COOPERATIVE DESIGN LAWYERING: HOW CAN LAWYERS PREVENT DISPUTES THROUGH VALUE INNOVATION?

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Abstract

This article puts forth processes for preventing disputes based on value innovation, an approach referred to as Cooperative Design Lawyering ("CDL"). It suggests that law firms could take a competitive edge by offering Cooperative Design Lawyering services. It explores how legal designers can redefine the value and predictability of a relationship between parties by creating positive-sum interdependence, managing risk allocation and preventing the escalation of eventual disputes. It argues that CDL has the potential to act as a "blue ocean" strategy by targeting unmet needs and delivering value innovation to reach untapped markets. CDL relationship-oriented services capture value and improve predictability to generate fair reciprocal exchanges between parties. CDL is concerned with both risk minimization and increasing value, which can attract new clients for legal services and open new markets for law. This way, lawyers, redefining themselves as legal designers, address the issues of affordability, efficiency, and scope of legal services.

I. Introduction

A shift toward a new business model for the legal profession is called for to face the combined forces of globalization, technology, and market liberalization worldwide. The sustainability of the traditional way of practicing law is at stake. The *Global Pound*

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Conference Series data collected worldwide[1] reveal that party users of commercial dispute resolution view pre-dispute or pre-escalation processes to prevent disputes as the top priority before any processes to improve the future of commercial dispute resolution.[2] Leading academics and practitioners in the field believe that the key to establishing a sustainable competitive legal business model, while addressing access to justice issues, lies in innovation.[3]

This article puts forth processes for preventing disputes based on "value innovation."[4] It suggests that law firms could take a

[1] The Global Pound Conference Series convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016–2017. Aggregated results are available in GLOBAL POUND CONFERENCE SERIES, SHAPING THE FUTURE OF DISPUTE RESOLUTION & IMPROVING ACCESS TO JUSTICE, CUMULATED DATA RESULTS (2016–2017), https://www.globalpound.org/gpc-series-data/#397-gpc-series-final-report (last visited Mar. 17, 2019).

[2] "Pre-dispute or pre-escalation processes" received 51% of respondents' allocated points (3363 points). *Id.* at Session 3, Question 2. There were five categories of stakeholders: (1) party (user of dispute resolution services)—a person or in-house counsel involved in commercial disputes; (2) advisor—an external lawyer or consultant to a party; (3) adjudicative provider—a judge, arbitrator, or organization providing services; (4) non-adjudicative provider—a conciliator, mediator, or organization providing services; and (5) influencer—researcher, educator, representative of government. They answered twenty multiple choice questions by way of selecting their top three options. The first option received 3 points; the second, 2 points; and the third, 1 point, as a way to measure popularity of the options. Each option's score was then accumulated and compared to its highest possible rating and presented in the form of a percentage. Voting was made online through an application. For more information about the methodology, see JEREMY LACK, A SUMMARY OF THE PRELIMINARY GLOBAL POUND CONFERENCE (GPC) DATA IN 2016: TRENDS AND THEMES 1–3 (2016), https://www.imimediation.org/research/gpc/series-data-and-reports/#909-reports. *See also* Thomas D. Barton & James P. Groton, *Forty Years on, Practitioners, Parties, and Scholars Look Ahead*, 24 DISP. RESOL. MAG., Spring 2018, at 9.

[3] "A business process innovation is a new or improved business process for one or more business functions that differs significantly from the firm's previous business processes and that has been brought into use in the firm." OSLO MANUAL 2018: GUIDELINES FOR COLLECTING, REPORTING AND USING DATA ON INNOVATION 34, para. 1.31 (4th ed. 2018), https://www.oecd-ilibrary.org/docserver/9789264304604-en.pdf?expires=1552892203&id=id&accname=guest&checksum=F67E832BCAE46C6640FA70A5FEAB7A51. For an overview of the situation in the United States, see AMERICAN BAR ASSOCIATION, COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), http://abafuturesreport.com/2016-fls-report-web.pdf; CENTER FOR THE STUDY OF THE LEGAL PROFESSION AT GEORGETOWN UNIVERSITY LAW CENTER AND THOMSON REUTERS LEGAL EXECUTIVE INSTITUTE, 2018 REPORT ON THE STATE OF THE LEGAL MARKET (2018), http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/01/2018-Report-on-the-State-of-the-Legal-Market.pdf. For an overview of the situation in Canada, see CANADIAN BAR ASSOCIATION, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA 6, 31–39 (2014), http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf; ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, ACCESS TO CIVIL AND FAMILY JUSTICE: A ROADMAP FOR CHANGE (2013), http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

[4] Value innovatioin is a concept elaborated by authors Kim and Mauborgne. It pursuits differentiation and low cost simultaneously in order to create a leap in value for both buyers and

competitive edge by offering *Cooperative Design Lawyering* ("CDL") services. It explores how *legal designers* can redefine the value and predictability of a relationship between parties by creating positive-sum interdependence, managing risk allocation and preventing the escalation of eventual disputes (Part II).[5] It argues that CDL has the potential to act as a "blue ocean" strategy for lawyers by targeting unmet needs and delivering value innovation to reach untapped markets.[6] CDL relationship-oriented services capture value and improve predictability to generate fair reciprocal exchanges between parties. CDL is concerned with both risk minimization and increasing value, which can attract new clients for legal services and open new markets for law. This way, lawyers, redefining themselves as *legal designers,* address the issues of affordability, efficiency, and scope of legal services (Part III).

II. Cooperative Design Lawyering (CDL): Preventing Disputes Through Value Innovation

Cooperative Design Lawyering services aim to facilitate and sustain collaboration between parties, using contracts as a relational tool. Contracts have been used by lawyers as a legal tool to create rights and obligations, which can be enforceable by the courts if they are not respected by one of the parties. When lawyers assist their client in contract negotiation, they seek to obtain the most favorable terms for their client and put her in an ideal position in the event of a breach of contract by the other party. What lawyers often fail to consider is that contracts can also serve as management tools, which not only delimit legal risk, but also provide opportunities for value creation, successful collaborations,

the company. The company saves costs by eliminating and reducing the factors that an industry competes on, and it raises the value for buyers by creating new elements that are not offered by the industry. W. Chan Kim & Renée Mauborgne, Blue Ocean Strategy: How to Create Uncontested Market Space and Make the Competition Irrelevant 12–18 (1st ed. 2005). For a discussion on how lawyers could offer value innovation services, see Part III below.

5 *Cooperative Design Lawyering* is an application of *Legal Design Lawyering*, a problem-solving framework developed by the authors of this paper to reboot the legal business model. *Legal Design Lawyering* is based on design thinking dynamics involving various cognitive styles, assessment of concrete and abstract realities, and embracing visions of the past, present, and future potential. At the heart of this evolution of lawyering is a reassessment of ways of being (mindset), reasoning (thinking), and doing (methods) related to problem-solving. Véronique Fraser & Jean-François Roberge, *Legal Design Lawyering: Rebooting Legal Business Model with Design Thinking*, 16 Pepp. Disp. Resol. L.J. 303 (2016).

