into the details of the process, we give the computed scores for the objective of the construction contract, viz., a good agreement, using the CIGs of Figure 2 and Figure 3. Using the single-value metrification scheme given in Section A.3.1 of Appendix A, the metric for the "goodness" of the agreement in the CIG of Figure 2 is 0 (zero), while the metric for the "goodness" of the agreement in the CIG of Figure 3 is 2. This also confirms what we know intuitively, that is, the clauses in the CIG of Figure 3 are more agreeable to the parties than those in Figure 2 and therefore, the CIG of Figure 3 is indeed better. However, the most important advantage of using Nomus to evaluate agreements is that this evaluation can be done during the *process* of negotiation;[40] that is, at any time during negotiation, any side may determine the numeric score for the achievement of its objectives during the negotiation.

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[39] *See* Subramanian, *supra* note 13, at 79.

[40] *See* HERMAN, *supra* note 4, at 142 (This may be contrasted with game theory or economic theory that "focus primarily … on the outcome of negotiations rather than on their process.")

VIII. PLAYING THE COMPETITIVE GAME

The discussions in the preceding sections assumed an "ideal" world in which both parties are open and trust each other. Unfortunately, real world negotiation is usually not this transparent,[41] and we would like to point out that the CIG[42] and the NAAT software program will work equally well in the real world. Here the tool will be used by all the concerned parties separately and each party will be worried only about its own objectives and interests. The various clauses being considered will be evaluated by each party against its goals– sometimes a party may deliberately develop (and/or accept) negatively satisficing clauses (such as HURT or BREAK) ,so that these clauses may be negotiated away for something else subsequently in the negotiation process.[43] Consider the following situation in the CIG of Figure 2: negotiators for Zedco have deliberately permitted the development of the BREAK-contribution clause: *The security for equipment and personnel shall be provided by the Papaganian police force.* The actual intention was

[41] *See id.* at 143, 178 ("(during argumentation phase) attorneys present their positions in the light most favorable to their respective side... [and] seek to discover the "real" position of the other side…"). Also, comment 1 of Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct has commented that "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

[42] When we say CIG we mean the manual development of the CIG; CIGs can be drawn using pencil and paper as well, but the NAAT program automates this activity.

[43] We would like to thank Prof. Vern Walker of the Hofstra University Law School for this enlightening observation.

to increase the price of the contract so that Zedco may bring in its own security personnel. Therefore, during negotiations, the Zedco negotiators may say that:

> the clause relating to security could affect the project completion schedule since we are unable to consider the Papaganian police force reliable based on the media reports of corruption in the police; therefore, if you want us to accept that the security is to be provided by Papaganian police we would have to ask for an increase in price of the contract so that we may arrange for additional contingency insurance, and we will also have to ask for additional time to complete the project so that we may take into account any contingencies.

This means from the Papaganian point of view that the contributions to the legal concepts Completability [Project] and Acceptability [Compensation] could be affected. That is, these contributions could become negative. In order to avoid this situation, the Papagania negotiators may make one or more of the following offers:[44]

> The Papaganian army will provide the protection instead of the Papaganian po-

[44] We are simplifying the whole process for the sake of illustration.

> lice force, or if you (Zedco) choose to bring in your own protection personnel then your personnel will need to register their arms and any intelligence equipment with Papaganian police force as per the laws of Papagania, or if you insist on getting outside security personnel then we will need special permission from our government for any additional increase to the contract price which could delay the start of the project.

In this paper we have indicated that the Zedco team accepts the first of these offers (thereby compromising its intentions) since its security personnel would not have been willing to register themselves with the local police (since Zedco's competitors could possibly "buy" this information from Papagania police) and neither was Zedco willing to delay the start of the project (as this would have meant that payment would have been correspondingly delayed). This way the factors (legal concepts), clauses (operationalizing concepts) and the contributions may be used effectively by either side during the negotiation process. The NAAT program keeps track of the current state of negotiation and eases the job of the negotiators.

IX. CONCLUSIONS

A technique of representing and reasoning about the

process of negotiation will help all concerned parties in the negotiation come to an agreeable agreement. In this paper we propose the use of the Concept Interdependency Graph (CIG) that is part of the Nomus Framework[45] to represent and reason about the process of negotiation. CIG captures pictorially the dialectical reasoning used during the negotiation process. CIG is goal-oriented in that it helps the negotiators towards the goal of agreeable agreement. We show the representation and reasoning capability of CIG by considering a hypothetical agreement developed for a construction project. In addition, CIG helps to automate the process of agreement generation. In order to show this aspect of the CIG we developed the Nomus Agreement Assistant Tool (NAAT), which assists lawyers and legal experts involved in a negotiation reach the goal while at the same time keeping track of all the decisions made. We show how NAAT helped generate the agreement for the construction project. Finally, Nomus can be applied to derive numerical scores for the achievement of the objectives through the agreement and we show the scores for the "goodness" of the construction agreement during negotiation and after acceptance.

