Networks as Connected Contracts BY GUNTHER TEUBNER, EDITED WITH AN INTRODUCTION BY HUGH COLLINS AND TRANSLATED BY MICHELLE EVERSON [Oxford: Hart Publishing, 2011. 301 pp. Hardcover: £50]

Networks as Connected Contracts is the seventh volume in the International Studies in the Theory of Private Law Series. This series of books "aims to investigate the normative and theoretical foundations of the law governing relations between citizens". The book under review was originally written in the German language by Gunther Teubner, and translated into the English language by Michelle Everson. Hugh Collins, who also provides a substantial introduction spanning some 72 pages, is the editor of the present book. The subject of the book is the business network, which is "a contractual network consist[ing] of a number of independent firms that enter a pattern of interrelated contracts, which are designed to confer on the parties many of the benefits of co-ordination achieved through vertical integration in a single firm, without in fact ever creating a single integrated business entity such as a corporation or a partnership" (at p. 1). The legal problem with business networks is that they do not fit neatly into recognised legal concepts and hence escape easy legal resolution. A paradigm example of a business network is the retail franchise: it is neither a bilateral contractual arrangement (since that ignores the interdependence of the separate franchise agreements), nor a company (since that ignores the general independence of the franchisees from the franchisor). Through the use of an approach known loosely as "sociological jurisprudence", Teubner advances the novel idea of "connected contracts", which he in turn uses to address the legal problems arising from business networks. This book is a synthesis and development of Teubner's earlier works on the same subject.

Perhaps it might be useful to first set out the problems posed by business networks. Teubner claims that ordinary legal conceptions of business networks may sometimes be inadequate to resolve possible problems. While it is possible to analyse individual transactions within the network as discrete contracts (and hence resolvable by normal contractual principles), such an approach does not account for the business relations between remote parties in the network. Neither does such an approach explain the relationship of the network as a whole with external parties. Collins in his introduction raises a general illustration of just such a problem: a retailer may operate a

computerised inventory control, which makes it possible for direct and remote suppliers to deliver replenishment of stock when and where needed. However, whereas conventional contract law will govern the direct contractual relationship between the retailer and its direct supplier, it does not account for the relationships with the more remote suppliers. While it is true that the retailer can sue his direct supplier, who will then seek damages from more remote suppliers up the supply chain, this example illustrates certain unique characteristics of the business network, and how existing law does not *fully* account for them. Three specific problems where conventional law does not adequately explain business networks are (a) loyalty to the network, (b) internal non-contractual liability in networks, and (c) external network liability.

Teubner's solution to these problems is the concept of "connected contracts". Teubner argues that it is possible to use s. 358 of the *German Civil Code (B.G.B.)* as the "original legal concept on which to construct a legal model that more adequately handles networks" (at p. 32). The idea behind the section is that what would otherwise be two independent contracts would be regarded as interdependent for certain purposes. Thus, according to s. 358(3), a contract for the supply of goods and a consumer loan contract are linked, if the loan is used to finance the other contract and both contracts constitute an "economic unit". These interdependent contracts are either effective or ineffective together. For example, if a consumer withdraws from the transaction in question, he will also have the right to cancel the loan arrangement. In the book under review, Teubner uses this starting point to illustrate how the concept of "connected contracts" can be used to solve the three problems associated with business networks, as was outlined briefly earlier on. In order to appreciate the significance of Teubner's work, it might be useful to examine how the common law falls short when confronted with these three problems.

The first problem of loyalty to the network can arise when a party in a franchise (a typical example of a business network) brings an action against another party that the latter has somehow undermined the common purpose of the inter-organisational contract. The reason why such an action may not be resolvable under conventional principles is that, in the absence of an express term, the party bringing the action would have to argue for the breach of an implied duty of good faith in performing the contract. The possibility of implying such a term is doubtful as a matter of common law. Indeed, in the Singapore context, the Singapore Court of Appeal in *Ng Giap Hon v. Westcomb Securities Pte Ltd* [2009] 3 S.L.R.(R.) 518 ("*Ng Giap Hon*") held that there is no implied term (in law) of good faith, even though it may be possible for such a term to be implied in fact. This is primarily because the doctrine of good faith itself is very much a fledging one in Commonwealth contract law (*Ng Giap Hon* at paras. 47–59). Without a proper understanding of the doctrine at a theoretical level, it would certainly be premature to attempt an application of the doctrine in practice. The Singapore Court of Appeal reiterated the correctness of these views in *Chua Choon Cheng v. Allgreen Properties Ltd* [2009] 3 S.L.R.(R.) 724. Of course, implication of a duty of good faith is still possible on the particular facts of the case, but this may be difficult where the franchisor in a franchise simply decides, as a matter of profit maximisation, not to expand the franchise. Its action would certainly deprive the existing franchisees of increased profit margins, but it would be difficult to say that a duty of good faith (even if implied) extends to the franchisor taking steps that might be detrimental to its own business interests. Teubner's proposed solution

to the problem revolves around the "purpose" of the network to distinguish between contractual good faith duties and intensified loyalty duties toward the whole network. These loyalty duties are not the same, however, as similar duties in corporate law. He finds the legal basis for such a solution within the *German Civil Code (B.G.B.)*. Whether such a solution can find application in a common law jurisdiction, however, depends heavily upon statutory recognition of a new legal concept, currently foreign to the common law.