6 *See generally* Kim & Mauborgne, *supra* note 4.

profitability, and competitive advantage.[7] Contracts can also be designed to motivate each party to fulfill their responsibilities; they can be used to share, minimize, and manage risks; they can also prevent problems, and keep problems from developing into disputes.[8] "One way to look at contracts is to see them as *visible scripts*—blueprints, roadmaps or sets of instructions for collaboration."[9]

Cooperative Design Lawyering involves a three-step process starting with an assessment of *interdependence value and trust* (Section II(A)) between parties during an exploration phase preceding any contract. It is a necessary step to share motives for a partnership and look for benefits to reach, as well as an opportunity to build trust. The second phase occurs when parties decide to engage in contractual terms with a *rational risk allocation* (Section II(B)) approach that takes into consideration potential pitfalls to the relationship and provides ahead of time measures to prevent the identified risks from occurring and minimizing their impacts. In the third phase, the *legal designer* helps the parties to agree in advance on the appropriate dispute prevention and resolution processes to put into place to ensure the *early management* of misunderstandings, disagreements, or disputes (Section II(C)). In an ideal world, both parties should be accompanied by a *legal designer* who masters the CDL process. However, the CDL process could nevertheless be successful if only one of the parties is represented by a *legal designer* providing that the lawyer representing the other party is geared toward collaborative lawyering. In summary, CDL is about creating *value innovation*, by driving value up for both clients while simultaneously driving down potential risks and costs for their business relationship. CDL provides added-value legal services.

A. *Interdependence Diligence*

Interdependence diligence assumes that a sustainable relationship lies upon a productive collaboration, which brings fair results

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[7] HELENA HAAPIO & GEORGE J. SIEDEL, A SHORT GUIDE TO CONTRACT RISK 11 (1st ed. 2013). *See also* JEANETTE NYDEN, KATE VITASEK & DAVID FRYDLINGER, GETTING TO WE: NEGOTIATING AGREEMENTS FOR HIGHLY COLLABORATIVE RELATIONSHIPS (2013 ed. 2013).

[8] HAAPIO & SIEDEL, *supra* note 7, at 12. *See generally* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO STATE J. ON DISP. RESOL. 303 (1998).

[9] *Id.* at 11.

to partners considering their respective inputs. This approach is like a due diligence phase usually understood as "the detailed examination of a company and its financial records, done before becoming involved in a business arrangement with it."[10] In Cooperative Design Lawyering services, the difference is that value is determined by each potential partner's motivation and trust in the deal, which are assessed on the basis of instrumental and social connection factors. Instrumental factors refer to material self-interest sustained by incentives, sanctions, and dependence.[11] Social connection factors correspond to internal predispositions driving behaviors and a desire to engage in a relationship.[12] People may be willing to cooperate because of their (individual or shared) beliefs, values, and identification with one another. While the traditional due diligence approach is primarily oriented toward economic parameters (i.e. instrumental factors), in CDL both instrumental and social connection factors are taken into consideration and given equal weight to build a sustainable collaborative relationship.

There are two steps for an interdependence diligence: (1) a value assessment to explore the motivations of the parties to engage in a partnership together and (2) a trust assessment to explore the likelihood of a beneficial and sustainable business relationship (see Figure 1). As every assessment is a psychological judgment subject to cognitive biases, legal designers can play an important role to provide clients with impartial feedback in the negotiation of a partnership deal.[13]

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[10] *Due diligence*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/fr/dictionnaire/anglais/due-diligence (last visited Mar. 17, 2019).

[11] TOM R. TYLER, WHY PEOPLE COOPERATE? 13 (2011).

[12] *Id.* at 31–42.

[13] DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); Mark Simon, Susan M. Houghton & Karl Aquino, *Cognitive Biases, Risk Perception and Venture Formation: How Individuals Decide to Start Companies*, 15 J. BUS. VENTURING 113 (1999); Sveinn Vidar Gudmundsson & Christian Lechner, *Cognitive Biases, Organization and Entrepreneurial Firm Survival*, 31 EUR. MGMT. J. 278 (2013); Alberto Galasso & Timothy S. Simcoe, *CEO Overconfidence and Innovation*, 57 MGMT. SCI. 1469 (2011); Holger Herz, Daniel Schunk & Christian Zehnder, *How Do Judgmental Overconfidence and Overoptimism Shape Innovative Activity?*, 83 GAMES AND ECON. BEHAV. 1 (2014).

FIGURE 1. TWO STEPS FOR AN INTERDEPENDENCE DILIGENCE

Step 1 Value Assessment	*Step 2* Trust Assessment

1. Step 1. Value Assessment: Instrumental and Social Motivations

Value assessment is about looking for reasons to cooperate. Searching for instrumental motives and social connections is the first step of interdependence diligence. *Legal designers* can help clients find the right partner by exploring the global value, i.e. the individual benefits that each partner can attain alone, as well as the mutual benefits that arise from the integration of interests and mutual investment with a collaborator.

Interdependence diligence starts with information gathering on potential partners taking into consideration economic parameters, such as financial records, growth records, as well as social connectors like similarities in managerial approach and a shared vision of corporate social responsibility between operational management individuals (CEOs, CFOs, COOs, etc.) for instance. When positive-sum potential is confirmed, then the *legal designers* should conduct *value assessment workshops* between management officials of each organization. It is worth hiring an impartial third-party facilitator mutually chosen by the parties to conduct the workshops. Since this person will be responsible for executing the procedure, the facilitator should have the necessary mediation skills needed to explore the substantive, as well as the procedural and psychological interests of every potential partner.[14] Such meetings should be confidential considering the strategic information exchanged and the parties should sign a non-disclosure agreement. Discussions are presumably made in good faith and without prejudice. Confidentiality will positively impact the transparency of the discussions between the prospective partners. The facilitator keeps minutes of the meetings highlighting consensus and reservations on crucial topics for the partnership. In the end, each client has a *shared value opportunity document*. This document facilitates

[14] For a definition of interests in the mediation context, see CHRISTOPHER W. MOORE, THE MEDIATION PROCESSES: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (3d ed. 2003); Jean-François Roberge, *Comment diagnostiquer la substance d'un conflit en médiation? [How to Diagnose the Substance of a Conflict in Mediation]*, 1 REVUE DE PRÉVENTION ET DE RÈGLEMENT DES DIFFÉRENDS 35–59 (2003).

informed decision-making on the worthiness of committing to the partnership.

