Business Law Transplants and Economic Development:

An Empirical Study of Contract Enforcement in Dakar,Senegal

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ABSTRACT

One of the latest priorities of the current law and development agenda consists in the creation of "investment climates" favoring the development of markets, through the adoption by developing countries of business regulation based on the "best practices" found in richer countries. Despite acknowledgements that the transfer of legal models from one country to another often leads to poor results, the question of the "fit" required between transplanted laws and local environments is either ignored or treated as a technical matter best dealt with by local legal professionals. In the whole process, the point of view of the reforms' end-users, i.e. the firms operating in developing countries, is conspicuously missing.

This dissertation consists in an empirically-based investigation of the impact of business law reform with respect to one of the top priorities identified by the World Bank, i.e. the enforcement of business contracts. In the first part, the assumptions upon which the current reforms are based are examined in the light of contributions from the fields of comparative law, management, economics, sociology and anthropology. Diverse factors – cultural, economic, and structural − hypothesized to account for the limited impact of legal transfers on behaviour are reviewed.

The second part of the dissertation presents and analyses the results of 30 in-depth interviews conducted with small- and medium-sized enterprises operating in Dakar, Senegal. Dakar SMEs are shown to exhibit a very high degree of flexibility in the enforcement of their contracts, with the "quality" of the legal system playing a very minor role in their choice of an enforcement strategy. The general business environment − characterized by the presence of important financial constraints and a high level of uncertainty and interdependence between firms − stands out as the most important determinant of disputing preferences.

In the third part, the implications of the findings for current theories about the role of contract law in development and, more generally, in business relationships, are

discussed. It is suggested that seeing law reform as key to solving Dakar firms' "enforcement problems" misses the point and may create new problems for SMEs, without solving the most pressing issues they face.

RÉSUMÉ

La création d'environnements attrayants pour les investisseurs est récemment devenu une priorité pour les spécialistes du développement, qui conseillent aux pays en voie de développement d'adopter les « meilleures pratiques » d'affaires utilisés dans les pays développés. Bien qu'on reconnaisse que le transfert de modèles juridiques d'un pays à un autre entraîne souvent des résultats décevants, la question du niveau de compatibilité requis entre les modèles transférés et le pays importateur est le plus souvent ignorée ou considérée comme une question technique relevant de la compétence des professionnels du droit locaux. Dans ce processus, pratiquement aucune place n'est faite au point de vue des utilisateurs finaux des nouvelles normes et institutions.

La présente thèse se fonde sur une étude empirique de l'impact de la réforme du droit des affaires relativement en matière d'exécution des contrats. Dans une première partie, les hypothèses sur lesquelles les réformes actuelles se fondent sont examinées à la lumière de contributions provenant de divers champs disciplinaires. Divers facteurs considérés comme expliquant les effets limités des réformes entreprises jusqu'à présent sont présentés.

La deuxième partie analyse le contenu de 30 entretiens en profondeur réalisés auprès de petites et moyennes entreprises de Dakar, Sénégal. Les entretiens révèlent que les PMEs dakaroises font preuve d'une grande flexibilité dans l'exécution de leurs contrats d'affaires, et que la qualité des institutions juridiques et judiciaires joue un rôle peu important dans les décisions qu'ils prennent à cet égard. L'environnement général dans lequel elles opèrent, qui se caractérise par la présence de contraintes financières importantes, un haut niveau d'inceritude et une grande interdépendance entre les entreprises, constitue le facteur le plus important pour expliquer le comportement des entreprises.

La troisième partie de la thèse analyse les implications du travail de terrain effectué pour les théories actuelles sur le rôle du droit des contrats dans le développement économique et les relations d'affaires en général. Elle suggère que

la réforme du droit, loin de constituer une panacée pour les entreprises dakaroises, est susceptible d'augmenter les pressions auxquelles elles font face, sans leur permettre de régler leurs plus importants problèmes.

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TABLE OF CONTENTS

INTRODUCTION

Since the end of the 1980s, the mainstream discourse about development has taken a radical turn. After a decade characterized by the failure of structural adjustment programs and neo-liberal prescriptions to generate growth in the developing world, concepts like "poverty reduction", "good governance", and "rights-based development" emerged as new mantras. One of the most striking phenomena in the development field has been the resurgence of interest in legal institutions. After more than 20 years spent in disrepute, law has now returned to the foreground in development programs built around the concept of the rule of law.

The new "law and development" movement has generally been met with enthusiasm in the policy and academic communities. Formerly conceived as a tool for achieving development, law reform has now become an end in itself.[1] As noted by Davis and Trebilcock, a great deal of the debate now surrounding the use of law in development does not concern the usefulness of law reform, but how such reforms should be pursued,[2] with considerably less attention being devoted to examining the evidence of relationships between a specific type of reform and one or another aspect of development.[3]

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[1] David M. Trubek & Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 1, at 9.

[2] See Kevin E. Davis & Michael J. Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics" (2008) 56 American Journal of Comparative Law 895, for whom "the salience of these controversies reflects the success of optimistic law and development scholarship as an intellectual enterprise" (at 917).

[3] See *e.g.* Kevin E. Davis & Michael J. Trebilcock, "Legal Reforms and Development" (2001) 22 Third World Quarterly 21; Kevin E. Davis, "What Can the Rule of Law Variable Tell us About Rule of Law Reforms?" (2004) 26 Michigan Journal of International Law 141 [Davis, "Rule of Law Variable"]; Frank Upham, "Mythmaking in the Rule-of-Law Orthodoxy" in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment For International Peace, 2006) [Carothers, *Promoting*] 75 [Upham,

One of the issues raised by the skeptics concerns the heavy reliance of policymakers on Western legal models rather than home-grown laws as a basis for reform. The "transplanting" approach taken in the new law and development agenda seems mostly rooted in pragmatic considerations. On the one hand, the current context of market globalization provides particularly powerful incentives for legal harmonization: some degree of regional or international integration is considered advisable as a way to create larger, and thus more attractive, markets, and to relieve producers from the need to adapt their products to different regulatory frameworks; furthermore, the focus put on foreign investement as a leading force in economic development, and the resulting competition among developing countries to attract such investments, directs that legal harmonization be done in line with the rules preferred by the investors in question.[4] The recommendation of the World Bank that developing countries adopt the "best practices" (i.e. the regulatory frameworks) found in developed economies probably constitute the best illustration of this trend.[5] On the other hand, the bulk

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"Mythmaking"].

Boldly stated, arguments for legal reform ultimately seem to rely on crude intuitions that law somehow makes a difference. See *e.g.* Stephen J. Toope, "Legal and Judicial Reform through Development Assistance" (2003) 48 McGill Law Journal 357, at 361 ("[L]legal and judicial reform is both a worthy end in itself and is most probably a means to facilitate other development objectives."). In fact, the World Bank itself recognizes that "many of the assumptions underlying law and justice reform efforts have not been subject to rigorous questioning, theorizing, or testing": World Bank, "Rule of Law and Development", online: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Dec. 10, 2009). Amanda Perry, "Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence" (2000) 49 The International and Comparative Law Quarterly 779, at 784 (citing a World Bank official's admission that the thought that legal reform will have an impact is intuitive).

[4] According to the World Bank, the absence of uniform laws increases the costs incurred by investors in the evaluation of different investment locations, "deterring them from pursuing invesments in countries with unfamiliar arrangements": World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (New York: World Bank and Oxford University Press, 2004), at 181 [World Bank, *WDR 2005*].

[5] See in particular the annual reports titled *Doing Business* published by the World Bank since 2003, which provide a series of indicators designed to provide "an objective basis for understanding and improving the regulatory environment for business": World Bank, *Doing Business 2010: Reforming Through Difficult Times* (Palgrave Macmillan/World Bank, 2009), at v.

transfer of laws is also an economical alternative to their "customization" to varying local conditions, which necessitates skills that are in short supply in developing countries.[6] Yet, however convenient they may be, legal transfers are not unproblematic. In particular, important doubts persist about the capacity of laws designed in a given environment to produce predictable, and desirable, results in a new setting.

A closer look at the current law and development agenda reveals that it fails to give full and adequate consideration to the question of the effectiveness of legal transfers. Although policymakers take care to warn against the bulk export of foreign laws and underline the need to take local conditions into account when devising a reform, these broad statements seem to have a limited impact on reform agendas. In the case of business law, more particularly, the reforms implemented consist essentially in the import of the "best practices" in use in the West, with a minimal degree of adaptation to local circumstances.

The present work emerged out of the author's desire to understand the reasons underlying this failure to take proper account of the issue of the "fit" in business law reform. Among these reasons figures the idea that cultural and social considerations are all but irrelevant in the "rational" world of market exchange, making resort to foreign models unproblematic in business matters. The first main objective of this dissertation was to provide a theoretical and critical examination of this assumption, on the basis of diverse insights about the failure of business law transplants to take root in specific settings.

