

CONTRACTS: AN INTRODUCTION TO A SYMPOSIUM AND A FEW ADDITIONAL THOUGHTS

JENNIFER S. MARTIN*

On February 21, 2014, the St. Thomas University School of Law opened a symposium entitled simply “Contracts” in conjunction with the Ninth Annual International Conference on Contracts hosted by the School of Law. The decision of the *St. Thomas Law Review* to sponsor and conduct a symposium on the simple broad reaching topic of contract law with this esteemed group was a natural decision and exciting opportunity. Contract law has long been a foundation study for students and scholars with a rich history and significance to individuals and businesses alike. Significantly, as reflected by Dr. Roni Rosenberg in his essay in this Symposium, “[c]ontract law is the backbone of civil jurisprudence, and at its center stands the contract itself, in all of its splendor.”¹ Yet, while contract law anticipates a system of “voluntary agreement,” it is one where “[t]he paradigm case involving negotiation is not the only kind of contract that can be valid under the basic commitment to freedom of contract”² It is the necessity of demonstrating “a bargain [made with] free choice or consent”³ that provides the flexibility inherent in contract law, but which also continues to raise different questions regarding consent.

Still, for those who might question, why have a symposium that is broadly casted in a study that is so far reaching? Would it not be better to have a more theoretical symposium topic, such as one on constructions and manipulations in the assent doctrine?⁴ Or, alternatively, a practice-oriented reader might be intrigued by a topic focused on pitfalls in a transactional practice. The other conferences, panels, and symposia that have taken up a wide variety of contractual and transactional topics reveal the robustness of

* Professor of Law, St. Thomas University School of Law, in Miami Gardens, Florida. Professor Martin wishes to thank research assistants Rosario Torres and Monika Woodard for their valuable help with the International Conference on Contracts held at St. Thomas University School of Law on February 21–22, 2014 and in support of this Introduction.

1. See Roni Rosenberg, *The Contract: Between Contract Law and Criminal Jurisprudence*, 26 ST. THOMAS LAW REV. 444, 444 (2014).

2. Margaret Jane Radin, *BOILERPLATE* 3 (2013).

3. *Id.*

4. See John E. Murray, Jr., *Judicial Vision of Contract—The “Constructed Circle of Assent” and Printed Terms*, 26 ST. THOMAS LAW REV. 386 (2014). There is no doubt that an entire symposium could be built around the ideas of Dr. Murray’s paper.

this area and a call for continued reflection.⁵ While other proceedings have at times focused on narrow issues in a more comprehensive fashion, they cannot deal with and take up as a whole the fundamental questions: Why is the study of traditional contract doctrine relevant today? What is its relationship to and dependency on other doctrines and studies? What is the reach of contract law in a globalized market? It is to explore these rich questions that we decided to have a symposium open to all of the topics related to contract law on a global basis. These papers collectively tell a story about the need to examine and consider our application of traditional contract doctrine, particularly in modern transactions.

I. TRADITIONAL DOCTRINE

Autonomy and assent are much debated cornerstones to traditional contract doctrine. The papers in the symposium will not disappoint with their lively analysis and discerning treatment of these areas. Both autonomy and assent are concepts subject to limitations that do not always naturally coincide in specific instances with our understanding of the concepts in a broad sense. The problem is that the autonomous exercise of assent to contract is subject to many understandings, either by the parties themselves or society as a whole, arising from the context of any potential agreement that goes beyond a simple statement of agreement. Ultimately, we find that where, when, and how a contract is made is not always a simple matter of autonomous assent and presents factual and legal difficulties that require significant reflection.