The second problem with business networks identified by the book concerns the business relations between parties to the network who have no direct contractual relationship with each other. Such an example may arise in a franchise. Suppose that a franchisee of a food business fares badly in a hygiene inspection, thereby affecting the businesses of other franchisees. While the guilty franchisee would almost certainly owe some kind of duty (contractual or otherwise) to the franchisor, it is less clear as a matter of common law whether *other* franchisees—who would no doubt have suffered some kind of indirect financial harm—can sue the guilty franchisee. The reason why conventional contract law cannot account for this is because of the doctrine of privity. As is well known, the doctrine provides that a party who is not a party to a contract cannot enforce any rights or obligations that arise under that contract. In the Singapore context, although the *Contracts (Rights of Third Parties) Act* (Cap. 53B, 2002 Rev. Ed.) has done much to relieve the occasional unfairness resulting from strict adherence to the doctrine, it is clear that the common law is not quite prepared to jettison the doctrine of privity. Nor do common law exceptions to the doctrine of privity resolve the problems posed by business networks. Two important exceptions to the general rule that the promisee (the franchisor in the current example, who may then re-compensate the franchisee concerned) can only recover nominal damages for a breach of contract where it has suffered no loss are the so-called "narrow ground" and "broad ground" exceptions. The narrow ground permits the promisee to recover substantial damages on behalf of the third party (here, the franchisee who suffered harm). The Singapore Court of Appeal in *Family Food Court v. Seah Boon Lock* [2008] 4 S.L.R.(R.) 272 ("*Family Food Court*") identified three elements of the narrow ground: chiefly, the Court noted that Lord Browne-Wilkinson's statement of the narrow ground in *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2001] 1 A.C. 518 (H.L.) ("*Alfred McAlpine*") still requires the contemplation on the part of the parties that the proprietary interest in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods. This leaves the application of the narrow ground to the franchise example in some doubt in Singapore. In contrast, the broad ground permits the promisee to recover substantial damages on its own accord on the basis that it is recovering for its own loss. The broad ground has its genesis in Lord Griffith's speech in *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 (H.L.). The Singapore Court of Appeal endorsed the broad ground in both *Chia Kok Leong v. Prosperland Pte Ltd* [2005] 2 S.L.R.(R.) 484 ("*Chia Kok Leong*") and *Family Food Court*. Unlike the multiple understandings of the broad ground in *Alfred McAlpine*, the Singapore courts' comprehension has been more consistent with Lord Griffiths' explication based on general principles of contract law. In *Chia Kok Leong*, the Court reaffirmed the performance interest approach to contractual damages as the foundation of the

broad ground. It also pointed out that the broad ground was not—unlike the narrow ground—concerned with making up for the third party's lack of remedy against the promisee. In the later case of *Family Food Court*, the Singapore Court of Appeal further confirmed this understanding of the broad ground by stating that the narrow and broad grounds are "conceptually inconsistent with each other" (at para. 56), and that the broad ground ought not be labelled an "exception" since it is consistent with the basic principles of contract law (at para. 31). Transposed to the franchise example in the book under review, the difficulty is in arguing that the affected franchisee had some kind of performance interest in the guilty franchisee's contract with the franchisor. Overall, it is clear that this second problem escapes easy resolution via the common law of contract. In this regard, Teubner's solution is to identify extra-contractual obligations, similar to a "derivative action" within a contractual network. Again, the utility of such a concept to the common law is limited at this stage, but undoubtedly provides fertile food for thought.

The third problem with business networks identified is the external liability of the business network as a whole. It is clear that a consumer who has suffered loss caused by an individual member of the network can sue that member directly, but problems arise when that specific action is rendered meaningless because the party at fault is, for example, insolvent. Does the network have any liability to the consumer in such a situation? Again, this problem is not easily resolved under the common law. The common law concept of vicarious liability does not normally govern situations that concern legally independent entities. Indeed, in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 S.L.R. 540, the Singapore Court of Appeal restated the trite principle that vicarious liability concerns only employer-employee situations; it therefore cannot easily account for the relationship between the franchisor and the guilty franchisee. Teubner suggests that a form of network liability must be developed within the connected contracts to resolve problems of external liability of networks. Such liability will not be as broad as corporate liability, but exists only to ensure the transfer of responsibility to other members in the network. As with his solutions to the two other identified problems, this solution may not be as useful—in practical terms—in a common law jurisdiction, but nonetheless provides a good point of comparison.

This review would not be complete without mentioning the excellent introduction in the book under review. Because Teubner's work is premised on German law, it might be difficult reading for the common lawyer. This problem is remedied by a comprehensive and elaborate introduction by Hugh Collins. In his introduction, Collins explains the analysis of business networks in the context of German law and the approach from which Teubner deals with the topic. But, more relevantly for the common lawyer, the introduction also examines how Teubner's concept of "connected contracts" might be of relevance to the common law. In doing so, Collins also explains the common law's shortcomings when applied to the three problems of business networks identified by Teubner (as briefly outlined above). The introduction is itself a very useful explanation and summary of the work, although one should of course read the entire book for a thorough understanding of Teubner's arguments.

In summary, the book under review is highly recommended to those who might be interested in the law of obligations, with a specific emphasis on the law of business organisations. From a narrow compass, the book is helpful towards understanding the

peculiar characteristics of business networks, and the inadequacies of the common law when applied to them. However, the reader should not expect the solutions proposed in the book to have any direct application in a common law jurisdiction, since those solutions are premised on German law and, more broadly, on a legal concept alien to the common law. But therein also lies the real contribution of the book: from both the comprehensive introduction to the main chapters lies an intriguing application of a novel legal concept to an existing business structure, which is itself juxtaposed by an insight into comparative law and sociological jurisprudence. It may not yet be change itself, but is clearly an agent for any future changes to come.

GOH YIHAN
Assistant Professor
Faculty of Law, National University of Singapore