Facilitated workshops are conducted with the purpose of sharing information about the ambitions and capacities of each organization, as well as learning the driving motivators of their officials and their managerial vision and ethics.[15] It is preferable at this point to focus on the big picture rather than on the operational details. The objective here is partnership building. The first meeting should be dedicated to the exploration of the *business environment*; more specifically, to exchange views about existing market boundaries, as well as prospective ones. For instance, relevant information to share might be how each party sees its current market position, identify current and future factors that affect stakeholders in the industry, and how potential partners differ from the competitors in the investment made for future success. If there is compatibility in visions and, in addition, complementarity of knowledge and resources is foreseen between parties, a second meeting may be conducted to start exploring a *partnership strategy*. Looking toward maximizing opportunities and minimizing risks is key to create a "blue ocean" environment and capture a new market open to collaboration instead of trying to increase existing market share.[16]

Kim and Mauborgne suggest that a business should reach beyond existing demand by looking at overlapping commonalities be-

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[15] The value assessment workshop was built upon the concept of "partnering," a dispute prevention process widely used in the construction industry for large infrastructure projects. *See, e.g.*, Stipanowich, *supra* note 8, at 378–84; FRANK CARR, PARTNERING: ALIGNING INTERESTS, COLLABORATION, AND ACHIEVING COMMON GOALS (2010), https://www.cpradr.org/resource-center/toolkits/construction-briefing-partnering/_res/id=Attachments/index=0/CPR-Construction-Partnering-Briefing.pdf; David Ross, *The Use of Partnering as a Conflict Prevention Method in Large-Scale Urban Projects in Canada*, 2 INT'L J. MANAGING PROJECTS BUS. 401 (2009); Gerald S. Clay, Ann L. MacNaughton & John F. Farnan Jr., *Creating Long-Term Success Through Expanded "Partnering"*, 59 DISP. RESOL. J. 42 (2004).

[16] For additional information about blue ocean strategy, see Part III below. KIM & MAUBORGNE, *supra* note 4, at 16–22. Scott Partridge, then Vice President of Global Strategy for Monsanto Company, described the impacts of a conflict management strategy that Monsanto implemented with its competitors and major customers as follows:

> Monsanto also has a very rich history of being involved in a lot of litigation as patent laws were put into place and applied to GMO innovations. Monsanto was very vigorous in protecting those patent rights. Today, through programs we have created and instituted at Monsanto, we have no litigation with any of our competitors. We have no litigation with multi-nationals in our space. We also have no antitrust litigation, and we have had a wealth of it in the first ten or twelve years that biotech was introduced. We have had no significant commercial litigation with any of our major customers, and this is not just in the United States, this is globally.

Scott Partridge, *Session 2: Navigating, Building, and Strenghtening Relationships*, 16 PEPP. DISP. RESOL. L.J. 133, 165 (2016).

tween three distinct tiers of non-customers: people sitting on the edge of the partner's current market (waiting to be persuaded that something better may come along); people refusing to use a partner's current offerings (waiting to be persuaded that one's services are not too expensive or elaborate for their needs); and people who never thought of the partner's services as an option (waiting to be persuaded that their needs were understood and that one's services can fulfill them).[17] It is the capacity of partnership to provide exceptional *utility*, not just novelty, to current non-customers that will make the difference and add global value to the mutual investment between the partners.[18] Exceptional utility services should be clear and easily understandable, get delivered promptly and efficiently, should not require specialized training to use, should not necessitate expensive supplementary services, and should be easily terminated at the end of their usefulness.[19]

2. Step 2. Trust Assessment: Calculus and Identity Predictability

In addition to value assessment, *legal designers* can support clients with a predictability analysis on the likelihood that fair reciprocal exchanges will result from the partnership. Trust is a necessary condition for cooperation.[20] Therefore, legal designers should evaluate to what extent each party will bring input and get their due share of the new value created by the business relationship. *Value assessment* and *trust assessment* are different, but in practice they will often be performed simultaneously. Trust or distrust is built through communications and interpersonal interactions, and its level may vary over time.[21] The *legal designer's* mandate should cover advice on both the global value made available by cooperation and the probability that the partnership will be fair and sustainable.

Trust-building workshops may be efficiently conducted by an impartial third-party facilitator. Their primary objective is to specifically evaluate the trustworthiness between partners. In such

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17 KIM & MAUBORGNE, *supra* note 4, at 103–15.

18 *Id.* at 118–21.

19 *Id.* at 122–25.

20 TYLER, *supra* note 11, at 30–31, 42–43.

21 Roy J. Lewicki & Carolyn Wiethoff, *Trust, Trust Development, and Trust Repair*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Peter T. Coleman, Morton Deutsch & Eric C. Marcus eds., 2000); Jean-François Roberge & Roy J. Lewicki, *Should We Trust Grand Bazaar Carpet Sellers (and vice versa)?*, *in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES, 421–37 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2010).

workshops, the parties are given the opportunity to make a judgment on whether they can expect reciprocal behaviors by evaluating both "calculus-based trust" and "identity-based trust."[22]

Calculus-based trust "is grounded in the assumption that the other will do what they say because (a) they are rewarded for keeping their word and preserving the relationship or (b) they fear the consequences of not doing what they said they would do."[23] An anticipated positive balance in terms of benefits compared to costs lead to a "working partner" relationship driven by the mutual instrumental desire to get rewards and avoid sanctions. The parties can exchange information on their potential input in the partnership in terms of economic resources involved (money, shares, time, human resources, etc.), psychological resources mobilized in the implementation and functioning of the project (personal and family impacts, stress, etc.), as well as commitment from each partner's network (contacts solicited, reputational capital impact, etc.). Therefore, the parties can evaluate the cost of each other's input to the partnership, leading to "calculus-based trust."[24]

Identity-based trust "is grounded in identification with the other's desires and intentions. At this level, trust exists because the parties effectively understand and appreciate each other's wants, desires, and values; this mutual understanding is developed to the point that each party can effectively act for the other."[25] Perceived similarities can also play a role in building trust between potential partners leading to a "friendly partner's" relationship driven by social connectors and the desire to work with compatible people for which they have developed emotional attachment.[26] Facilitated trust-building workshops offer an opportunity for partners, under the guidance of a facilitator and with the support of *legal designers*, to explore common visions and beliefs, shared values, as well as compatible goals and develop quality communication oriented toward understanding. Partners willing to "put themselves in the other's shoes" will be able to make a judgment on trustworthiness based on reciprocal similarity, leading to "identity-based trust." Cooperation will be more reliable and sustainable if both types of trust are developed between partners.

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[22] Roy J. Lewicki, *Trust and Distrust*, *in* THE NEGOTIATOR'S FIELDBOOK 191, 199–201 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

[23] *Id.* at 194.

[24] Roberge & Lewicki, *supra* note 21, at 421–37.

[25] Lewicki, *supra* note 22, at 194.

[26] Roberge & Lewicki, *supra* note 21, at 421–37.

At the end of the interdependence diligence conducted through value assessment and trust-building workshops, the *legal designers* should provide feedback to their clients on the merit of the intended partnership. Their problem-solving competency based on design-thinking cognitive styles (knowing, analyzing, synthesizing, creating) make them acute to understanding the client's past, present, and future situations at both abstract and concrete levels.[27] Advising on a future partnership to be built requires integrative thinking that takes into consideration retrospective and prospective visions about what has real value for the client and is considered a priority.[28]

In the event that clients are not persuaded regarding the benefits or if they are not confident on the realism of the endeavor, the *legal designer* can start the process over with new industry stakeholders to find a better partnership opportunity. There could then be an issue regarding strategic information shared—that is why the workshops are confidential and presumably made in good faith and without prejudice. This, along with the non-disclosure agreement signed by the parties and lawyers, provides some protection against inappropriate use by the parties. If the partners believe that the partnership can bring them worthy value and they trust each other enough to go ahead, the *legal designers* can support their client and negotiate contractual terms on risk allocation and preventive dispute management. The next sections discuss how lawyers providing a *Collaborative Design Lawyering* service can achieve this.