5. See, e.g., *Symposium to Honor Professor Bill Whitford*, 86 *TEMPLE L. REV.* (forthcoming 2014); *Symposium to Honor Professor Chuck Knapp's 50th Year of Law Teaching*, 65 *HASTINGS L. REV.* (forthcoming 2014); Symposium, *Fringe Economy Lending and Other Aberrant Contracts*, 89 *CHI.-KENT L. REV.* 3 (2014); Symposium, *Contracts in the Real World*, 88 *WASH. L. REV.* 1227 (2013); *Regulation in the Fringe Economy Symposium*, 69 *WASH. & LEE L. REV.* 435 (2012); Symposium, *Contract as Promise at 30: The Future of Contract Theory*, 45 *SUFFOLK L. REV.* 601 (2012); Symposium, *Contracts in Context: Identity, Power, and Contractual Justice*, 45 *WAKE FOREST L. REV.* 549 (2010); Symposium, *Promises, Commitments, and the Foundations of Contract Law*, 81 *CHI.-KENT L. REV.* 3 (2006); Symposium, *Fault in Contract Law, "Boilerplate": Foundations of Market Contracts Symposium*, 104 *MICH. L. REV.* (2006); Symposium, *Contracting Out of the Uniform Commercial Code*, 40 *LOY. L.A. L. REV.* 487 (2006); Symposium, *Freedom from Contract*, 2004 *WIS. L. REV.* 777 (2004); *Contracts Symposium*, 2001 *WIS. L. REV.* 525 (2001). For conferences, see Emory Law's Fourth Biennial Conference on Teaching Transactional Law and Skills, entitled "Educating the Transactional Lawyer of Tomorrow," Program available at Emory Law's Fourth Biennial Conference on Teaching Transactional Law and Skills, entitled "Educating the Transactional Lawyer of Tomorrow," and "Making the Fine Print Fair" Symposium, hosted by the Georgetown Consumer Law Society and Citizen Works/FairContracts.org, available at <http://apps.law.georgetown.edu/wbcasts/eventDetail.cfm?eventID=2319>, [<http://perma.cc/VW2D-93KY>] (last visited June 1, 2014).

One problem with the exercise of autonomy to contract goes beyond mere voluntariness and encompasses when, with whom, and on what terms a party can make a contract at all. While we might consider a broad concept of individual autonomy of contract, “we do not have the [autonomous] right to contract . . . with whomever we wish, and on whatever terms, [because] we do not have such a right, in part, by virtue of various civil rights laws.”⁶ To what extent individuals actually enjoy a right to contract was explored in the symposium’s first keynote address delivered by Professor Robin West, Georgetown University Law Center. We were extremely pleased to hear from Professor Robin West, as her scholarship arises primarily from a constitutional law perspective, rather than one focusing more directly on contracts doctrine. Significantly, Professor West argued that an unfettered view of contract economy arises historically “from the now discredited constitutional jurisprudence of the *Lochner* era.”⁷ Rather, individuals enjoy a more limited right to contract that is heavily determined by constitutional jurisprudence that takes into account the civil rights acts and the general obligation of civil society.⁸

Yet, once we leave the general parameters of civil rights, it may become difficult to say precisely what the individual sovereignty and autonomy over contract includes. Surely, the right to contract is also delineated statutorily, whether we’re referring to the nondiscrimination doctrine of the civil rights laws or other laws that may—on a broad or narrow basis—restrict contractual freedoms.⁹ Moreover, at times, the law actually requires parties to enter into contracts, which hardly sounds autonomous.¹⁰ Specifically, the individual’s rights to self-management are limited in operation by those acts which the individual must do, such as purchasing auto and health insurance; and may not do, such as hurting others.¹¹ Indeed, the common law doctrines of misrepresentation, illegality, and duress allow parties a ground for avoidance of contracts made that violate a sense of public policy. Rather, the autonomy we speak of in contract is one that is deep with limitations on the deals made.¹²

A similar observation is set forth by Dr. Rosenberg in his paper in this symposium that explores the intersection of contract law and criminal

6. See Robin West, *The Right to Contract as a Civil Right*, 26 ST. THOMAS LAW REV. 551, 551 (2014).

7. *Id.* at 553.

8. *Id.* at 555.

9. *Id.*

10. *Id.* at 559.

11. *Id.* at 555–56.