The work done in this paper is a bit more "formal" in the Computer Science/Software Engineering/Artificial Intelligence sense and is intended to

[45] *See* Subramanian, *supra* note 13, at 79.

help build a tool to "assist" legal experts during the negotiation phase. However, in our opinion, Nomus is a useful framework through which to represent and reason about the negotiation process during agreement formation and to evaluate whether or not the negotiation process has achieved the objectives of the agreement.

APPENDIX A

Legal Measurement Framework: Nomus

In this appendix, we describe the legal[46] measurement framework, Nomus.[47] Nomus consists of six major

[46] The word "legal" is used in its noun form and not in its adjective form – thus we are not talking about the legality/illegality of a measurement framework; instead we are referring to a framework that can be used to measure different aspects of law.

[47] Nomus refers to the God of Law in Greek Mythology (Nomos, aka Nomus)

components: a set of *concepts* for representing legal qualities such as evolvability of legal personality, operationalizing concepts and claims, a set of *contribution types* for relating concepts to other concepts, a set of *methods* for refining concepts into other concepts, a set of *correlation rules* for inferring potential interactions among concepts, a *labeling* procedure which determines the degree to which an operationalizing concept satisfices a concept, and a set of *metrification schemes* to map labels to numbers. The partial ontology of Nomus is given in Figure A1.

A.1 The Components of Nomus

The six components (or elements) of Nomus are described below:

1. concepts can be of several types: the legal concepts (depicted by a cloud), the operationalizing concepts (depicted by a dark cloud), and the claim concepts (depicted by a dotted cloud). The operationalizing concept represents a legal artifact such as the first generation of legal personality for human beings, while a claim concept represents a claim (for any item of the Framework).
2. Contribution types connect various concepts: the links may connect several concepts to one concept in an AND-decom-position (depicted by single arc) or in an OR-decomposition (depicted

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at: http://www.theoi.com/Daimon/Nomos.html.

by double arc). A concept may also be refined into just one concept ("equal" decomposition).

3. Methods are ways to refine or decompose one concept into offspring concepts for purposes of clarity and achievement of better decomposition.
4. Corelation rules help determine the interactions between different legal concepts for an operationalizing concept.
5. Labels indicate the degree to which their associated concepts (or links) are satisficed (satisficed[48] means satisfaction within limits and not absolute satisfaction): the various satisficing degrees are given in Figure A1. Labels for concepts could be satisficed, denied or unknown; labels for links could be MAKE (strongly positively satisficing), HELP (positively satisficing), HURT (negatively satisficing) or BREAK (strongly negatively satisficing).
6. Metrification schemes map qualitative labels into quantitative scores for a given set of operationalizing concepts. Labels of legal concepts, operationalizing concepts, claim concepts and links, in some combination (either only one of these, any two of these, any three of these or all of these), may be converted to numbers.

Semantically, an AND-decomposition (step 2

[48] Another way of looking at "satisficing" is that it is a more modest form of satisfaction – we do not aim for (and do not expect) perfect satisfaction but are happy to satisfy concepts within a particular range.

above) means that all the children need to be satisficed in order for the parent concept to be satisficed; an OR-decomposition means that satisficing of any one child is sufficient for the parent concept to be satisficed; and an EQUAL-decomposition means a refinement or clarification of a concept into a child concept. Elements 1, 2, 3, and 4, of Nomus help in generating the Concept Interdependency Graph (or CIG). CIGs are a semi-formal graphical representation of the data present in the informal written documents. These CIGs can be used for applying steps 5 and 6 of Nomus. For each legal concept to be measured, a CIG can be generated using steps 5 and 6, Nomus helps in also deriving the numerical score for the concept. The process of CIG creation is discussed in the next section.