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[6] See *e.g.* Richard Posner, "Creating a Legal Framework for Economic Development" *The World Bank Research Observer* 13:1 (February 1998) 1, at 6 ("In these circumstances the adoption of a foreign code may be the more sensible move.") See also Brian Z. Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries" in Robert B. Seidman, Ann Seidman & Thomas W. Walde, eds., *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague/Boston: Kluwer Law International, 1999) 145 (proposing the adoption of a "pragmatic approach" to drafting legislation based on the adaptation of foreign models). Political difficulties may also be foreseen in heterogeneous societies: see World Bank, *World Development Report 2002: Building Institutions for Markets* (New York: Oxford University Press (CHECK), 2002), at 7 [World Bank, *WDR 2002*].

The second objective pursued in the dissertation was to assess the capacity of the diverse theories reviewed to account for the situation of a specific legal transfer. This was done by studying the reactions to the OHADA[7] business law reform of a small sample of small- and medium-sized enterprises (SMEs) operating in the capital city of Dakar, Senegal. By providing textured, scarcely available data on African business practices, one major goal of this work was to contribute to bridging the knowledge gap concerning the actual impact of legal reform. The choice of the research setting and population was influenced by the desire to maximize the usefulness of the empirical findings to be made, by selecting a population with respect to which the dearth of data seemed particularly acute. The choice of sub-Saharan Africa − a region that has failed to garner the same levels of interest among researchers as Asia and Latin America and has represented a puzzle for development experts ever since the birth of development − quickly emerged as obvious. It also seemed that the particular needs of SMEs often fail to be taken into account by policymakers more sensitive to large investors, justifying further investigation of the peculiarities of their situation.

This dissertation attempts to tackle a classic comparative law issue – the transferability of law − in a way that differs profoundly from the approaches traditionally taken by legal scholars. First, the emphasis is not put on the normative content of legal transfers and their compatibility with existing legal institutions, but on their actual impact or lack of impact on end-users. Secondly, the impact of the legal norms is not analysed by focusing on the efficiency of the implementation mechanisms put in place, including by measuring levels of knowledge of a law, the "barriers" to its effective application, or the quality of judicial decisions. Rather, this study resorts to a bottom-up approach in which phenomena acquire or fail to acquire a legal character according to how they are perceived by those involved in them. The focus is put on the relationships

[7] OHADA stands for "Organisation pour l'harmonisation du droit des affaires en Afrique de l'Ouest". More information on this initiative is provided in Appendix I.

between the diverse formal and informal modes of ordering at the disposal of legal actors, and the logics behind their choice to apply one set of norms over another in specific situations. The pluralist approach to normativity taken in this work precludes any *a priori* distinction between "law" and "non law", and considers State law as being on an equal footing with other modes of social ordering. The emphasis is then put on the interaction between these modes and the conditions under which certain ones come to take precedence over others. This approach, as well as the current embryonic state of legal scholarship on business practices, account in great part for the profoundly multidisciplinary character of this endeavour.

This dissertation is primarily concerned with the impact of law reform on business practices, with a particular emphasis on the enforcement of business contracts. It should not be construed as an examination of the general relationship between (business) law and development or investment, or of the politics of legal reform programs. Neither does it constitute an evaluation of the state of legal institutions in Senegal. The dissertation aims at departing from "expert views" of the West African economic and legal situation by seeing it through the eyes of the Senegalese entrepreneurs themselves. It can be interpreted as a humble attempt to give a voice to seldom-heard African entrepreneurs about the development of their country and the potential role of law in this process. The rich, qualitative data gathered do not purport to provide a complete and exact picture of the situation prevailing in Dakar. Rather, they are a basis from which to question the impact that the introduction of an 'improved' Western-modelled formal law is likely to have from the perspective of local businesses, and draw hypotheses to be tested in future research.

The dissertation comprises two major parts. In Part I, the historical and theoretical bases of the new law development agenda are first presented, before a review of the relevant literature on the informal and formal norms governing business relations. Contributions from a number of different fields are reviewed in order to examine diverse theories on the norms governing business relationships. They

form three main categories. First, they comprise works influenced by game theory, for which "informal" and "formal" norms are used, and should be assessed, in terms of their capacity to foster cooperation. A second category is composed of studies close to the legal anthropology tradition and emphasizing the "cultural" origins of social norms and the ultimate incapacity of law to modify behaviour in the absence of cultural change. The works belonging to the third category are from the field of economic sociology and look at the ways in which social ties and legal contracts can contribute to or deter cooperative behaviour in business relationships. Part II is devoted to the description of the study undertaken in Dakar and its results. It starts with a description of the research methodology employed, followed by the presentation of the research findings. In Part III, the implications of the findings for current theories about the role of contract law in development and, more generally, in business relationships, are discussed; some policy implications of the research are drawn, and avenues for future research are proposed.

PART I: LITERATURE REVIEW

Chapter 1. Prospects and problems of "law and development"[8]

In both the policy and academic communities, global reform through law has now become an orthodoxy,[9] in which the new mantra is that the "rule of law" is an essential pre-condition for development. In the last fifteen years, a growing number of national and international organizations, including CIDA, USAID and the World Bank, have adopted comprehensive legal reform programs. Western nations, private donors, and international aid agencies have spent billions of dollars into rule of law reforms[10] focusing mostly on three points: the drafting of better laws, the creation of efficient judicial institutions, and the increase of government's compliance with the law.[11] Even though evaluations of these programs have often not been very optimistic, they continue to be seen as a fundamental component of programs aiming at establishing democratic regimes, protecting human rights, promoting economic development and fighting poverty.

The present chapter discusses the main tenets of the current law and development agenda as it pertains to business law. In the first section, the history of the field of "law and development" and the context in which the new agenda was devised is presented. The content of this agenda is then described, before a discussion of the main theoretical weaknesses of the approach taken with respect to business law reform.

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[8] A preliminary version of part of this chapter has been published in Julie Paquin, "Cross-Cultural Business Law Transplants: The Neglected Issue of the "Fit"" (2008) 17 Transnational Law and Contemporary Problems 331.

[9] Bryant G. Garth, "Law and Society as Law and Development" (2003) 37 Law and Society Review 305, at 307.

[10] The World Bank alone reports having spent $2.9 billion dollars on law reform between 1990 and 2006: see David M. Trubek, "The "Rule of Law" in Development Assistance: Past, Present, and Future" in Trubek & Santos, *supra* note 1, 74, at 74 [Trubek, "Development Assistance"].

[11] Thomas Carothers, "The Rule of Law Revival" *Foreign Affairs* 77:2 (March 1998) 95, at 99-100.

A. "Law and development": historical overview

The emergence of "law and development" as a distinct field of knowledge and practice is inseparable from the birth of the notion of "development". "Development theory", in its modern sense, is routinely thought to have emerged in Western thought in the aftermath of World War II.[12] Following the reconstruction of Europe under the Marshall Plan, it seemed appropriate and necessary to turn to the case of the non-European States newly created during the decolonization process. In the context of the Cold War, international "development" was seen as a means to ensure international stability and the proper functioning of the international economic system as well as preventing "underdeveloped" countries from falling into communist hands. This period saw specialists from diverse fields attempting to devise appropriate theories to account for the existence of different development levels among nations.

Lawyers were among the last to jump on the development bandwagon. In the 1960s, specialists from diverse legal sub-fields joined together to form what came to be called the "law and development movement". These new legal experts had no clearly stated theory on which to rest their interventions. They were, according to Friedman, in a curious "twilight world", operating on the basis of unstated assumptions that "some legal systems are not suited to development, or stand in

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[12] However, some have argued that "development" dates as far back as the 19th century, a period when "those who saw themselves as developed, believed that they could act to determine the process of development for others deemed less-developed." (Michael Cowen & Robert Shenton, "The Invention of Development" in Jonathan Crush, ed., *Power of Development* (London: Routledge, 1995) 27, at 28; see also, generally, Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (2002). The notion that colonized peoples were to "develop" under the guidance of their benevolent conquerors was prevalent in the colonial period and, although the term "development" itself shared the ground with others such as "civilization", "evolution", or "progress", it was far from unknown: see *e.g.* the famous notion of "development on their own lines" developed by Lord Lugard in Lord Lugard, *The Dual Mandate in British Tropical Africa,* 5th ed. (London: Frank Cass & Co., 1965). Many of the practices that will later come to be associated with "development theory" were also in use in colonial times, including the provision of international assistance to modernization in the form of capital and expertise. From this perspective, it can be argued that what decolonization entailed then was not the "birth" of development theory as much as its reinvention in a changing international context.

the way of progress, or are archaic, or outdated, or simply unadaptable."[13] Deeply influenced by the "modernization paradigm" that dominated development studies in the 1950s and 1960s, they rested their intervention on "legal liberalism", a concept created on the basis of some of Max Weber's ideas about legal rationality.[14] Under this theory, development was conceived of as a universal process at the end of which all societies were to present the characteristics of Western modern societies, including their economic, political, and legal institutions. In this process, law was to act as a causal factor of development, by putting in place the institutions necessary for change to occur. The adoption of a modern legal framework was seen as essential to development, and "[t]he Third World […] assumed to be doomed to underdevelopment until it adopt[ed] a modern Western legal system."[15]

The first law and development movement was declared dead in 1974,[16] less than 15 years after its birth. During its short and tumultuous life, its proponents passed from an unfettered enthusiasm to a state of crisis that threatened the very existence of the new field. The factors leading to its demise have been well documented.[17] The increasing number of challenges to the dominant

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[13] Lawrence M. Friedman, "On Legal Development" (1969) 24 Rutgers Law Review 11, at 13-14.