12. *Id.* at 560.

law.¹³ Like Professor West, Dr. Rosenberg's work recognizes that parties are not fully autonomous in the formulation or performance of their contracts. While Professor West's work explores the boundaries of autonomy presented by civil rights laws and similar statutory frameworks, Dr. Rosenberg's essay posits that a breach of contractual obligations can also create liability under criminal law as well because of the creation of a duty to act in some cases.¹⁴ He argues that even where parties cannot obtain specific performance of a contract in order to obligate a breaching party to perform, the breach may serve the basis of a legal duty under criminal law where the breaching party has created a risk and assumed certain responsibilities to perform.¹⁵

The first couple of papers in the symposium also explore concepts—like Professor West's discussion of autonomy and Dr. Rosenberg's discussion of duty—that fall squarely within the realm of basic traditional contract doctrine, such as those of assent, third-party beneficiaries, and the parol evidence rule. At first glance, one might be tempted to forgo an exploration of topics, such as the battle of the forms under U.C.C. section 2-207¹⁶ or the parol evidence rule,¹⁷ that are well covered in other sources.

13. See Roni Rosenberg, *supra* note 1, at 444.

14. *Id.* at 454–65.

15. *Id.* at 456–57.

16. See generally, Charles L. Knapp, *Cases and Controversies: Some Things to do with Contracts Cases*, 88 WASH. L. REV. 1357, 1361 (2013) (noting the need for use of cases such as *Brown Machine, Incorporated v. Hercules, Incorporated*, 770 S.w.2d 416 (Mo. Ct. App 1989) to “comprehend or apply” section 2-207); Stephen W. Ranere, Note, *Charting a Course: How Courts Should Interpret Course of Dealing in a Battle-of-Forms Dispute*, 41 SUFFOLK U. L. REV. 671, 672–3 (2008) (noting the frequency of litigation regarding proper application of section 2-207 to instances when the contracting parties have chosen a specific course of dealing to resolve their disputes); Corneill A. Stephens, *Escape from the Battle of the Forms: Keep it Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233 (2007) (criticizing 2-207 for giving rise to inconsistency in the judiciary for resolving battle of the forms disputes due to the ambiguous language of the section); Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the “Material Alteration” Inquiry*, 33 PEPP. L. REV. 501, 502 (2006) (stating one of the major questions left open through section 2-207 is determining exactly which terms would ‘materially alter’ the contract and should thus be ousted from the final terms); Charles M. Thatcher, *The Long Awaited Official Overhaul of U.C.C. Section 2-207: An Essay on the Limits of Improvement*, 51 S.D. L. REV. 296, 306 (2006) (noting an issue with the original section 2-207 is that it allows for one of the contracting parties to have a “substantive advantage” over the other party, looking only at “whether that party ‘fired’ the first or the last ‘shot’ in an exchange of transactional communications”); Giesela Rühl, *The Battle of the Forms: Comparative and Economic Observations*, 24 U. PA. J. INT’L ECON. L. 189 (2003) (analyzing the “battle of the forms” issue on an international level); John D. Wladis, *The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2*, 54 SMU L. REV. 997, 1004 (2001) (discussing the unsuccessful 2001 proposed revisions to the UCC and its attempt to transform 2-207 to “cover only contract terms, not contract formation issues”); John E. Murray, Jr., *The Definitive “Battle of the Forms”*: *Chaos Revisited*, 20 J.L. & COM. 1 (2000) (noting that the confusion behind 2-207

The inclusion of these topics as a subject of contracts discourse is obvious, and if the discussion simply rehashed existing themes in ordinary ways, then it might be tempting to visit other papers in the symposium first. In this case, though, neither the discussants nor the approach to the topics are simply ordinary. Dr. John Murray is the Chancellor and Professor of Law of Duquesne University and author of several complex treatises who has

has stemmed from cases in the 1990's that confused the interpretation as well as continuous transformation of the statute by the National Conference of Commissioners on Uniform State Laws (NCCUSL)); Daniel A. Levin & Ellen Blumberg Rubert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision be Adopted?*, 11 J.L. & COM. 175 (1992) (highlighting the decision by the Uniform Commercial Code Permanent Editorial Board ("PEB") that a major overhaul on 2-207 was due and their consideration of the recommendations made by John E. Murray, Jr.); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815 (1991/1992) (asserting a close reading of 2-207 "reveals it to be a 'puzzling,' 'murky bit of prose' that is a 'statutory disaster whose every word invites problems in construction'").