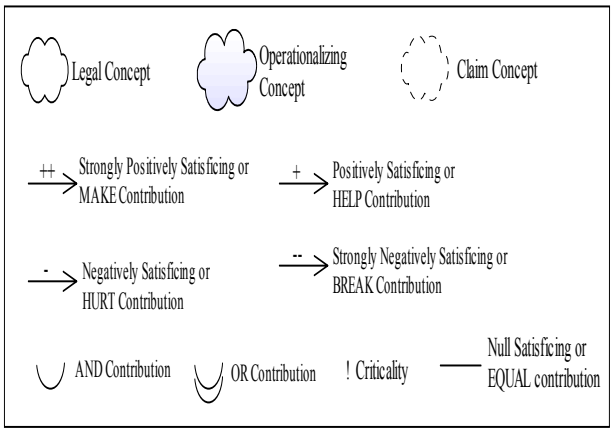
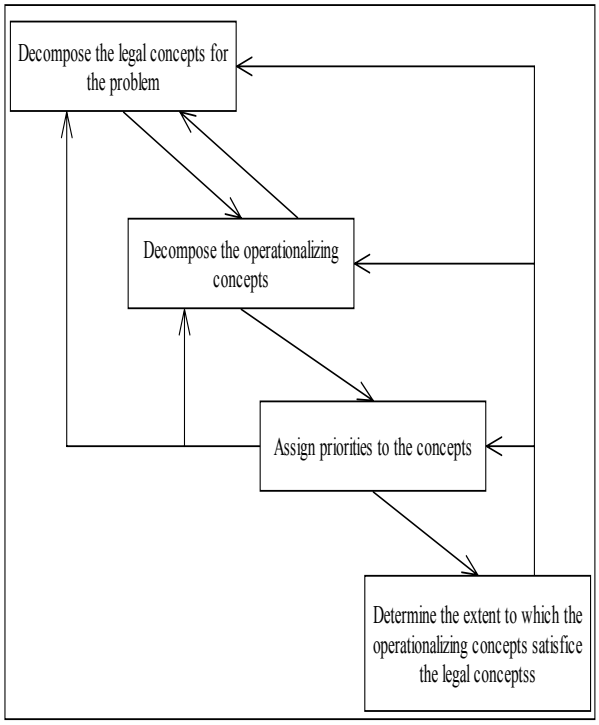


Figure A1 Partial Ontology of Nomus

A.2 Concept Interdependency Graph

The process of generating a CIG (Concept Interdependency Graph) is given in Figure A2. The CIG is a generalization of the SIG (Softgoal Interdependency Graph)[49] to talk about "evolvability" along with other "-ilities/-ities," not necessarily as goals to be achieved. The CIG provides a visual representation of the informal written description and helps to reason about the concepts.



[49] *See generally* CHUNG, *supra* note 21.

Figure A2 Process for Creating the
Concept Interdependency Graph (CIG)

The first step in the development of a CIG is to decompose the legal concept(s) for the problem. A concept is named using the convention Type [Topic1, Topic2], where *Type* is a legal concept (e.g., Good) and *Topic* is the artifact[50] to which *Type* applies (e.g., agreement), and the decomposition can take place along Type or Topic. The decomposition involves refining the legal concept(s) until we are satisfied. The decomposition may be AND-decomposition, OR-decom-position, or EQUAL-decomposition (see element 2 of Nomus in Section A.1). Also, decomposition methods (element 3 of Nomus in Section A.1) could be used for the purpose of legal concept refinement. This decomposition creates the legal concept hierarchy. The next step is to create the operationalizing concept hierarchy by decomposing operationalizing concepts. As mentioned earlier, operationalizing concepts are legal artifacts or systems such as first generation human rights, penal system, or copyright law. These operationalizing concepts may also be decomposed into their constituent concepts: for example, the first generation human rights consist of civil rights and political rights. The decomposition of operationalizing concepts could be AND-, OR-, or EQUAL-decomposition, and decomposition methods

[50] The topic could apply to any aspect of law – it could be for example, the criminal justice system, international law, countries, corporations, or even tangible items such as a law book, a court house, or a prison.

may be used for these concepts (just like legal concepts), as well. The third step in the CIG development is to assign priorities to the different concepts, both legal and operationalizing. Some concepts may be more important for the problem than the others and the important concepts are assigned higher priority. Priorities are indicated by exclamation marks: "!" means high priority. The last step in the CIG creation process is to determine the extent to which the operationalizing concepts satisfice legal concepts. The satisficing could be in four forms: MAKE, HELP, HURT, and BREAK (these are the link labels in step 5 of Nomus). The reasons for choosing one of these types of satisficing are captured by claim concepts; thus, a hierarchy of claim concepts can be created.

All the steps in the CIG creation process are iterative; from any one step we can go back to any other step and modify the CIG. Once we have a CIG we can provide labels (step 5 of Nomus Section A.1) to the concepts; the labels are satisficed, denied, or unknown. Based on the label of an operationalizing concept, the labels may be propagated up the CIG (through the links) to determine the extent of satisficing of legal concepts.[51] This will result in a qualitative evaluation for the legal concepts. Some of the label propagation rules include:

[51] The propagation is accomplished using label propagation rules. Detailed rules are given in: L. Chung, B. A. Nixon, E. Yu, & J. Mylopoulos, NON-FUNCTIONAL REQUIREMENTS IN SOFTWARE ENGINEERING (2000).