[14] See *e.g.* D. M. Trubek, "Law and Development" in Neil J. Smelser & Paul B. Baltes, *International Encyclopedia of the Social and Behavioral Sciences* (Oxford: Pergamon, 2001) 8443.

[15] David M. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development" (1982) 82 Yale Law Journal 1, at 11.

[16] This date corresponds to the publication of an official post-mortem by two of the leading figures of the movement: see David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections of the Crisis in Law and Development Studies in the United States" (1974) Wisconsin Law Review 1062.

[17] See *e.g.* Elliot M. Burg, "Law and Development: A review of the Literature and a Critique of "Scholars in Self-Estrangement" " (1977) 25 American Journal of Comparative Law 492; John Henry Merryman, "Comparative law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement" (1977) 27 American Journal of Comparative Law 457; Maxwell O. Chibundu, "Law in Development: On Tapping, Gourding and Serving Palm-Wine" (1997) 29 Case Western Reserve Journal of International Law 167; Brian Tamanaha, "The Lessons of Law-and-Development Studies" (1995) 89 American Journal of International Law

"modernization theory" figures prominently among them. In the 1970s, external, rather than internal, factors started to dominate in theories seeking to account for the enduring state of 'underdevelopment' of the Third World. The leaders who previously were eager to implement the recommendations of the legal missionaries were increasingly turning to dependency theory and pressing for a new international law of development. As funding for law and development projects dried up, most legal scholars previously involved in the field turned to domestic or international economic relations issues. By the late 1970s, the golden era of voluntary borrowing of legal models graciously provided by Western benefactors was over.

In the 1980s, neo-classical prescriptions came to replace the previously dominant Keynesian model. This period, which was later labelled "the lost decade for development",[18] was characterized by the introduction of structural adjustment programs ("SAPs") imposed to indebted countries by their lenders. Through a combination of short and medium term stabilization measures and policies of State withdrawal from the economic sector, these programs aimed at correcting the ballooning deficits of developing countries, while leaving the operations of the market as free as possible from outside "interference". Loans made to developing countries were conditional on their commitment to reform inappropriate public policies, thus giving international financial institutions great control over a wide range of domestic issues. However, the results achieved by these policy prescriptions proved disappointing in terms of growth rates and macro-economic stability, while leading to widening inequalities and political instability, combined with persistently high levels of poverty.

At the end of the 1980s, the concept of "institutional quality" started to gain prominence in the development sphere. The realization that SAPs carried

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470; Lan Cao, "Law and Economic Development: A New Beginning?" (1997) 32 Texas International Law Journal 545.

[18] Gustavo Esteva, "Development" in Wolfgang Sachs, ed., *The Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books, 1992) 6, at 16.

undesirable social consequences that undermined economic growth suggested, among other factors, that the role played by the State in economic development might not have been properly evaluated. Increasing concerns with the role of government in development culminated in 1989 with the publication of the widely influential World Bank's report titled "Sub-Saharan Africa: From Crisis to Sustainable Growth", which categorically identified the source "underlying the litany of Africa's development problems" as "a crisis of governance."[19] Three years later, the World Bank confirmed this turn by declaring that "good governance is central to creating and sustaining an environment which fosters strong and equitable development, and it is an essential complement to sound economic policies."[20] The table was set for the rebirth of "law and development".

B. The rule of law revival

The new law and development movement arose from the realization by economic development agencies that markets need the right institutional conditions to be in place before they can develop. In David Trubek's words, its reform agenda arose from a "curious amalgam"[21] of the project for democracy developed by the human right movements of the 1970s and 1980s with the market-building project of development experts, under the common umbrella of the "rule of law". In the course of the 1990s and 2000s, the movement evolved somewhat, leading Trubek and Santos to conclude to the recent beginning of a "third moment" in law and development.[22] However, the main characteristic of the "new" law and development agenda remains the combination of a clear recognition of the role of the State in development with a strong commitment to market liberalism and the "Washington consensus". While it is now acknowledged that "[d]evelopment –

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[19] World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, D.C.: World Bank, 1989), at 60.

[20] World Bank, *Governance and Development* (Washington, DC: World Bank, 1992), at 1.

[21] Trubek, "Development Assistance", *supra* note 10, at 86.

[22] Trubek & Santos, *supra* note 1, at 3.

economic, social, and sustainable – without an effective State is impossible",[23] it remains evident that "States should work to complement markets, not replace them."[24] State interventions should contribute to the creation of an appropriate system of incentives allowing private firms to function efficiently. The job of governments is to provide an adequate institutional infrastructure in support of markets, including effective laws and the legal institutions to implement them.[25]

1. The need for formal institutions

Based on the idea that "institutions matter", the new law and development agenda bears the clear imprint of New Institutional Economics (NIE) thinking. NIE developed to address the failure of the neoclassical model to account for persistent and widening disparities in wealth, by highlighting the role played by "institutions" in the process of economic growth. It holds that the neoclassical result of efficient markets is obtained only when it is costless to transact. Rejecting the neoclassical assumptions of perfect information and unbounded rationality, "NIE assumes instead that individuals have incomplete information and limited mental capacity and because of this they face uncertainty."[26] In consequence, they incur transaction costs to gather information, negotiate, monitor, and enforce their property rights and contracts.

This assumption has strong implications for explanations of economic growth. While new institutional economists agree with Adam Smith that economic growth stems from gains from trade and increasing specialization and division of labour, "they do not accept that such gains are automatic or costless […] Societies may not benefit from trade or specialization if the "transaction costs" incurred in the

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[23] World Bank, *World Development Report 1997: The State in a Changing World* (New York: Oxford University Press for the World Bank, 1997), at 15.

[24] *Ibid*.

[25] *Ibid.*, at 18:

[26] Claude Menard & Mary M. Shirley, "Introduction" in Claude Menard & Mary M. Shirley, eds., *Handbook of New Institutional Economics* (Dordrecht: Springer, 2005) 1, at 1.

process of exchange outweigh the benefits of that exchange."[27] Economic growth depends on a reduction of these transaction costs, by changing the institutions that determine them. In other words, the key to economic development is the presence of institutions that provide incentives for people to be productive and creative.

NIE is closely associated with the work of Nobel prizewinner Douglass North, an economic historian whose influence on the development policy and research agendas can hardly be overstated. According to North, institutions "include any form of constraints that human beings devise to shape human interaction"[28] and consist of formal rules as well as informal constraints such as conventions and codes of behaviour. Their role is "to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction"[29] that determines the cost of transacting. The challenge for developing countries is thus to put into place institutions conducive to growth.[30]

According to North, successful economies are characterized by evolution from simple to more complex forms of contracting, following three major stages. At first, the general pattern of exchange was personalized exchange involving a small number of trading partners at a local level. As the scope and size of exchange increased, a pattern of impersonal exchange developed, in which parties were constrained by kinship ties, the exchange of hostages or codes of conduct. Over time, impersonal exchange with third-party enforcement arose as "the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth."[31] Since economic growth requires the development of increasingly sophisticated institutions, and in

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[27] Jean Ensminger, *Making a Market: The Institutional Transformation of an African Society* (New York: Cambridge University Press, 1992), at 18.

[28] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), at 4.

[29] *Ibid.* at 6.

[30] *Ibid.* at 110 ("Third World countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity.").

[31] *Ibid.* at 35.

particular the development of efficient and low-cost contract enforcement mechanisms, North indeed sees in the absence of such mechanisms "the most important source of both historical stagnation and contemporary underdevelopment in the Third World."[32] Although he recognizes that complex exchange can take place by creating a voluntary system of third-party enforcement, he estimates the costs of such a system as prohibitive. In consequence, "[t]hird-party enforcement means the development of the state as a coercive force able to monitor property rights and enforce contracts effectively."[33]

2. Changing institutions through legal reform

North's demonstration that economic development requires the presence of formal contract enforcement institutions does not however entail that the reform of such institutions constitutes an efficient development tool. North readily acknowledges that although "we know a good deal about the institutional foundations of successful development. […] [w]hat is still missing is how to get there."[34] Indeed, his more recent work − which focuses on the complex interdependence between formal rules and informal enforcement mechanisms and norms − underlines the resulting limitation of our ability "to make the system work better".[35]

In order to find support for the use of legal reform for economic development, one has to turn to another leading figure in the development community, Peruvian economist Hernando de Soto, whose 1989 book *The Other Path* has proven a seminal work for law and development proponents. According to de Soto, "[a]ll

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[32] *Ibid.* at 54.