17. See generally, David G. Epstein, Timothy Archer, & Shalayne Davis, *Extrinsic Evidence, Parol Evidence, and the Parol Evidence Rule: A Call for Courts to Use the Reasoning of the Restatements Rather than the Rhetoric of Common Law*, 44 N.M. L. REV. 49 (2014) (discussing the difference and consistent misuse of the terms extrinsic evidence, parol evidence, and the parol evidence rule); Kathryn Albergotti & Sascha Yim, *He Said She Said: Parol Evidence of Fraud is Admissible to Prove the Invalidity of a Contract—Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 40 WM. MITCHELL L. REV. 135 (2013) (discussing the future widespread effect that *Riverisland Cold Storage, Incorporated v. Fresno-Madera Production Credit Association* will have on relationships and interactions between borrowers and lenders in particular when the court utilized a narrow interpretation of the fraud exception to the parol evidence rule); David G. Epstein, Melinda Arbuckle, & Kelly Flanagan, *Contract Law's Two "P.E.'s": Promissory Estoppel and the Parol Evidence Rule*, 62 BAYLOR L. REV. 397 (2010) (discussing the proper application of the parol evidence rule in cases of promissory estoppel); Margaret N. Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?*, 62 RUTGERS L. REV. 75 (2009) (discussing the regular confusion between the concepts of contract interpretation and the parol evidence rule); Luke L. Stuart, *Electricity and UCC Article 2: A Regulatory and Contractual Pyramid of Mismatched Liabilities*, 40 NO. 2 UCC L.J. ART. 4 (2007) (suggesting that UCC provisions dealing with the parol evidence rule are different than the rule under common law); Peter Linzer, Symposium, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799 (2002) (discussing the evolution of the parol evidence rule throughout the years and the underlying notion behind the doctrine that "words have plain meanings"); Lawrence M. Solan, Symposium, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHL.-KENT L. REV. 87 (2001) (discussing the parol evidence rule and its motivations); Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269 (2000) (weighing in on Judge Richard Posner's contributions to the parol evidence rule doctrine and its ultimate effect on the relationship between judges and juries); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998) (classifying state common law parol evidence rules as either being "hard" or "soft" parol evidence rules); Ferdinand S. Tinio, *Comment note.—The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract*, 40 A.L.R.3D 1384 (1971) (discussing "generally the parol evidence rule as it has been applied in determining the admissibility of extrinsic evidence to establish and clarify an ambiguity in a written contract").

taught and wrote for more than fifty years.¹⁸ Likewise, Professor Joseph Perillo's significant contributions to the field of contracts as a scholar and teacher for more than fifty years is a reflection on the importance of his commentary on third party beneficiaries and the parol evidence rule.¹⁹ Yet, both of these papers add to the literature by inviting us to reconsider in a critical manner when and how we obligate parties to an agreement, lest we obligate some parties to terms not agreed upon and fail to extend contractual benefits to others at all.

In the first paper in the symposium, Dr. John Murray undertakes a critical review of judicial considerations and manipulation of the doctrine of assent under section 2-207 of the U.C.C.²⁰ A central goal of Dr. Murray's paper is to argue for a more restrained analysis of assent more consistent with common law notions of reasonability and materiality. The position he advocates is one that would apply a rigorous filter to material risk—shifting clauses printed in often-ignored boilerplate. Dr. Murray rightfully criticizes many courts that fail to apply the same type of 'practical reasonableness' that they do routinely in other contractual issues, such as interpretation. He attempts to answer a number of key questions that routinely face judicial scrutiny: Which additional terms are actually material and whether 'unfair surprise' or 'hardship' is the result of a material alteration, rather than a criterion? Should a seller's use of the well-known proviso of section 2-207(1) be subject to an express acceptance to avoid reinstating the 'last shot' principle? How should we treat a written confirmation that arrives after the parties have included an oral agreement? When is printed contract language 'additional' or 'different' for purposes of the 'knockout' rule?

18. See John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35 (2012); *What is a "definite and seasonable expression of acceptance" under UCC 2- 207?*, 2011 EMERGING ISSUES 6123 (Dec. 7, 2011); Ken Gormley, *Message from Interim Dean Ken Gormley*, DUQUESNE LAWYER 2 (2009). Some of Dr. Murray's recent work includes, *The Unsettled Nature of "Terms – Later" Contracting*, 2013 EMERGING ISSUES 6895 (Jan. 29, 2013); Symposium, *Article 2: Eliminating the "Battle" and Unconscionability*, 52 S. TEX. L. REV. 593 (2011); *Specific Performance of an Agreement to Agree is an Available Remedy*, 2011 EMERGING ISSUES 5762 (July 20, 2011).