B. *Rational Risk Allocation*

Traditionally, contract risks are shared equitably or on the basis of the relative strengths and bargaining power of the parties. Indeed, as part of his duty to zealously represent their client, the lawyer often seeks to obtain the maximum for their client by attempting to transfer the largest number of risks to the other party. As a result, risk allocation in contracts often reflects the parties' relative bargaining power.

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27 Fraser & Roberge, *supra* note 5, at 305–08.

28 *Id.* For more information about integrative thinking, see ROGER MARTIN, THE OPPOSABLE MIND: HOW SUCCESSFUL LEADERS WIN THROUGH INTEGRATIVE THINKING (2007); JENNIFER RIEL & ROGER MARTIN, CREATING GREAT CHOICES: A LEADER'S GUIDE TO INTEGRATIVE THINKING (2017).

What lawyers often do not realize is that misallocation of risks can act against the interests of the party with superior bargaining power. This can be explained by at least two reasons. First, misallocation of risks creates, from the very beginning, an adversarial relationship between the parties who will be part of a joint venture, a common project, or a long-term business relationship. Sometimes contract terms are presented on a "take-it-or-leave it" basis by the party with the greatest bargaining power, which leaves little choice for the weaker party. However, during the contract performance, the party who felt they did not have a fair deal may experience the need to level the playing field by attempting to recover through creative legal actions or bad faith behaviors what it thought was the legitimate part it was entitled to receive.

Second, when a party bears a particular risk to the contract, it creates incentives for this party to take actions to control or minimize the effects of that particular risk. However, when a risk is misallocated, such incentive is removed, and it thus places the burden on a party which often has little control over the particular risk. When the particular risk materializes, it affects contract performance because the party which had control over the manifestation of the risk is released from the incentive of managing it, and the party to which the risk was shifted cannot control its emergence or its effects. The inability of a party to perform its contractual obligations thus affects the fulfillment of the overall business objectives that the parties were originally seeking when they entered the business relationship. Moreover, the materialization of the misallocated risk increases disputes between the parties because the party to which the risk was unrealistically and unfairly shifted will usually seek release in arbitration or litigation.[29]

The *legal designer* should advise his client to perform a rational allocation of risks when the parties are involved in a long-term contract, partnership, or project, such as a long-term supply contract, an outsourcing relationship, a contract between a producer and a distributor, a franchise relationship, a research and development relationship, a private-public partnership, or a joint venture. Rational allocation of risks has the potential to improve efficiency, promote a more positive working relationship between the parties, reduce the overall cost of the project, minimize the oc-

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[29] James Groton & Robert J. Smith, Realistic Risk Allocation: Allocating Each Risk to the Party Best Able to Handle the Risk 6–7 (2010), https://www.cpradr.org/resource-center/toolkits/construction-briefing-risk-allocation/_res/id=Attachments/index=0/CPR%20Construction%20Realistic%20Risk%20Allocation%20Briefing.pdf.

currence of disputes, and lead to a greater chance for project success.[30]

There are three steps for a rational allocation of risks: (1) the identification of the sources of potential risks; (2) the rational allocation of risks between the parties concerning those that have the highest likelihood of occurring and the greatest potential cost consequences; and (3) the adoption of measures to prevent the identified risks from occurring and minimize their impacts (see Figure 2).[31]

FIGURE 2. THREE STEPS FOR A RATIONAL RISK ALLOCATION

<table>
<tr><th>*Step 1*
Identification of
Potential Risks</th><th colspan="2">*Step 2*
Prioritization and
Rational Allocation of Risks</th><th>*Step 3*
Proactive and Attenuating
Risk Management Measures</th></tr>
<tr><td rowspan="2">Potential risk</td><td colspan="2">Attribution of the risk to
a party or both</td><td rowspan="2">Specific measure to prevent
the occurrence of the risk or
to mitigate its impact</td></tr>
<tr><td>Party A</td><td>Party B</td></tr>
</table>

1. Step 1: Identification of Potential Risks

In the first step, the *legal designers* should help the parties identify the sources of potential risks or disputes that could arise during the entire lifecycle of a project or a relationship. In order to avoid any "blind spots" or to overlook some areas of the relationship, the *legal designers* should organize a workshop to which staff members from both parties and experts with knowledge and experience in all of the fields would participate to contribute to the brainstorming process. At this stage, it could be beneficial to invite the facilitator who conducted the *value and trust assessment workshops*[32] to hold the workshop on potential risk identification. Alternatively, the parties may prefer to get the assistance of a third-party neutral specialized in the partnership's subject matter to benefit from her expertise and knowledge of typical risks that generally occur in this type of contractual relationship. The

[30] These positive effects of rational risk allocation have been found in numerous studies undertaken in the construction industry. *See* CONSTRUCTION INDUSTRY INSTITUTE, IMPACT OF VARIOUS CONSTRUCTION CONTRACT TYPES AND CLAUSES ON PROJECT PERFORMANCE 6 (1986), https://www.construction-institute.org/resources/knowledgebase/knowledge-areas/contracts-(archived)/topics/rt-005/pubs/rs5-1.

[31] James P. Groton, Christopher Honeyman & Andrea Kupfer Schneider, *Thinking Ahead*, *in* THE NEGOTIATOR'S DESK REFERENCE 265, 267–70 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).

[32] *See supra* Section II.A.

identification of potential risks will necessitate foresight from the *legal designers* and all the workshop participants to anticipate the type of issues that are likely to arise.

Once the workshop participants have completed a first phase of brainstorming, they should use a checklist to complete the list of potential issues that they have already identified.[33] A common mistake is to use the checklist at the beginning of the brainstorming session due to the fact that the participants tend to focus their attention exclusively on the areas identified on the checklist. Hence, a checklist used too early can impair the brainstorming process. Checklists can be created on the basis of data collected by organizations containing areas of past claims or disputes and the costs and length that was associated with their resolution as well as their outcome. Such data can help anticipate issues that could arise in a particular context or a relationship. Some industry institutions have developed indexes of potential disputes that parties can use as checklists to ensure that they have anticipated all risks that could occur. For example, the International Association for Contract and Commercial Management ("IACCM") undertakes an annual study to identify the top thirty most frequent causes of a claim or a dispute from a wide range of industries including oil & gas, manufacturing, outsourcing, and information technology.[34]

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[33] INNOVATIVE PROGRAM DELIVERY & U.S DEP'T OF TRANSPORTATION, GUIDEBOOK FOR RISK ASSESSMENT IN PUBLIC PRIVATE PARTNERSHIPS 14–15 (2013), https://www.fhwa.dot.gov/ipd/pdfs/p3/p3_guidebook_risk_assessment_030314.pdf; CONSTRUCTION INDUSTRY INSTITUTE, DISPUTES POTENTIAL INDEX, VERSION 2.0 (2017), https://www.construction-institute.org/resources/knowledgebase/best-practices/disputes-prevention-resolution/topics/rt-023/pubs/sp23-3; JAMES DIEKMANN, MATTHEW GIRARD & NADER ABDUL-HADI, DPI—DISPUTE POTENTIAL INDEX: A STUDY INTO THE PREDICTABILITY OF CONTRACT DISPUTES (1994), https://www.construction-institute.org/resources/knowledgebase/best-practices/disputes-prevention-resolution/topics/rt-023/pubs/sd-101.