[33] *Ibid.* at 59.

[34] Douglass C. North, "Institutions and the Performance of Economies Over Time" in Claude Menard & Mary M. Shirley, eds., *Handbook of New Institutional Economics* (Dordrecht: Springer, 2005) 21, at 28.

[35] Douglass C. North, "Why Some Countries are Rich and Some are Poor" (2001) 77 Chicago Kent Law Review 319, at 329; Douglass C. North, *Understanding the Process of Economic Change* (Princeton, N.J.: Princeton University Press, 2005).

the evidence suggests that the legal system may be the main explanation for the difference in development that exists between the industrialized countries and those […] which are not industrialized."[36] In consequence, reforming inefficient legal systems should be prioritized in order to drive economic development.

De Soto's conclusions rest on a specific understanding of the nature of what he calls the "informal economy," i.e. those private enterprises operating outside the purview of formal law. According to him, the existence of an informal economy is directly related to the inefficiency of formal institutions: facing the choice between operating under a "bad law" having "an excessive impact on the way in which businesses are run"[37] and doing so informally, entrepreneurs choose on the basis of a "rational evaluation of the relative costs and benefits of entering legal systems."[38] In consequence, "[t]he legal system so far seems to be the best explanation for the existence of informality."[39]

For de Soto, the institutions that "informals" generate to enable economic activity are inefficient substitutes for legally enforceable contracts.[40] From this perspective, the key to both development and the suppression of informality is the adoption of a "good law" that informals would naturally embrace. As to what such a good law should consist of, de Soto advocates the formalization of informal norms, which have two major advantages: they are efficient, as "shown

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[36] Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989), at 185.

[37] *Ibid.* at 151.

[38] *Ibid.* at 185.

[39] *Ibid*.

[40] For example, the measures aiming at minimizing contractual risks and increasing compliance with contracts, such as investing in long-term friendship, investigating new partners, diversifying sources of supply and sales in order to spread risk, and relying on reputation-based constraints and private associations to enforce contracts, require time and effort that could be spent on more productive activities and lead to inefficiency. In addition, by creating barriers to entry for newcomers with no established reputation, they prevent firms from concluding possibly more advantageous bargains. See *ibid.*, at 165-67.

by the fact that they are widely observed"[41] and they are "rooted in people's beliefs" and "thus more likely to be obeyed and enforced."[42]

3. Reforming through legal transfers

Although some of de Soto's ideas have taken deep root in the development community, his conclusion that legal reform should aim at "formalizing" existing informal institutions has generated some controversy in academia[43] and failed to become a standard policy recommendation. Rather than the formalization of home-grown informal institutions, the law and development agenda advocates for the introduction of foreign models, more or less extensively "adapted" to local conditions. As the World Bank acknowledges, "[d]espite widespread academic debates whether legal transplants are possible at all, they are common practice."[44]

One of the challenges faced by the new orthodoxy is to provide satisfactory answers to concerns about the potential of such transfers to "take root" and work as expected in their new milieus, and resolve the underlying tension between the benefits of legal harmonization and the need to customize harmonized laws in order to make them efficient. This tension is clearly palpable in the "investment climate" ("IC") strategy developed by the World Bank.

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[41] *Ibid.* at 245.

[42] *Ibid.* at 259.

[43] See *e.g.,* Davis, Kevin E., "The Rules of Capitalism" , Book Review of *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* by Hernando De Soto (2001) 22 Third World Quarterly 675; See also the debate between Cooter and Trebilcock in Michael Bruno & Boris Pleskovic, eds., *Annual World Bank Conference on Development Economics 1996* (Washington, D.C.: World Bank, 1997): Robert D. Cooter, "The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development" in Michael Bruno & Boris Pleskovic, eds., *Annual World Bank Conference on Development Economics 1996* (Washington, D.C.: World Bank, 1997) 191

[44] http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20759640~menuPK:2035153~pagePK:210058~piPK:210062~theSitePK:1974062,00.html (last visited on Jan. 17, 2007).

The IC strategy focuses on the role of private actors in the development process, and holds that "the contribution firms make to society is mainly determined by the investment climate".[45] In consequence, "improving the investment climate is the first pillar of the World Bank's overall development strategy."[46] The question then becomes of determining what constitutes a "good investment climate" and how to create one. The Bank proposes that this can be done by adopting a "benchmarking" approach putting developing economies in direct competition with each other to attract investment. For this purpose, the Bank uses different kinds of data[47] as "building blocks" to draw Investment Climate Assessments (ICAs) of specific countries. As to the series of annual reports titled "Doing Business", it investigates the regulations that enhance or constrain business activity, with a view to comparing the business environments of different countries on the basis of new qualitative indicators used to analyse economic outcomes.

As stated in the first report of the Doing Business series, published in 2003, the project has four objectives: [48] motivating reform through country benchmarking,[49] informing the design of reforms by backing indicators with an extensive description of regulations, enriching international initiatives on development effectiveness, and informing theory. Comparing regulation in poor and rich

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[45] World Bank, *WDR 2005, supra* note 4, at 1.

[46] *Ibid.* at 3.

[47] These include the Investment Climate Surveys, expert surveys conducted in the course of the Doing Business project, information on political and social conditions, and external evaluations such as the Credit Risk International, Institutional Investor, and World Economic Forum ratings. See *ibid.* at 144.

[48] World Bank, *Doing Business in 2004: Understanding Regulation* (Washington: World Bank /Oxford University Press, 2004), at ix-x [World Bank, *Doing Business 2004*].

[49] See http://rru.worldbank.org/PapersLinks/Benchmarking-Business-Environment (last visited Jan. 17, 2007) ("[b]enchmarking involves identifying best practice and applying procedures that have led to such practices. […] Benchmarking the investment climate involves comparing a country with competitors in terms of various factors that affect investment decisions. These include specific aspects of public administration […] Countries are also compared in terms of qualitative factors that affect investment decisions, such as their perceived readiness to receive foreign direct investment, the willingness of the workforce, and "business-friendliness.").

countries, the report makes clear that good regulation means less regulation for poor countries, whose generally heavier regulation leads businesses to operate in the informal economy.[50] In contrast, rich countries present the "best practices in business regulation, meaning regulation that fulfills the task of essential controls of business without imposing an unnecessary burden."[51] In other words, best practice regulators are those who regulate the least and protect property rights the most.[52] There is, however, some good news for developing countries: "[m]any times what works in developed countries works well in developing countries, too, defying the often used saying, 'one size doesn't fit all.'"[53] And, even though some "good practices" devised in rich countries might be hard to transfer to poorer ones, "in such instances, developing countries could simplify the models used in rich countries to make them workable with less capacity and fewer resources."[54]

By relying on quantitative indicators such as the number of days or steps required to start a business or to recover overdue payments, the benchmarking approach allows for the ranking of countries using seemingly objective criteria related to efficiency. But attempts to account for differentials between countries can also lead to controversial results. For example, following Rafael La Porta and other economists deeply involved in the Doing Business project,[55] the World Bank now asserts that legal origin is, after income, the most important variable accounting for the quality of the investment climate. French-based law is considered less protective of property rights than the common law and therefore less conducive to growth, whereas common-law countries and Nordic countries

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[50] World Bank, *Doing Business 2004*, *supra* note 48, at xii.

[51] *Ibid.* at xvi.

[52] *Ibid.* at 89.

[53] *Ibid.* at xviii.

[54] *Ibid.* at xvi.

[55] Rafael La Porta et al., "Law and Finance" (1998) 106 Journal of Political Economy 1113 [La Porta et al., "Law and Finance"].

are said to offer the best practices in business regulation, a clear indication of the superiority of these systems over civil law.[56]

4. "Ownership" and the transition issue

The task of legal reformers does not only consist in devising laws most likely to achieving the reformers' objective to create a good investment climate. They also need to ensure the effective application of the new laws. Reformers face two major challenges: making the reform acceptable to "stakeholders" in order to facilitate its adoption and implementation, and convincing local firms (especially those operating in the "informal sector") to embrace the new laws. The success of the reforms will thus depend not only on their substantive content but also on one's ability to "sell" them to stakeholders and end users. De Soto offers a simple solution to this marketing problem. The very nature of the process he proposes to follow, i.e., the identification and formalization of existing informal norms (whose efficiency he assumes), means that very little effort will be needed to convince people to switch from an informal to an identical formal (and thus even more efficient) norm. In contrast, the new orthodoxy, which favours "best practices" over informal norms, cannot assume that people in developing countries will automatically embrace the reforms. Its answer to this challenge is not to customize the reforms, but to make them look more local, and less dictated from above. Although the Bank cautiously acknowledges that "transplanting approaches uncritically from one country to another often leads to poor results"[57] and that the approaches of rich countries can be sources of inspiration but have to be adapted to local conditions,[58] the effect of its warnings against uncritical transplants is limited in practice to repeatedly emphasizing the need for

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[56] World Bank, *Doing Business 2004*, *supra* note 48, at 84-86.