19. The importance of Professor Perillo's work was well-documented in Symposium, *a Tribute to Professor Joseph M. Perillo*, 71 FORDHAM L. REV. 623 (2002). For some of his recent works, see *Restitution Rollout: the Restatement (Third) of Restitution & Unjust Enrichment: Restitution in a Contractual Context in the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1007 (2011); *The Collateral Source Rule in Contract Cases*, 46 SAN DIEGO L. REV. 705 (2009); Symposium, *The Common Law of Contracts as a World Force in Two Ages of Revolution: A Conference Celebrating The 150th Anniversary of Hadley v. Baxendale: Hadley and the Common Law: Origins and Development*, Robert J. Pothier's *Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267 (2005).

20. See Murray, *supra* note 4.

While criticism of section 2-207 is hardly new,²¹ his position draws attention to the notion of assent intended in section 2-207 with respect to ‘unimportant,’ but not with respect to ‘important’ terms.²² While this hardly seems controversial on its face, Dr. Murray effectively argues that courts routinely ignore this distinction when evaluating materiality in a way that relies unduly upon ‘unfair surprise’ or ‘hardship.’²³ The result is a “constructed circle of assent” of contractual clauses that are material, yet may not be surprising.²⁴ Dr. Murray argues that “[t]he absurdity is clear in the uniform view that a disclaimer of implied warranty is a ‘material’ alteration, but all expectation interest remedies for breach of that important warranty can be excised by a boilerplate exclusion making the warranty an empty shell.”²⁵ Yet, the judicial approach to assent, criticized by Dr. Murray, permits the seller to achieve this result because these provisions are somehow immaterial to buyers who are deemed to have assented to them in the way in which they might have to other immaterial boilerplate.

Professor Joseph Perillo also grapples with the application of traditional contract doctrine, but in the context of rights obtained by contractual third-party beneficiaries whose status requires proof of extrinsic evidence. Professor Perillo’s essay largely focuses on the rights obtained by donee beneficiaries, which he defines as all intended third-party beneficiaries who are not creditors.²⁶ Specifically, Professor Perillo notes—without advocating for any particular version of the parol evidence rule—the status of donee beneficiaries should be exempt from the rule entirely. The potential pitfall for the donee beneficiary is that because contracting parties do not frequently reference them in the contract directly, the only way to prove the status as a third-party beneficiary is through extrinsic evidence. Yet, as Professor Perillo points out, the purpose of the parol evidence rule is to exclude any evidence that would vary or contradict the written contract when applicable, which has the potential to exclude recourse for the beneficiaries entirely. Indeed, this position is consistent with the parol evidence rule because donee beneficiaries do not seek to introduce the extrinsic evidence for the purpose of adding to the parties

21. Charles L. Knapp, *supra* note 16; Stephen W. Ranere, *supra* note 16; Corneill A. Stephens, *supra* note 16; Colin P. Marks, *supra* note 16; Charles M. Thatcher, *supra* note 16; Giesela Rühl, *supra* note 16; John D. Wladis, *supra* note 16; John E. Murray, Jr., *supra* note 16; Daniel A. Levin & Ellen Blumberg Rubert, *supra* note 16; Corneill A. Stephens, *supra* note 16.

22. See Murray, *supra* note 4, at 386.

23. See Murray, *supra* note 4, at 398–99.

24. See Murray, *supra* note 4, at 399–402.

25. See Murray, *supra* note 4, at 400.

26. Joseph M. Perillo, *Donee Beneficiaries and by Parol Evidence Rule*, 26 ST. THOMAS LAW REV. 496, 496 (2014).

agreement, but, instead, the evidence is for the purpose of determining who may enforce the contractual obligations.²⁷