[34] The IACCM's 2018 study was based on data collected from over 2,000 organizations. *See* INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT, MOST NEGOTIATED TERMS REPORT—2018 (TOP TERMS) (2018), https://www.iaccm.com/resources/?id=10243&cb=1553069954. The following causes of disputes are found at the top of the list of the 2018 study: (1) Scope and Goals; (2) Responsibilities of the Parties; (3) Price/Charge/Price Changes; (4) Delivery/Acceptance; (5) Service Levels; (6) Performance/Guarantees/Undertakings; (7) Limitation of Liability; (8) Payment; (9) Data Protection/Security/Cybersecurity; and (10) Change Management. Tim Cummins, *Most Negotiated Terms 2018*, COMMITMENT MATTERS BLOG (June 12, 2018), https://blog.iaccm.com/commitment-matters-tim-cummins-blog/most-negotiated-terms-2018. For another example, see CONSTRUCTION INDUSTRY INSTITUTE, DISPUTES POTENTIAL INDEX, VERSION 2.0 (2017).

2. Step 2: Prioritization and Rational Allocation of Risks

The second step is the rational allocation of risks between the parties. Before undertaking the allocation of risks, the *legal designers* should help the parties prioritize the risks to separate the significant risks from the insignificant ones. The prioritization of risks is usually done following a *qualitative risk assessment* based on two factors: (1) the likelihood of a risk occurring; and (2) the cost consequences of it occurring as a percentage of the baseline project estimate. These factors are subsequently assigned qualitative values of "very high," "high," "medium," "low," or "very low" based on the combination of the probability of the risk occurring and its cost consequence (see Figure 3).[35]

FIGURE 3. ESTIMATION OF THE RISK PROBABILITIES AND ASSOCIATED COST CONSEQUENCES[36]

			Cost Consequence				
			Greater than 25%	10% to 25%	3% to 10%	1% to 3%	Less than 1%
	Scale		5	4	3	2	1
Probability	Greater than 70%	5	Very High	Very High	High	High	Low
	40% to 70%	4	Very High	High	High	Medium	Low
	20% to 40%	3	High	High	Medium	Low	Low
	5% to 20%	2	High	Medium	Low	Low	Very Low
	0% to 5%	1	Low	Low	Low	Very Low	Very Low

The *legal designers* should help the parties focus on allocating the risks that are the most significant. How should the risks be allocated between the parties? The central principle of risk allocation is to shift the risk to the party who is in the best position to manage it. There are three generally accepted principles of risk allocation. Firstly, risk should be allocated to the party best able to control the likelihood of the risk occurring. For example, in the context of a construction project carried out by a local government (public party) and a construction company (private party), such as the construction of a new subway station, the cost of construction cost overruns or delays should be borne by the construction company as it is usually the one in charge of the project construction

[35] OFFICE OF TRANSPORTATION PUBLIC-PRIVATE PARTNERSHIPS, PPTA RISK ANALYSIS GUIDANCE 15 (2011), http://www.p3virginia.org/wp-content/uploads/2015/03/PPTA-Risk-Guidance-Document_9.30.2011_Old-Version.pdf; INNOVATIVE PROGRAM DELIVERY & U.S DEP'T OF TRANSPORTATION, *supra* note 33, at 17–18.

[36] OFFICE OF TRANSPORTATION PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 35, at 43.

and has the most expertise in the area. Secondly, a risk should be allocated to the party best able to control the impact of the risk on project outcomes. For example, no party can control the risk of an earthquake occurring. However, by assigning the risk to the party responsible for the design of the project (often the construction company), it is likely that such party will take measures, use techniques or materials which will reduce the damage should an earthquake occur.

Thirdly, a risk should be allocated to the party best able to absorb the risk at lower cost if the likelihood and impact of the risk cannot be controlled. A party's ability to absorb the risk depends on four factors: (1) the extent to which the risk is correlated with the value of its assets and liabilities (for example, there could be a correlation between the demand for a toll road and the strength of the local economy and, therefore, with the value of the government's portfolio of assets and liabilities); (2) its ability to pass the risk on to others (for example, by contracting an insurance against an act of God or buying derivatives to protect the party from changes in interest rates or prices of commodities such as oil); (3) its ability to spread risk among other risk bearers (for example, taxpayers, creditors, or shareholders); and (4) its degree of risk aversion (often related to a party's financial health).[37]

In addition, the *legal designers* should invite the parties to consider partial risk allocation between themselves in certain situations. This could be the case where a party can best manage the occurrence of risk, but the other party can best manage its impact. In the example of the construction of a new subway station, one frequent risk is that the trains could be the object of vandalism. In such case, the government would be in a better position to prevent the risk from occurring by providing additional security (such as police or patrols). However, the construction company could minimize the impact of the risk by building the trains with vandalism-resistant materials. Therefore, by taking measures to ensure that the construction company shares a portion of the financial consequences of the risk, it incentivizes it to take risk mitigation measures that will reduce the potential damage and repair costs.[38]

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[37] Timothy C. Irwin, Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects 56–62 (2007), https://openknowledge.worldbank.org/handle/10986/6638; World Bank, Public-Private Partnerships: Reference Guide Version 3, 142–43 (2017), https://openknowledge.worldbank.org/handle/10986/29052.

[38] Pauline Hovy, Risk Allocation in Public-Private Partnerships: Maximizing Value for Money 2–3 (2015), https://www.iisd.org/sites/default/files/publications/risk-allocation-ppp-maximizing-value-for-money-discussion-paper.pdf.

Similarly, a partial allocation of risk may be advisable to create greater incentives for a party to mitigate a risk. For example, in the context of the construction of a toll road where the construction company is responsible for toll collection, transferring a percentage of the financial consequences to the government may incentivize it to issue fines for non-paid tolls by road users. In the process of risk allocation, the *legal designers* should help the parties to minimize overall transaction costs. An illustration of this principle would be the example where the construction company is responsible for regular wear and tear of the asset, whereas the government bears the costs associated with vandalism or misbehavior. In this example, such a risk allocation could lead to numerous disputes between the parties to determine whether a particular damage was the result of regular wear and tear or vandalism. For that reason, it may be desirable for the parties to agree that any damage under a certain amount of money (for example $500) should be allocated to the construction company, and above this amount, the parties could examine the cause of the damage upon occurrence and allocate the risk accordingly. It would be wise to set up a mechanism in case the parties cannot agree on the cause of the damage, such as the referral of the dispute to an expert or a third party neutral.[39] In that respect, early dispute management measures are discussed further below.