[57] *Ibid.* at 53-54.

[58] *Ibid.* at 53 ("The success of any policy intervention ultimately depends on the extent to which the chosen approach reflects a good fit with local institutional conditions.").

"commitment" from all branches of government and local "ownership" of the reforms.

Cultivating "ownership of" and "commitment to" the reforms rests on three strategies. First, since commitment depends on reforms responding to the needs of the country "the Bank's activities must be grounded firmly in knowledge gained from country-specific diagnostic assessments."[59] By identifying the precise areas in which performance could be improved, benchmarking and rankings provide a powerful impetus for reform. Secondly, particular attention should be paid to the political issues raised by legal and judicial reform. The challenges faced by would-be reformers include convincing decision-makers that reforms are necessary, dealing with opposition from diverse interest groups, "packaging" reforms so that they are credible and feasible, and mobilizing support and building capacity to implement the reforms.[60] Education and dialogue are both tools to mitigate interest-group opposition by empowering supporters.[61] Thirdly, support and ownership from all "stakeholders, including "different branches of government, bar associations, law schools, NGOs, and citizens"[62] need to be built by using a "participatory approach" designed to empower potential supporters (and neutralize less reform-minded stakeholders) as well as making the reforms more legitimate, and thus acceptable to the general population. The kind of participation which is both "indispensable in promoting respect for the rule of law by the public at large"[63] and "ensures that [reforms] are suitable for the economic, social, and legal climate, and thereby facilitates subsequent compliance"[64] needs

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[59] World Bank Legal Vice Presidency, *Initiatives in Legal and Judicial Reform,* 2004 ed. (Washington, D.C.: World Bank, 2004), at 16. [World Bank Legal Vice Presidency, *Initiatives*].

[60] Sunita Kikeri, Thomas Kenyon, &Vincent Palmade, *Reforming the Investment Climate: Lessons for Practitioners* (Washington, D.C.: World Bank, 2006) at 11.

[61] *Ibid.* at 3-4.

[62] *Ibid.* at 12.

[63] World Bank Legal Vice Presidency, *Legal and Judicial Reform: Strategic Directions* (Washington, D.C.: World Bank, 2003) at 37.

[64] *Ibid.* at 6.

to be complemented with information and education efforts aimed at ensuring that individuals will be able to assess the reforms at their true value and embrace them, thus leading to "substantial attitudinal and behavioural changes in individuals".[65]

C. Lessons learned?

The rule of law revival has generally been eagerly welcomed, including in the academic community.[66] One way to account for the adherence of legal and non-legal scholars to the new agenda is to point to the theoretical and methodological tools used by its proponents in support of their claims. In contrast to the theory of "legal liberalism" on which the first law and development movement was based and which was rapidly called into question, the new movement benefits from the increasing popularity of New Institutional Economics, which provide it with well-developed and attractive theoretical arguments about the role of law in the economy.[67] In addition, the idea that law reform can drive development has now found support in a growing body of studies purporting to establish the existence of a causal relationship between legal (including "rule of law") and economic indicators. The World Bank, in particular, has been a major actor in the generation of various statistical analyses whose results are commonly cited in academic work as well as in policy publications advocating legal reform, and which seem, at first glance, to provide compelling evidence of the causal role of law.[68] Moreover, by relying primarily on transactions cost economics and cross-country

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[65] *Ibid*.

[66] See *e.g.* Garth, *supra* note 9, at 307 (arguing that the mainstream of the LSA has "adopted the agenda of global reform through law.").

[67] See *e.g.* Thomas Carothers, "The Problem of Knowledge" in Carothers, *Promoting, supra* note 3, 15, at 27 (mentioning the "irresistible apparent connection" between law and development, rather than past success, as the main factor accounting for the expansion of legal reform assistance) [Carothers, "Problem of Knowledge"].

[68] Davis, "Rule of Law Variable", *supra* note 3, at 143-44 (underlining the methodological superiority achieved by law and development proponents over the skeptics with respect to providing evidence for their claims).

macroeconomic data, the self-annointed experts in the field are in a position to frame the debate in terms that few people are trained and comfortable to use, making it the quasi-exclusive preserve of economists or law-and-economics scholars. The ultimate consequence is that the rationale for rule of law reforms is as hard to attack as to justify on the basis of available data.

The enthusiasm surrounding the reforms nevertheless appears surprising, especially when one considers the failure of the first law and development movement efforts and the disappointing results reached so far, especially in the case of Eastern Europe.[69] In addition, despite the volume of information now available and the revival of academic interest in the topic, the legal academy has not yet managed to resolve uncertainty about the validity of basic assumptions underlying legal reform efforts.[70] The "problem of knowledge"[71] in the field remains unsolved. This leaves us to wonder to what extent, and what, the new law and development movement has indeed learned from the failure of its predecessor.[72]

In this respect, some important differences may be noted between the two movements. One of them relates to the conceptualization of non-State modes of ordering. The first movement generally insisted on the "traditional" nature of the law prevailing in developing countries, and described it as a remnant of a past that was to be brushed aside for "modern" societies to emerge. In the new movement, the modern/traditional dichotomy has given way to an opposition between two types of complementary institutions, with "informal institutions" allowing for the proper functioning of formal ones. The first and second law and development

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[69] See *e.g.* Kathryn Hendley, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law" (1999) 8 (4) East European Constitutional Review 89.

[70] Davis & Trebilcock, *supra* note 2, at 898.

[71] Carothers, "Problem of Knowledge", *supra* note 67.

[72] See *e.g.* Channell Wade, "Lessons not Learned about Legal Reform" in Carothers, *Promoting, supra* note 3, 137, at 139: "In many if not most cases, the lessons of the law and development movement have simply not been leaned by practitioners in the new rule-of-law enterprise of the last two decades."

movements also differ with respect to their treatment of the political issues associated with law reform. Formerly an instrument of the State, law is now seen as a technology that aims at controlling it and has to be insulated from politics. Under this technological view of law,[73] the legal transfers, which were previously seen as a tool for State-building and fostering cultural change, are thought of as a form of technical assistance with primarily economic effects.

It is doubtful, however, that these differences are substantial enough to allow current initiatives to avoid repeating the mistakes of the past. For example, while the recognition that informal institutions actually exist in developing and developed countries alike seems to signal a certain evolution from previous conceptions emphasizing the "customary" nature of unwritten law, the emphasis put on formalization also clearly shows that some institutions may be "more equal" than others. For the World Bank, for example, informal institutions "tend to support a less diverse set of activities than do formal legal institutions. […] As countries develop, the number and range of partners that market participants deal with increases and market transactions become more complicated, demanding more formal institutions."[74] Somewhat paradoxically, de Soto's celebration of the triumph of capitalism without law finally ends up in a demonstration of the need for formal law.[75]

While not radically challenging previous hierarchical understandings of the relationships between State and non-State legal orders, the new terminology entails a certain change in understanding of the relationships between these orders. By depriving law of its political character, and paying mere lip service to the cultural roots of institutional arrangements, the new approach brings a simple answer to the question of legal effectiveness. Following the idea that rational, well-informed people cannot fail to choose efficient institutions over ill-

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[73] Upham, "Mythmaking", *supra* note 3, at 76.

[74] World Bank, *WDR 2002*, *supra* note 6, at 6.

[75] Upham, "Mythmaking", *supra* note 3, at 80.

functioning ones, no resistance from the beneficiaries of reforms is contemplated. By framing the issue in terms of "institutional change", the institutional perspective in fact suggests that, although it might be lengthy, the process of social change through law is ultimately unproblematic. Although new formal institutions will not necessarily be valued at first by potential users, they will nevertheless create new trading opportunities and increasing competition, thus weakening the effectiveness of informal norms-based mechanisms. This will in turn have the effect of stimulating local demand for formal institutions, creating the conditions that will allow them to supplant community norms and networks.[76] Social change, defined as the supplanting of "traditional" informal norms by new formal rules, will then result, following a series of rational choices made by individuals facing the consequences of changes in market conditions.

This approach basically assumes that the supply of more efficient and well-publicized laws will automatically generate local demand for them. Even the initial absence of such demand is no impediment to the introduction of reforms. Acting as a legal Trojan Horse, they are expected to "foster a culture of legality" that will spread and create the constituency required for further reform.[77] The overall result is a "build it and they will come approach"[78] in which the issue of "institutional fit" becomes a matter of education, professionalization, and access to justice, rather than "bottom-up" input. The emphasis put by the World Bank on the combination of "benchmarking" with "ownership" highlights the limits put on the participation that is ultimately expected from local actors. The use of benchmarking to assess local needs means that the problem of a country (a bad ranking), its objectives (a better ranking), and the solutions to its problems (better practices) can all be identified with a minimal degree of participation from local

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[76] For a discussion of this issue, see World Bank, *WDR 2002*, *supra* note 6, ch. 9.

[77] Matthew C. Stephenson, "A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China" (2000) 18 UCLA Pacific Basin Law Journal 64, at 14.