In light of the importance of subordination agreements in real estate—lending and security interests generally—I appreciate Professor Perillo’s focus on the nature of donee beneficiaries, particularly in commercial transactions. On the other hand, we should not look at donee beneficiaries in an unfettered manner. If, for instance, a junior lender wants to argue that it is the beneficiary of an agreement between the debtor and a senior lender that future advances will not be made without the approval of the junior lender, is the evidence barred by the parol evidence rule? If not barred by the parol evidence rule, to what extent will this evidence expose the senior lender to litigation by junior lenders who were not identified in the lending agreement? Of course, if Professor Perillo is correct and evidence of such an agreement is not barred by the parol evidence rule, the admission of extrinsic evidence of the subordination agreement does not necessarily prove that the agreement was in fact made, particularly if the senior lender included a no third party beneficiary clause. Hence, the nature of assent comes full circle.

The potential limitations of assent and limitations in relationships with third parties is also the subject of St. Thomas University School of Law second year student Monika Woodard’s article on third party invocation of forum selection clauses.²⁸ Ms. Woodard notes the potential that parties outside of the contract may want to invoke a forum selection clause, particularly in cases where there are related business entities or related issues. While traditional third-party beneficiary doctrine covers some of the parties who attempt to take advantage of the contract’s forum selection clause, the Seventh Circuit’s “affiliation” and “mutuality” approach to nonparty indications extend the potential reach to third parties in these cases. Ms. Woodard’s analysis in the cases of parties that are closely related to the contract again raises potential issues in the lending situation where the debtor may have financing for its operations with multiple lenders, each of which might be subject to its own forum selection clause. Yet, as Ms. Woodard argues, considerations of foreseeability might limit the reach of nonparty enforcement of forum selection clauses. It seems that a new variety of forum selection clauses may be helpful for inclusion in standard boilerplate to resolve this issue, which may raise other

27. *Id.* at 498.

28. Monika L. Woodard, *Ghosts Have Right Too! A New Era In Contractual Rights: Third Party Invocation In Forum Selection Clauses*, 26 ST. THOMAS LAW REV. 467 (2014).

issues of assent and notice that are prevalent points of discussion in other articles of the symposium.

II. THE CHANGING CONTEXT OF CONTRACTING

It is hard to think about contracts without examining the application of traditional doctrine to e-commerce. At the symposium, Amy Schmitz, Professor of Law at the University of Colorado, presented an essay which examines the impediments to dispute resolution in an e-Commerce world, devoid of the personal trustmark of the handshake and marked, instead, by increasing barriers to consumers in terms of remedies for breach.²⁹ While much can be said about Professor Schmitz' essay, of note is her argument that the dependence upon certain consumers in a squeaky wheel system as catalysts that protect uninvolved consumers is illusory due to business pacification of the squeaky wheels that, in essence, undermines a system that presumes those same consumers initiate change and police corporate behavior.³⁰ Professor Schmitz suggests that protection of the business to consumer relationships may depend, among other factors, upon the availability of and access to a reliable and fair consumer complaint process online.³¹

III. CONTRACT DRAFTING AND TECHNOLOGY

The same technological advances that present contracting issues for consumers in e-commerce also reach practicing attorneys and affect the nature of the practice itself, availability of legal services, and client representation. Technological advances will affect the efficiency of attorneys and the very methods by which they draft agreements for clients. The reach and limitations of technology and content structures for one approach to drafting contracts in this new marketplace was illustrated by the Symposium's keynote address delivered by Kingsley Martin.³² We were pleased to hear from Kingsley Martin, an entrepreneur who started a company, KMStandards, which created software to allow attorneys to build model forms from their agreements, and who the American Bar

29. Amy J. Schmitz, *Introducing the "New Handshake" to Expand Remedies and Revive Responsibility in eCommerce*, 26 ST. THOMAS LAW REV. 522 (2014) [hereinafter Schmitz 2014]; see also Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012).

30. Schmitz 2014, *supra* note 29 at 536.

31. *Id.* at 548–50.

32. See Kingsley Martin, *Emergence of Contracts Standards and its Future Impact on Legal Education*, 26 ST. THOMAS LAW REV. 570 (2014).