3. Step 3: Proactive and Attenuating Risk Management Measures

Once the risks have been rationally allocated between the parties, the *legal designers* should advise the parties to implement proactive and attenuating risk management measures. The *legal designers* should help the parties brainstorm as to whether one or both of the parties could take measures to prevent a risk from occurring or to mitigate a risk in the event of its occurrence. For example, in the context of the construction of a new subway station, to prevent vandalism from occurring during the operational period, the parties could agree to put into place measures to discourage vandalism, such as the installation of security cameras. An example of an attenuating risk management measure would be the case where, to mitigate the risk of material costs increase due to the rising of oil prices, the parties could agree that one of the parties would buy a hedging product. Alternatively, the parties could

[39] *Id.* at 2–5.

agree upon a formula that would adjust the contract price in the event of an increase in the price of oil.[40]

C. *Early Dispute Management*

Even in a contract where risks have been rationally allocated between the parties, it is possible that disagreements or disputes occur. The *legal designers* should help the parties put into place processes to ensure the early resolution of disputes. Depending on the nature of the parties' commercial relationship, different processes can be applied. The most commonly used are: (1) Issue Resolution Ladder; (2) standing neutrals; and (3) dispute boards.[41]

1. Issue Resolution Ladder

Issues frequently occur during a project involving numerous parties. An issue can be defined as a "disagreement between two or more people."[42] When two persons disagree on an issue, instead of making efforts to move toward a solution, it is frequent that they spend time and effort to convince the other of their arguments. This may cause the two persons to harden their respective positions with the desire to prove that they are right, and that the other person is wrong. The two persons begin to think in terms of black and white. At this point, a dispute has emerged.[43]

In large infrastructure projects, there is often a public and a private party involved. For example, if the dispute arose at a lower management level on a construction site between two persons representing respectively the public and the private party, they may inform higher management levels of the dispute who may, in turn, get involved in the resolution of the dispute. Two problems can arise at this stage. First, the two persons who were originally involved in the dispute may not communicate the same information about the issue to their superiors. Second, several layers of higher management levels from one party may be informed about the dispute, but not those from the other party. For example, the person

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[40] INNOVATIVE PROGRAM DELIVERY & U.S. DEP'T OF TRANSPORTATION, *supra* note 33, at 27.

[41] Groton, Honeyman & Schneider, *supra* note 31, at 271–76.

[42] PARTNERING GUIDELINES MANUAL FOR PARTNERING ON TRANSPORTATION PROJECTS 27 (2008), http://www.transportation.alberta.ca/Content/docType29/Production/PartneringGuidelines.pdf.

[43] FRIEDRICH GLASL, CONFRONTING CONFLICT: A FIRST-AID KIT FOR HANDLING CONFLICT 86–91 (1999).

on the public party side, who was originally involved in the dispute, may only reach out to the project manager. On the other hand, his counterpart from the private party side may inform the project manager, who may contact the operation manager who, in turn, may discuss the issue with the President of the private company. At this point, the President of the private company may reach out to his counterpart on the public party side, such as the Deputy Department Director, who may be hearing about the issue for the first time. Then, the Deputy Department Director may attempt to get the information from the project manager who may already have had some discussions with the project manager on the private party side. This results in broken chains of communications which may lead to lack of trust between the two organizations. What was originally an issue of lower importance between two persons on a construction site can turn into a dispute between the two organizations. Furthermore, a simple issue can hence become the cause of important delays of the construction project leading to cost increase and important waste of time of several people from both the private and the public party's sides.

How to prevent a simple issue from escalating into a major dispute and leading to construction delays and costs increase? One process that has been developed and is frequently used in the construction industry is an Issue Resolution Ladder. The Issue Resolution Ladder is a stepped process that formalizes negotiations over the resolution of issues between parties of a large infrastructure project. The resolution process starts at the lowest practical level for each organization and proceeds up the ladder through the organizations' hierarchies until the issue is resolved. To set up the process, parties identify different levels of issue resolution for which they assign individuals from each side who will attempt to resolve the dispute within a provided specific period of time (see Figure 4).[44]

[44] SAN FRANCISCO PUBLIC WORKS, A MINI GUIDE TO PARTNERING 10 (2016), http://sfpublicworks.org/sites/default/files/Mini%20guide%20to%20partnering%206.23.16%20.pdf; PARTNERING GUIDELINES MANUAL FOR PARTNERING ON TRANSPORTATION PROJECTS, *supra* note 42, at 27.

FIGURE 4. SAMPLE ISSUE RESOLUTION LADDER[45]

Level of Issue Resolution	Public Party (e.g. Awarding City Department)	Private Party (e.g. Contractor)	Time to Elevate
I	Inspector or Resident Engineer	Foreman/Superintendent	1 day
II	Project Manager	Project Manager	1 week
III	Program Manager	Area Manager	1 week
IV	Division Manager	Operations Manager	2 weeks
V	Deputy Department Director	Owner; President	1 week

When an issue arises, it should be assigned to the lowest level of issue resolution as possible. Then, the individuals assigned at each level of issue resolution should set up, as quickly as possible, a special meeting focused on the settlement of the issue. If they cannot resolve the issue within the specified period of time, they must elevate the issue to the next level. At any time, any individual to whom the resolution of the issue has been assigned can decide to escalate the issue to the next level provided that he informs his counterpart that he is escalating the dispute. When an issue is elevated, the individuals should provide a memo for the next level explaining the agreed upon problem, each individual's best ideas for resolving the issue, as well as the areas where the individuals agree or disagree.[46]

If an issue has been elevated to the top level of the ladder without resolution, the parties should move the dispute to a formal dispute resolution mechanism as provided in their contract. There are two types of dispute resolution processes that can favor a speedy resolution of the dispute: standing neutrals and dispute boards.

2. Standing Neutrals

A standing neutral is a trusted neutral expert selected by the parties at the outset of a business relationship who will be available throughout the working partnership to assist in the immediate resolution of problems or disputes.[47] Upon appointment of the stand-

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45 PARTNERING GUIDELINES MANUAL FOR PARTNERING ON TRANSPORTATION PROJECTS, *supra* note 42, at 26, Appendix A.

46 *Id.* at 27.