[78] See Hendley, *supra* note 69 (discussing the problems related to the application of such an approach in Russia).

actors. The issues of participation and ownership then emerge after problems have already been brought to light and solutions proposed by experts on the basis of available "knowledge."

From this perspective, it becomes clear that the main objective of "participation" is not to ensure compatibility, but to provide ways to reduce politically-motivated opposition to the reforms. As a result, considerable attention is devolved to the marketing of the reforms in order to diffuse opposition, descriptions of the reform process often reading like a battle between altruistic reforms adherents and self-interested entrenched political interests impervious to the public good. In contrast, recommendations on how to assess and obtain the level of "institutional fit" between these practices and local conditions are at best extremely vague and at worst totally opaque.[79] Although the Bank acknowledges that "the benefits from foreign experts who provide a comparative perspective should be fused with knowledge of the local legal community—knowledge of the language, social norms, and the socioeconomic factors underpinning the country's political structure and legal tradition,"[80] specific recommendations as to the amount and type of "tailoring" allowed are conspicuously missing. Similarly, and even though the World Bank asserts that "getting the reform process right is just as important as ensuring sound policy content",[81] the way in which "participation" can be achieved also remains unclear, except for the fact that it can take place in the course of "workshops" and "town meetings"[82] and through "the solicitation of the public views on proposed legislation".[83]

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[79] See *e.g.* World Bank Legal Vice-Presidency, *Initiatives*, *supra* note 59, at 8 ("While laws are country-specific, they benefit from regional harmonization and from incorporation of global best practice principles to foster empowerment, security, and opportunities.").

[80] *Ibid.* at 13.

[81] Kikeri, Kenyon & Palmade, *supra* note 60, at 6.

[82] *Ibid.* at 12.

[83] World Bank Legal Vice Presidency, *Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency* (Washington, D.C.: World Bank, 2002), at 29.

The assumed connection between supply and local demand has however proven elusive in practice. Many authors have noted that rule of law reforms have so far had at best mixed results,[84] raising the general issue of the kind of "fit" required between imported law and the receiving society. For example, a team of researchers undertook to compare the actual impact of legal transplants[85] differing in their degree of "receptiveness" − defined as their level of adaptation to local conditions and their familiarity to the receiving population. Using the sample of 49 countries covered in the work of La Porta et al.,[86] they found that locally-grown legal institutions and receptive transplants tend to be more effective than unreceptive transplants. In addition, the impact of the transplant process (which they call the "transplant effect") is a more important predictor of legality than legal family. According to the authors, this is because effectiveness is "largely a function of the demand for law,"[87] this demand itself depending on its compatibility with local conditions. The authors are, however, less clear about what is essential for such compatibility.

D. Legal perspectives on "informal law"

The new law and development agenda holds that economic development requires economic actors operating in developing countries to abandon their current ways of doing business in favour of the "best practices" in use in developed economies. There are, however, reasons to doubt the capacity of the new movement to reach

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[84] See *e.g.* Ronald J. Daniels & Michael J. Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries" (2004) 26 Michigan Journal of International Law 99, at 107 (noting the "considerable difficulties" encountered by many countries in implementing even [a] minimalist conception of the rule of law); Daniel Berkowitz, Katarina Pistor &Jean-François Richard, "The Transplant Effect" (2003) 51 American Journal of Comparative Law 163, at 164 ("there is a broad consensus that the impact of legal reform efforts has been at best limited.") [Berkowitz, Pistor & Richard, "Transplant Effect"].

[85] Daniel Berkowitz, Katarina Pistor &Jean-François Richard, "Economic Development, Legality and the Transplant Effect" (2003) 47 European Economic Review 165, Berkowitz, Pistor & Richard, "Transplant Effect", *ibid.*

[86] La Porta et al., "Law and Finance", *supra* note 55.

[87] Berkowitz, Pistor & Richard, "Transplant Effect", *supra* note 84, at 189.

its objectives. An important one is that reform advocates have not paid proper attention to the level of compatibility required for transplants to take root. The second issue, which seems even more fundamental, concerns the capacity of even "well-fitted" reforms to modify behaviour. In particular, research revealing, in the tradition of Stewart Macaulay's pathbreaking work, that "informal institutions" do not emerge or persist only where legal institutions are found dysfunctional[88] challenges the assumption that informal institutions will naturally be displaced in developing countries as more efficient, formal norms are introduced.

The well-evidenced co-existence of formal and informal modes of ordering in developed economies raises fundamental issues concerning the purposes and prospects of law reform in developing countries, and clearly underlines the need to deepen our understanding of the processes by, and conditions under which formal norms can displace informal business practices. Such exercise ultimately raises the major issue of the validity of the "legal centralist" claim that ultimately underlies any law reform effort.

Yet, although this question is of fundamental importance for legal theory, its investigation has been severely limited by the limited interest that legal scholars have traditionally exhibited in the empirical study of legal phenomena in general, and contracts in particular.[89] Although many acknowledge Stewart Macaulays's

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[88] Following the pioneering work of Macaulay (Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 1 [Macaulay, "Non-Contractual Relations"], a series of empirical studies have found clear evidence that businesses operating in environments with well-functioning legal systems often rely on a variety of informal mechanisms in order to prevent and solve contractual disputes. Most of these studies are reviewed in the following chapters: see below, chapters 2 and 4.

[89] In a review of empirical legal scholarship from 1985 to 2002, Korobkin indicates that "extremely little empirical contract law scholarship [is] being produced in the legal academia today." R. Korobkin, "Empirical Scholarship in Contract Law: Possibilities and Pitfalls" (2002) University of Illinois Law Review 1033, at 1036.

1963 study[90] as a breakthrough, few have explored the path opened by this "preliminary study".[91]

Traditional legal scholars have paid considerably more attention to the proper judicial response to the disjunction between law and practice, than to the investigation of the nature and extent of this disjunction.[92] In legal scholarship, Macaulay's contribution is generally interpreted as evidence that contract theory has little to do with the realities of contracting, without further need to investigate this "fact". Scholars nowadays basically agree that an overwhelming majority of transactions take place without the parties ever resorting to legal arguments or legal enforcement mechanisms. They also share a tendency to account for the disjunction between law and practice in historical terms, i.e. as a relatively recent phenomenon which emerged as modes of production evolved in the course of the 19th and 20th century. In the same way as legal realist arguments for the adoption of a more flexible, "neoclassical" approach to contract were framed in terms of the need to adapt to the increasing complexity of economic life,[93] arguments for

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[90] Macaulay, "Non-Contractual Relations", *supra* note 88.

[91] See Robert A. Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Dordrecht: Kluwer Academic Publishing, 1997), at 246 (mentioning the "dearth of studies testing Macaulay's thesis.") See also Korobkin, *supra* note 89, at 1040 (finding it "surprising that only a handful of contract law articles published in the last fifteen years attempt to build on [Macaulay's] methodology.")

[92] See Robert E. Scott, "The Case for Formalism in Relational Contract" (2000) 94 Northwestern University Law Review 847, at 852 ("We are all relationalists now. In that sense Macneil and Macaulay have swept the field. […] The debate, rather, is over the proper nature of *contract law*.") Korobkin, *supra* note 89, at 1048 ("In the majority of empirical contract law articles, the primary use of data is to provide support for the author's normative argument for doctrinal change or reinforcement.")

[93] See *e.g.* Ian Macneil, *The New Social Contract* (1980), [Macneil, *New Social Contract*] at 10 (comparing primitive, discrete and modern relational contracts, the latter being interconnected with "a larger society of great complexity, involving extremely elaborate specializations, and subject to constant change."); John P. Esser, "Institutionalizing Industry: The Changing Forms of Contract" (1996) 21 Law and Social Inquiry 593 (relating changes in contract theory to the historical switch from job to mass and flexible modes of production); Robert W. Gordon, "Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" (1985) Wisconsin Law Review 565, at 577-78 (summarizing standard accounts of the three-stage evolution of contract relations and contract law).

further reform are often based on the idea that neoclassical approaches are not well-equipped to deal with new modes of production and exchange.[94]

Legal scholars also agree that, even though law does not seem to play a central role in most real-life business relationships, it nonetheless "matters". A review of legal scholarship reveals that it forms two main categories, based on different conceptions of how it actually matters, and should matter in an ideal world. A first body of scholarship revolves around formalist ideas about the purpose of contract law. Scholars in this category conceive of contracts as sets of bargained-for promises made under the belief that they could, or could not, be enforced by courts. Assuming that businesspeople take legal rules into account when making contractual decisions and plans, including when determining the role that law will play in the course of their business relationships, they see the "gap" between law and business practices as the result of a rational choice made by transactors to operate under a dual set of rules, i.e. relationship-preserving, flexible, and self-enforceable norms applicable in the course of the relationships, and an explicit and legally enforceable set of rules appropriate when disputes escalate and relationships break down.