Association named as one of its Legal Rebels.³³ Mr. Martin's work challenges attorneys to use new technology that will streamline agreement drafting by allowing attorneys to select among optional and required clauses provided by the software for an agreement, thereby allowing them to focus on their practice. Significantly, Mr. Martin argues that the relevant issues in a transaction can be narrowed to a set of optimal outcomes by software which examines available contracts and then provides the attorney with an analysis of contract clauses used by examining the patterns of these agreements. The basic inductive–reasoning–based–approach presented by Mr. Martin can provide attorneys with contract standards for a particular agreement, such as an employment agreement.

In his paper in the symposium, Jeffrey Ritter, a pioneer in shaping rules of information commerce,³⁴ argues that technology and technologists, rather than traditionally practicing attorneys, now lead in the formulation of rules of engagement in a digital world. His paper explores the nature of a quantitative law approach which is not focused on resolution through litigation or the traditional approach to contract drafting.

IV. CONTRACT AS A GLOBAL ISSUE

Contractual issues are global ones, not simply by virtue of the importance of bargains in all societies, but also because they raise multijurisdictional issues subject to varying laws. This is because the contract might occur in or among parties of differing jurisdictions from where the others reside, or the contract itself may be such that it reaches the scope of other regulatory systems. For example, a seller in Austria may ship chocolate to a buyer in London, raising the possible involvement of different contract rules, in terms of formation, performance, and enforcement. In his paper in the symposium, Reza Beheshti, a PhD Candidate in Commercial Law at the University of Leicester, explores the potentially different treatments for remedies arising out of failed transactions for sales of goods under England's Sale of Goods Act 1979³⁵

33. Stephanie Francis Ward, *Simplify Contracts with Software, Says Legal Rebel*, ABA JOURNAL (May 28, 2013), available at http://www.abajournal.com/legalrebels/article/legal_rebel_kingsley_martin, [<http://perma.cc/UN7V-Q8VE>]; Stephanie Francis Ward, *Kingsley Martin's Analysis Software Spots Contract Flaws*, ABA JOURNAL (Sept. 18, 2012), available at http://www.abajournal.com/legalrebels/article/kingsley_martin_a_better_benchmark/, [<http://perma.cc/CE38-JLGR>].

34. See Jeffrey Ritter, *Designing and Constructing Commercial Agreements in the 21st Century*, 26 ST. THOMAS LAW REV. 506 (2014); see also Jeffrey Ritter, BUILDING DIGITAL TRUST: A NEW ARCHITECTURE TO CREATE WEALTH AND GOVERN A WIRED WORLD (forthcoming 2014).

35. Sale of Goods Act 1979, c. 54, §§ 1–54 (U.K.).

(hereinafter “SGA”) and the Proposal for a Common European Sales Law 2011³⁶ (hereinafter “CESL”).³⁷ While remedies can often be a neglected consideration of contracting parties, Mr. Beheshti’s paper draws attention to the potentially different treatments of breaches in terms of mitigation and foreseeability of damages. Ultimately, the time spent to consider the merits and drawbacks of both the SGA and CESL is time that matters to contracting parties, who will draft terms and conditions that reflect the application of the governing structure in these transactions.

V. CONCLUSION

Of course, no single symposium can give you the answer to all current topics on contracts. We do hope that these papers contribute to and advance our continuing discussion of the application and development of contract doctrine.

A number of people deserve thanks for contributing to this undertaking. I was joined by my colleagues, Professors Lenore Ledwon, Marcia Narine, and Ira Nathenson, moderators of various panels during the Symposium. Professor Frank Snyder of Texas A&M School of Law, the founder of the International Conference on Contracts, was an invaluable source of information and assistance in carrying out the work in preparation for the symposium. Douglas Edwards, Juan Matos, and others at the St. Thomas University School of Law Library Department provided support that ensured that we had a smoothly running symposium that reflected the level of academic and intellectual discourse. Lastly, Dean Douglas Ray, Associate Dean Cece Dykas, and the entire St. Thomas University School of Law community provided significant institutional support that allowed the symposium to reflect the high quality of our academic and scholarly environment.

36. *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Brussels, COM (2011) 635 final (Nov. 10, 2011), http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf [hereinafter CESL], [<http://perma.cc/9RVV-9BHH>].

37. See Reza Beheshti, *Comparative and Normative Analysis of Damages Under the SGA and the CESL*, 26 ST. THOMAS LAW REV. 413 (2014).