47 James P. Groton & Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29 ALTERNATIVES TO HIGH COST LITIG. 181, 181 (2011); James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure that also*

ing neutral, the parties should brief him on the nature, scope, and purpose of the business relationship, and provide him with the basic contractual documents that define the relationship. It could be valuable to appoint the facilitator who conducted the *value and trust assessment* workshops and/or the rational risk allocation workshops due to his acute knowledge of the context that led to the establishment of a contractual relationship between the parties. Throughout the relationship, the parties should keep the neutral informed on a continuous basis about the progress of the relationship. He may meet with the parties to learn more about the relationship and get a better sense of it even if there is no dispute.[48] The parties can assign different roles to the standing neutral. He can play the role of a standing mediator[49] to assist the parties in the real-time resolution of any disputes as they arise. He can act as a standing expert who will render an expert opinion about an issue, for example, concerning the cause of a specific damage involving complex technical data or where cost or quality standards could be at issue. The standing neutral can also be appointed as an arbitrator in the context of which he will hold a hearing in which the parties, represented by lawyers, will present their arguments and evidence. The standing arbitrator's decision is binding and enforceable.[50]

Overall, the use of standing neutrals has been proven beneficial at different levels of a parties' relationship. First, a standing neutral contributes to the early resolution of disagreements or disputes due to the fact that he is appointed at the outset of a business relationship, he is available immediately, the facts are fresh to the parties' and witnesses' memories, and he is already familiarized

Can Prevent Disputes, 27 ALTERNATIVES TO HIGH COST LITIG. 177, 177 (2009). For a discussion about the history of the use of standing neutrals, see Stipanowich, *supra* note 8, at 358–62.

48 Groton, *supra* note 47, at 181.

49 Jim Groton, one of the most acknowledged practitioners and authors in the areas of proactive prevention, control, de-escalation, and real time resolution of disputes, advises, however, based on long experience, that the role of mediator should be de-emphasized for the standing neutral: "If parties expect the neutral to act as a mediator, they generally perceive his role as that of a compromiser, and consequently, are tempted to exaggerate their initial positions, hoping for a resolution somewhere in the middle." E-mail from James P. Groton, retired partner of the law firm of Sutherland, Asbill & Brennan LLP, to Véronique Fraser, Assistant Professor of Law, Université de Sherbrooke (Apr. 10, 2018, 02:12 p.m. EST) (on file with authors).

50 Groton & Dettman, *supra* note 47, at 182. For an example of the use of a Dispute Resolution Adviser, who assisted the parties in cooperative problem solving, facilitated discussions, and employed several methods of third-party-assisted dispute resolution, including mediation, minitrail, and expert-fact finding in the context of a Hong Kong construction project in 1991, see Stipanowich, *supra* note 8, at 387–89.

with the parties' relationship. Second, it requires the parties to identify problems early, evaluate their positions realistically, and it discourages game-playing and posturing. Overall, in the long term, it has been found that the use of a standing neutral creates a problem-solving and cooperative subculture between the parties who jointly commit to the early and rational resolution of disputes. Through such a cooperative process, parties tend to develop mutual respect, trust, and confidence in each other.[51]

3. Dispute Boards

Dispute boards are similar to standing neutrals, but they are used predominantly in the construction industry.[52] They consist of a panel of three experts who are appointed at the beginning of the parties' contract. They are provided with all the relevant information and documentation regarding the parties' relationship. In addition, it is common that the experts are required to visit the construction site regularly to be aware of potential problems and talk to the people involved in the project to hear their complaints. The International Chamber of Commerce has drafted and published the *Dispute Board Rules* to provide a comprehensive set of provisions for establishing and operating a dispute board.[53]

When a dispute arises, the parties present the panel with their arguments and evidence and the panel renders a recommendation. If no party has given a written notice to the other party, the recommendation becomes final and binding after the expiration of a period of thirty days of receiving the recommendation. If a party is dissatisfied with the recommendation, it can provide such written notice to the other party and submit the dispute to arbitration or to the competent court. Until the arbitrators or the judge have rendered their final decision or judgment, the panel's recommendation can remain non-binding (this is the particular case of a Dispute Review Board[54]) or temporarily binding (such as in the case of a Dispute Adjudication Board[55]). The parties can also opt for a Combined Dispute Board which, upon a party's request, can make a decision as to whether it will render a non-binding or a binding recommendation based on several factors, including: (1) whether,

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51 Groton, *supra* note 47, at 184–85.

52 Stipanowich, *supra* note 8, at 362–64.

53 ICC DISPUTE BOARD RULES (ICC 2015).

54 ICC DISPUTE BOARD RULES art. 4 (ICC 2015).

55 ICC DISPUTE BOARD RULES art. 5 (ICC 2015). A binding recommendation is referred to as a "Decision" in the ICC Dispute Board Rules.

due to the urgency of the situation or other relevant considerations, a binding recommendation would facilitate the performance of the contract or prevent substantial loss or harm to any party; (2) whether a binding recommendation would prevent disruption of the contract; or (3) whether a binding recommendation is necessary to preserve evidence.[56]

In summary, Cooperative Design Lawyering is a novel approach to collaborative contractual relationship building based on three phases: interdependence diligence, rational risk allocation, and early dispute management. It has the potential to reboot the dominant legal business model by generating innovative preventive legal practices as described in the following section.

III. Cooperative Design Lawyering's (CDL) Potential for Rebooting the Legal Market

Cooperative Design Lawyering (CDL) seems promising as a "blue ocean strategy" to create a new market instead of competing in a "red ocean" with rivals to get a bigger share of the existing market.[57] Most law firms may consider it a fact of business life that the legal market is a red ocean where the rational strategy is to outcompete rivals (metaphorically depicted as sharks). Law firms put a great emphasis on business development: they compete to get clients and the largest accounts. It is conventional wisdom that clients should expect to pay more to obtain high-level legal services. Most accept the value-cost trade-off of a competition-based strategy where greater value for clients comes at a higher price, and reasonable value at a lower price. Law firms may take as a given that this is the price of entry for legal services and still keep offering traditional service delivery. Only the best will succeed in this "tournament of lawyers' game."[58] But all law firms, small and big

[56] ICC Dispute Board Rules art. 6 (ICC 2015).

[57] Kim & Mauborgne, *supra* note 4, at 3–8. Based on empirical data, Professors Kim and Mauborgne found that companies have a greater chance of success (i.e. total revenues and profits) when attempting to create new markets instead of launching new products in line extensions aiming to capture a larger share of the same market segment. *Id.* In the implementation of a *Cooperative Design Lawyering* strategy, some factors might need further consideration, such as cost concerns, enforceability and ethical issues. For a discussion of these potential concerns, see Stipanowich, *supra* note 8, at 394–403.

[58] Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm (1994). In a study of successful large U.S. law firms' transformation over time the authors concluded that it comes from the firms' ability to blend the talents of experienced partners with those of energetic junior lawyers driven by a powerful incentive—the

alike, are now facing major challenges. New competition and new delivery mechanisms, resulting from globalization and liberalization of markets, are emerging. Technology-assisted legal services are constantly improving, becoming increasingly sophisticated and easier to access through portable devices. Even more fundamentally, lawyers face a shift in clients' expectations toward quicker, cheaper, smarter, and more transparent services, as well as their need to be more involved in their dispute resolution and stay connected.[59] In this evolving context, competing for a share of the market with a traditional business model may not be sufficient to sustain high performance. Law firms need to go beyond competing to seize new profits and growth opportunities. This is a call to reinvent legal services in a context where the environment is perhaps riper than ever for disruptive innovations.[60]