For the scholars belonging to this group, such a dual system can only be efficient to the extent that it erects clear boundaries between legally enforceable rules and flexible, self-enforced norms. The neoclassical incorporation of customs and standards belonging to the realm of self-enforcement into the legal sphere deprives transactors of the "bright line rules"[95] they need to determine the exact extent of their obligations. Because of the current imprecision of law, transactors looking for predictability and security are forced to "opt-out" of the legal system,

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[94] See *e.g.* Jean-Guy Belley, *Le contrat entre droit, économie et société* (Cowansville: Yvon Blais, 1998), at 300: "la théorie générale du contrat est aujourd'hui en deça du seuil de complexité adéquate requise par l'évolution des pratiques contractuelles."

[95] Robert E. Scott, "The Death of Contract Law" (2004) 54 University of Toronto Law Journal 369, at 378.

leading to "a mass exodus from the public enforcement regime"[96] and the development of private legal regimes which "substitute clear, bright line rules and objective modes of interpretation for […] vague rules and subjective, contextualized approach to interpretation."[97] The solution is thus to return to formalist approaches which would allow courts to fulfill the tasks they are better suited for, i.e. the application of the clear rules the parties wished to be applicable at the end of their relationships.

The second category comprises scholars for whom real-life contracts do not constitute sets of bargained-for promises made at a specific point in time, but result from an incremental process of negotiation and adjustment during which expectations emerge and are modified. They are of the view that, since businesspeople give little consideration to the applicable legal rules in this process, the actual content of legal rules is unlikely to make a difference in practice[98] beyond its impact on the results reached by courts in litigated cases. In consequence, such rules should not aim at being predictable, but at generating fair decisions in litigated cases. This requires departing from formalism and applying flexible rules taking all contextual and individual circumstances into account.

Proponents of an increased contextualization of law contend that traditional conceptions of contracts are not compatible with the empirical reality of contracting. They interpret the gap as the result of the persistent reliance of legal theorists on a classical, promise-based conception of contract, and argue for its replacement with a new concept more in line with the realities of contractual

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[96] *Ibid*.

[97] *Ibid*., fn 21.

[98] Macaulay, for example, notes that "[m]ost business people do not stay up nights reading appellate decisions" (Stewart Macaulay, "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" (2003) 66 Modern Law Review 44, at 62 [Macaulay, "Real and Paper Deal"]). See *also* Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), at 123 ("Once we recognize that the parties to a contract are unlikely to wish to pursue legal sanctions even in the event of a breach of contract, than we can also appreciate that they will pay little attention to the question of whether the agreement is legally enforceable in the first place.")

relationships. Ian Macneil's relational contract theory arguably constitutes the most well-known attempt to develop a non-promise-based theory of contract. The major insight of Macneil's theory is that "contracts" are indistinguishable from exchange relations.[99] Rather than the transactions contemplated by classical contract theory, contracts can be better described as forming a continuum going from almost-discrete transactions to highly relational contracts. On the basis of the observation of the "behavioural patterns" exhibited by parties to contracts at different points of the continuum, Macneil asserts that ten "common contract norms" apply to all contracts, although to a varying extent depending on the position of the contract on the relational continuum. In addition, Macneil's emphasis on the descriptive, rather than prescriptive, nature of his theory[100] has not prevented other scholars from highlighting the normative implications of a relational understanding of contracts. For Feinman,[101] for example, law should differentiate between contracts according to their relational context. Collins also argues for "recontextualizing contractual agreements" by examining them in their "embedded context of a business relation and market conventions".[102]

One common point between "formalists" and "contextualists" is their general lack of interest in empirical research.[103] Leaving most of the empirical ground to "law-and-economics" researchers, legal scholars generally base their recommendations

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[99] See *e.g.* Ian R. Macneil, "Contracting Worlds and Essential Contract Theory" (2000) 9 Social and Legal Studies 431, at 432 ("In my writing, 'contract' […] always means relations among people who have exchanged, are exchanging, or expect to be exchanging in the future, i.e. exchange relations").

[100] This is expressed most clearly in Ian R. Macneil, "Relational Contract Theory: Challenges and Queries" (2000) 94 Northwestern University Law Review 877, at 899 : "I challenge to a duel anyone who […] persists in converting my descriptions of relational contract law into prescriptions of what the law should be, particularly prescriptions of some universal application of relational contract law."

[101] Jay M. Feinman, "Relational Contract Theory in Context" (2000) 94 Northwestern University Law Review 737.

[102] Collins, *supra* note 98, at 356. See *also* Belley's plea for a "critical revision" of contract doctrine on the basis of Macneil's theory: *supra,* note 94, at 301.

[103] A notable exception to this trend is Belley's work on the contracting practices of Alcan, *ibid*.

on assumptions about the role(s) played by law in contractual matters as well as their own beliefs about the proper purpose of contract law. The historical and normative approaches they take say little about the prospects of law reform to modify business practices in developing countries. Assessing the potential role that legal reforms based on the export of best practices are likely to play in economic development seems to require a more thorough examination of the question of "fit" (and the criteria by which such "fit" can be evaluated) as well as the relationships between formal and informal law.

The rest of this dissertation will examine these questions, through a wide-ranging review of works from different fields. These contributions include non-traditional legal scholarship falling into diverse "law-and-" categories, non-legal works partly based on the foundations laid by legal researchers interested in the relationship between formal law and informal practices, as well as studies with seemingly little relationship to questions of interest to legal scholars. These works will be presented with a view to highlighting different perspectives on the nature of informal modes of social ordering, their relationships with formal law, and the emergence, persistence and dominance of "informal contract enforcement mechanisms" in both developed and developing countries.

In the following chapter, economic approaches focusing on "efficiency" as the primary factor accounting for the use or non use of specific informal or formal mechanisms will be reviewed. Chapter 3 will be devoted to approaches emphasizing the cultural foundations of informal mechanisms and the need for formal enforcement mechanisms to reach a certain level of cultural fit in order to prevail. In Chapter 4, some approaches focusing on the role of "trust" and trust-based enforcement mechanisms in contract enforcement will be reviewed. The first part of the dissertation will then end, in Chapter 5, with a discussion of the avenues that remain to be explored.

Chapter 2. Enforcement as a transaction cost

A review of current literature on informal enforcement mechanisms reveals the predominant role played by economists in this field of inquiry. The notion that the enforcement of contracts constitutes a "cost" that parties to business relationships seek to minimize has taken a strong hold in the study of business contracts. In fact, most of the existing literature on informal ways to structure business relationships accounts for the emergence and maintenance of informal mechanisms in terms of their economic superiority over formal law, in certain specific circumstances.

The objective pursued in this literature may be described as the identification of the criteria distinguishing the cases in which existing informal mechanisms are indeed more efficient from those in which they could fruitfully be replaced with more adequate (formal or informal) alternatives. The present section is devoted to a review of this literature. The implications of transaction cost economics for contract enforcement will first be presented. A brief review of current literature on non legal enforcement mechanisms will then be made, before a presentation of some of the ways in which enforcement-centred models fail to account for the contracting practices in use in developing countries. Implications for future research will then be drawn.

A. Transaction cost economics and contracts

1. The costs of contracting

The basic notions of transaction cost economics (TCE) are generally held to have first emerged in the Ronald Coase's paper on "The Nature of the Firm",[104] before

[104] Ronald Coase, "The Nature of the Firm" (1937) 4 Economica 385.

gaining influence under the leadership of Oliver E. Williamson.[105] In line with mainstream economic thinking, TCE assumes that individuals are rational and profit maximizing, and thus seek to minimize the costs they incur. Crucially, it also recognizes that market transactions are not costless. Before a transaction can even take place, some costs need to be incurred to find a potential partner, determine the appropriate price to pay, and negotiate and draft the terms of the exchange. Additional costs will also need to be incurred to monitor the other party and ensure that the contract will be enforced. All of these activities require expenses in time, energy and money.[106]

Among the initial objectives of TCE, an important one was to account for the "rise of the firm" as an organizational form replacing the price system. It was hypothesized that firms emerge where the costs related to the "vertical integration" of a number of transactions are inferior to the costs of carrying the same transactions in the market. However, in the last 15 years or so, there has been a rise of interest in the variety of "hybrid" forms of governance forming the "swollen middle"[107] between hierarchies and markets. An important line of work concerns the impact of transaction costs on the type of formal contracts used by firms to govern their relationships.[108]

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[105] Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: Free Press, 1975); Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York: Free Press, 1985).

[106] Transaction costs are often divided into three main categories. *Search and information costs* correspond to the costs incurred to choose a contracting partner and determine the object of the transaction to take place. *Bargaining costs* correspond to the costs incurred to reach and conclude an acceptable agreement with the other party. Finally, *enforcement costs* are the costs incurred to ensure that the other party will fulfill the obligations contained in the contract or provide compensation in case of failure.

[107] Jean-François Hennart, "Explaining the Swollen Middle; Why Most Transactions are a Mix of Market and Hierarchy" (1993) 4 Organization Science 529.