R1. If most of the contributions received by a leaf legal concept are positive (MAKE or HELP) then that leaf legal concept is considered satisficed.
R2. If most of the contributions received by a leaf legal concept are negative (BREAK or HURT) then that leaf legal concept is considered denied or not satisficed.
R3. In the case of priority concepts, or when there is a tie between positive and negative contributions, the tie can be broken using either R1 or R2.
R4. In the case of AND-contribution, if all the child concepts are satisficed then the parent legal concept is satisficed; otherwise the parent legal concept is denied.
R5. In the case of OR-contribution, if at least one child concept is satisficed then the parent legal concept is satisficed; otherwise the parent legal concept is denied.
R6. In the case of refinement (only one child) the parent is satisficed if the child is satisficed; and the parent is denied if the child is denied.

These are actually simplified rules for easier understanding of the CIG and its application to agreements. The rules, in reality, should (and can) consider the effect of negative contributions of claim concepts as in Figure 1; therefore, if a MAKE contribution receives a BREAK contribution from a claim concept then that MAKE contribution is weakened into a

negative contribution such as HURT. In reality, such effects of claim concepts need to be considered when evaluating the overall satisficing or denial; however, for purposes of simplicity the propagation rules have been kept to a minimum.

APPENDIX B

Papagania National Copper Shipping Limited[52]

The Republic of Papagania is a small country located in South America. The population is less than one million citizens of widely different racial and cultural backgrounds. It is rich in natural resources, but almost entirely undeveloped. It is one of the poorest countries in the Western Hemisphere. The predominant language is English and its legal system is based on the Common Law. Due to a non-existent infrastructure or skilled work force at the professional level, the new government approached the World Bank for assistance. Encouraged by the USA, the World Bank sent a technical team to Papagania. This team reported back that the best hope for medium-term economic recovery would be to focus on the development of the nation's natural resources, particularly copper, which was present in abundance. The

[52] The idea for this appendix has been borrowed from "Practical Exercise: Negotiation and Drafting of an Arbitration Agreement" by Toby Landau, Development Lawyers Course, International Development Law Institute, *available at* www.idli.org.

World Bank directorate agreed to provide finance of up to one billion dollars to fund the development of a copper-ore mining, processing, and export industry. On the advice of the World Bank, the Papaganian Government created several government-owned corporations for the copper industry and one of them was the Papagania National Copper Shipping Limited (PNCSL), which was entrusted with the job of shipping the copper produced in Papagania to other countries. The CEO of PNSCL was empowered to take all business decisions to improve the profitability of PNCSL and to sign all contracts on behalf of PNCSL. PNCSL was headquartered in the capital city of Papagania, Papaville, at the following address:

> Papagania National Copper Shipping Limited
> 101 Copper Street
> Papaville
> Republic of Papagania

Since PNCSL had no infrastructure to start the shipping business, the board of directors of PNCSL decided that one of the top priorities will be to develop piers at the harbor and a warehouse for storing copper to be shipped. Based on a technical and economic feasibility study conducted on behalf of PNCSL by an international consultancy firm, it was decided that three piers will be needed to achieve the necessary financial growth in the medium term and it was recommended that the piers be located at the nearby PapaBay harbor in Papaville since that land

was suitable for heavy construction and the harbor provided excellent protection from the elements for the ships. The consultancy also estimated the project to cost at least 20 million (US dollars). Based on this survey, the PNCSL received tenders from industrial concerns around the world and the project was provisionally awarded to a US conglomerate called Zedco Industries Inc., subject to the negotiation of a satisfactory contract.

APPENDIX C

Zedco Industries Inc.[53] (ZII) is a US company that specializes in international construction projects. It is headquartered in New York at the following address:

> Zedco Industries Inc.
> 3300 Avenue of the Americas
> New York
> New York, USA.

ZII employs over 1000 people all over the world and is a multi-billion dollar company. ZII bids for tenders all over the world and the CEO of ZII is the officer empowered to sign contracts with a value in excess of $10 million. ZII bid for the tender floated by Papagania National Copper Shipping Limited (PNCSL) and was provisionally selected by PNCSL based on the experience of ZII in successfully executing several similar contracts in the past. The bid

[53] The idea for this appendix has been borrowed from "Practical Exercise: Negotiation and Drafting of an Arbitration Agreement" by Toby Landau, Development Lawyers Course, International Development Law Institute, *available at* www.idli.org.

price of ZII ($15 million), and some covert pressure from the US government through the World Bank, financed this project.

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