The key to a "blue ocean" business strategy is to create value innovation, i.e. driving *costs* down (eliminating or reducing unnecessary or lower impact functions) while simultaneously driving *value* up for buyers (improving and creating greater impact functions).[61] Value innovation (in products or services) occurs whenever companies align innovation with utility, price, and cost benefits for customers.[62] Instead of opposing costs and value, companies that achieve value innovation pursue differentiation and low cost simultaneously. They offer customers features that have not been available before at an affordable price. Dispute prevention services have not been put forth in the traditional legal service offer. To be economically sustainable, law firms, which will lean toward dispute prevention services, will have to orient the whole system to achieve a leap in value for both the clients and themselves. Economies of scale should come into effect over time due to the expertise developed from repeat business. This is a significant shift that needs to be supported by a new marketable service

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race to win "the promotion-to-partner tournament"; however, they predict that the very causes of the spiraling growth of the large law firm may also lead to their demise. *Id.*

59 CANADIAN BAR ASSOCIATION, *supra* note 3, at 6, 20, and 25. For an overview of the situation in the USA, see CENTER FOR THE STUDY OF THE LEGAL PROFESSION AT GEORGETOWN UNIVERSITY LAW CENTER AND THOMSON REUTERS LEGAL EXECUTIVE INSTITUTE, *supra* note 3.

60 For studies on this topic, see *Disruptive Innovations in Legal Services*, OECD (June 2016), http://www.oecd.org/competition/disruptive-innovations-in-legal-services.htm; Center on the Legal Profession, Harvard Law School, 1 DISRUPTIVE INNOVATION IN LEGAL SERVICES (Jan.–Feb. 2015), https://thepractice.law.harvard.edu/issue/volume-1-issue-2/.

61 KIM & MAUBORGNE, *supra* note 4, at 12–18.

62 *See* MICHAEL LEATHES, NEGOTIATION: THINGS CORPORATE COUNSEL NEED TO KNOW BUT WERE NOT TAUGHT 1–4 (2017).

integrated in a business model. We argue that *Cooperative Design Lawyering* is one innovative way to address clients' unmet needs for dispute prevention.

CDL has a value innovation potential because it designs the delivery of services using dispute prevention to reach underserved clients who cannot afford or do not need oversophisticated risk analysis services. The traditional core legal business model is based on legal risk analysis, which has proven to have flaws and limitations in terms of predictability of fair and efficient dispute resolution.[63] Many studies show that a large pool of clients, individuals and businesses, hope for a fair resolution rather than a full-fledged trial, yet, they are not well served by the traditional legal services market.[64] Today's clients also express a need for non-legal support to help them face the "uncertainty, emotions and complexities of a legal process."[65] More specifically, many clients want "access, empathy and personal contact with lawyers who demonstrate a holistic understanding of a client's circumstances and needs."[66] Moreover, a major report by the Canadian Bar Association published in 2014 outlines the need for "respect"—further elaborated upon as "participation in the process" and "a mutual partnership rather than an authoritarian process."[67] This juxtaposes a dramatic

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63 *See* Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. Empirical Legal Stud. 551 (2008). Kiser et al. analysed 2,054 contested litigation cases reported in Verdict Search California between 2002 and 2005 in which the plaintiffs and the defendants conducted settlement negotiations. *Id.* at 556. The study concluded that the risk analysis methodology has poor predictability potential. *Id.* at 586. Indeed, in a majority of 85.5% of the cases, attorneys committed a "decision error," occurring when "either a plaintiff or a defendant decides to reject an adversary's settlement offer, proceeds to trial, and finds that the result at trial is financially the same as or worse than the rejected settlement offer." *Id.* at 563. *See also* Michaela Keet, *Litigation Risk Assessment: A Tool to Enhance Negotiation*, 19 Cardozo J. Conflict Resol. 17 (2017).

64 In the Canadian context, various reports have indicated that approximately 42% of those who do not access legal services identify cost as the primary reason. *See* R. Roy McMurtry et al., Ontario Civil Legal Needs Project, Listening to Ontarians, 32, 39–40 (2010), https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/m/may3110_oclnreport_final.pdf. Legal cost concerns are also evidenced worldwide in a business context, supported by the Global Pound Conference data indicating that participants identified "financial or time constraints" as the "main obstacles or challenges parties face when seeking to resolve commercial disputes" (received 59% of the allocated points). Global Pound Conference Series, *supra* note 1, at Session 3, Question 1.

65 Canadian Bar Association, *supra* note 3, at 20. *See also* Michaela Keet, Heather Heavin and Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 Windsor Y.B. Access Just. 73 (2017).

66 Canadian Bar Association, *supra* note 3, at 20.

67 *Id.*

increase in litigants opting for self-representation compared to those who seek legal advice.[68]

Legal designers challenge affordability, efficiency, and scope of traditional legal services. Legal design law firms may drive *cost* down by reducing time spent on sophisticated risk analysis techniques that seek to predict the results of a trial since more than ninety percent (90%) of judicial cases in North America settle out of court.[69] *Legal designers* diverge from what the other players in the industry offer by offering alternatives to customers, i.e. additional services to assess global value, predict the likelihood of a mutual gain, and put into place the conditions necessary for long-lasting partnerships. *Efficiency* and *scope* are redesigned within a relationship service looking for positive-sum interdependence and trust building between parties. *Cooperative Design Lawyering* services aim at preventing and de-escalating disputes through an assessment of global value in relation to interdependence exploration, an evaluation of risk in a more productive way through rational risk allocation, and early dispute management through the use of real-time dispute resolution processes.

IV. Conclusion

This article proposed a relationship-oriented service, called *Cooperative Design Lawyering*, which could be provided by lawyers to capture global value, improve the predictability of generating fair reciprocal exchanges between the parties, sustain cooperation, and hence prevent disputes. *Cooperative Design Lawyering* involves a three-step process. The first phase is called the *interdependence diligence*, which necessitates an assessment of interdependence value and trust between the parties. The second phase involves the fostering of cooperation between the parties to have them engage in *rational risk allocation* and implement proactive measures to prevent the identified risks from occurring and minimizing their impacts. The third phase consists of the agreement in advance by parties on the appropriate dispute prevention

[68] For a study of self-represented litigants in the Canadian context, see Julie Macfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (2013), https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf.

[69] *See* Julie Macfarlane, The New Lawyer: How Clients are Transforming the Practice of Law (2d ed. 2017).

and resolution processes to ensure the *early management* of misunderstandings, disagreements, or disputes.

This article argued that *Cooperative Design Lawyering* has the potential to reboot the dominant legal business model by generating innovative legal practices. Instead of competing in a "red ocean" where law firms strive to offer oversophisticated legal risk analysis services at high cost the authors suggested that law firms could turn toward a "blue ocean strategy" and target unmet needs. Clients are increasingly seeking processes to prevent or de-escalate disputes and they are moving away from a full-fledged trial. They increasingly expect that lawyers will act as problem solvers and will assist them in developing value-added and sustaining contractual relationships.

In summary, *Cooperative Design Lawyering* services have the potential to create value innovation for clients. It puts forth a cooperative relationship process, which allows both parties to maximize value while simultaneously driving down potential risks and costs of their business relationship. CDL allows lawyers to develop an untapped market by providing added-value legal services aimed at the prevention of disputes.