[108] See *e.g.* Benjamin Klein, "Transaction Cost Determinants of 'Unfair' Contractual Arrangements" (1980) 70 American Economic Review 356; Francine Lafontaine & Joanne E. OXley, "International Franchising Practices in Mexico: Do Franchisors Customize their Contracts?" (2004) 13 Journal of Economics and Management Strategy 95; AW Dnes, "A Case-Study Analysis of Franchise Contracts" (1993) 22 Journal of Legal Studies 367.

TCE has also been used to account for the existence of informal "governance structures" such as long-term relationships not governed by explicit contractual terms, and intra-community patterns of contracting. In one of the earliest and most influential works on informal modes of ordering, Robert Ellickson resorted to TCE to show that the Sasha County ranchers he observed could not only "achieve order without law",[109] but that the norms to which they resorted were welfare-maximizing and superior to formal law. More recently, Lisa Bernstein has emerged as a leader in uncovering enforcement mechanisms used in specific merchant communities and analyzing their functioning in TCE terms.[110]

Transaction cost economics focuses on the role of efficiency in people's choice between formal and informal enforcement mechanisms. [111] In Ellickson's words, "one reason people are frequently willing to ignore law is that they often possess more expeditious means for achieving order."[112] Each option available to parties is said to have its own strengths and weaknesses, and to be "comparatively more

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[109] Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

[110] Lisa Bernstein, "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms" (1996) 144 University of Pennsylvania Law Review 1765 [Bernstein, "Merchant Law"]; Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contracting in the Diamond Industry" (1992) 21 Journal of Legal Studies 115 [Bernstein, "Opting Out"]; Lisa Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions" (2001) 99 Michigan Law Review 1724 [Bernstein, "Private Commercial Law"]; Lisa Bernstein, "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study" (1999) 66 University of Chicago Law Review 710. For similar works, see James A. Acheson, "The Social Organization of the Maine Lobster Market" in Stuart Plattner, ed., *Markets and Marketing* (Lanham, MD: University Press of the Americas, 1990) 105 [Acheson, "Lobster Market"]; James Acheson, "Transaction Costs and Business Strategies in a Mexican Indian Pueblo" in James Acheson, ed., *Anthropology and Institutional Economics* (Lanham/New York/London: University Press of America, 1994) 143; Eric A. Feldman, "The Tuna Court: Law and Norms in the World's Premier Fish Market" (2006) 94 California Law Review [Feldman, "Tuna Court"].

[111] See Avner Greif, "Contracting, Enforcement, and Efficiency: Economics beyond the Law" in M. Bruno & B. Pleskovic, eds, *Annual World Bank Conference on Development Economics 1996* (Washington, D.C.: The World Bank, 1997) 239 at 246: the existence of informal mechanisms, and "[t]he extent to which these mechanisms were and are used in an economy with a relatively well-developed legal system suggests that they enhance efficiency relative to exchange based exclusively on legally enforceable bilateral contracts."

[112] Ellickson, *supra* note 109, at 282.

adept - i.e., transaction-cost minimizing - than the others for certain transaction".[113] Assuming that "transactors allocate aspects of their relationships between the legal and extralegal realms in ways that seek to maximize the value of their transaction",[114] the challenge then becomes to explain why and when specific informal mechanisms emerge and prevail over informal and formal alternatives, by assessing their respective transaction costs.

2. Courts vs. informal enforcement

Resorting to legal contracts (or informal alternatives) carries both bargaining and enforcement costs, which vary according to the transaction contemplated by the parties. In TCE, the "efficiency" of a particular "governance structure" depends on three main characteristics of the transaction in issue: its level of asset specificity, the frequency with which it occurs, and the level of uncertainty associated with it. In consequence, the transaction costs associated with legal contracting and its relative efficiency compared to other options, will vary in function of the type of transaction contemplated as well as the context in which it is to take place.

In recent years, a number of researchers have sought to define with more precision the circumstances in which people choose to "opt out"[115] of the system and resort to informal alternatives. Studies of informal mechanisms have attempted to account for the use of specific informal mechanisms by tying them to some inherent limitations of the legal system.

The "problems with the legal system" that informal mechanisms are said to contribute to solving may be classified in four categories. The first, and most obvious one concerns the costs associated with the litigation process, which

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[113] Barak D. Richman, "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering" (2004) 104 Columbia Law Review 2328, at 2238

[114] Bernstein, "Merchant Law", *supra* note 110, at 1788.

[115] Bernstein, "Opting Out", *supra* note 110.

makes court use unattractive for claims falling below a certain threshold. The amounts at stake in a particular type of transaction will thus have an impact on the respective attractiveness of diverse mechanisms. For example, where a comparison of two tuna markets revealed that one (Honololu) relied on a simple *caveat emptor* norm, while the participants in the other (Tsukiji) had proceeded to creating a specialized "tuna court", it was hypothesized that the smaller size of the tuna sold in Honolulu played a determinant role in the simpler modes of resolution in place in this market. [116]

The second category of factors concerns the "bargaining" costs of negotiating and drafting contracts. In order to be enforceable by courts, a legal contract must contain provisions detailing contractual expectations whose compliance with can be verified *ex post* by a third party. However, the complexity of the contemplated transaction as well as the uncertainty surrounding the conditions in which obligations will have to be fulfilled may make it be too costly or even impossible for parties to negotiate and draft documents which appropriately describe the whole range of their obligations. For example, Woodruff's study of shoe production revealed that the quality of workmanship which is required from manufacturers in this industry can hardly be described in terms precise enough to allow the courts to determine whether returns from a retailer are legitimate or not.[117]

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[116] Feldman, "Tuna Court", *supra* note 110, at 348. Bernstein also partially accounts for the private system existing in the diamond industry by the discrepancy between the amounts at stake and the costs and benefits associated with litigation: "In the typical diamond transaction, litigation costs would be high relative to the amount that could be recovered, and the promise would almost always be undercompensated under standard damage remedies", since lost profit will in most instances be considered speculative: Bernstein, "Opting Out", *supra* note 110, at 134

[117] Christopher Woodruff, "Contract Enforcement and Trade Liberalization in Mexico's Footwear Industry" (1998) 26 World Development 979, at 985. Bernstein mentions similar problems in the case of cotton, a commodity whose grading is a highly subjective process: Bernstein, "Private Commercial Law", *supra* note 110, at 1745.

Thirdly, detailed contractual provisions will be of little use to judges unless the relevant facts can be proven in court in case of dispute.[118] This means that parties need to be informed of contractual breach soon enough to be able to sue at a time where the facts can still be verified by courts. Where the outcomes of transactions depend "on many realizations that could not be directly observed either by the merchant or by the legal system",[119] as in the long-distance medieval trade studied by Grief, the creation of a coalition based on reputation is more efficient than adjudication. The existence of a similar coalition was evidenced by Clay with respect to 19th century Mexican California traders. Because the agents employed in this trade operated in distant ports and in an environment characterized by price variability, they could easily underreport the proceeds of their sales to the principal and retain the difference. For courts, establishing *ex post* whether profits had been withheld by verifying "the factors, such as price and quantity, mentioned in the contract […] often months or even years after the fact, may have been nearly impossible".[120] Similarly, Feldman mentions that the existence of the Tsukiji tuna court is contingent on the fact that Tsukiji tuna are bought by small, family-owned enterprises that cut it immediately and resell it in the market. In contrast, Honolulu tuna are generally bought at auction by wholesalers who resell them to another buyer who will fillet them, a fact that "removes the product in time and space from the auction company and eliminates the possibility of bringing the cut tuna to an adjudication session."[121]

Finally, the kind of remedies that courts can provide limits the benefits associated with their use. Disputants who choose to litigate their claims may receive

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[118] Bernstein, "Merchant Law", *supra* note110, at 1791. For Bernstein, the distinction between observable and verifiable information is "one of the most important reasons [why] transactors allocate aspects of their agreemnt to the legal or extralegal realm".

[119] Avner Greif, "Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition" (1993) 83 American Economic Review 525, at 529 [Greif, "Early Trade"].

[120] Karen Clay, "Trade Without Law: Private-Order Institutions in Mexican California" (1997) 13 The Journal of Law, Economics, & Organization 202, at 208.

[121] Feldman, "Tuna Court", *supra* note 110, at 348.

compensation some time after breach has occurred, but will rarely be provided with adequate ways to deal with the more immediate consequences of breach on their lives and operations. Monetary compensation after the fact does not prevent plants from closing and clients from going elsewhere to find the goods they need. In many cases, preventing contractual problems and rapidly finding solutions to those problems that nevertheless occur are key to staying in business. Bernstein's conclusion that what participants in the cotton trade want is performance, not payment for non performance, is undoubtedly valid in a number of trades.[122]

B. Game-theory approaches to informal enforcement

The limitations inherent within the legal enforcement of contracts suggest that, in many instances, people's preference for alternative enforcement mechanisms is not related to the "efficiency" of courts (a problem that legal reform could in theory address) but their "ultimate futility"[123] when time comes to enforce certain types of agreements. In order to understand how informal mechanisms can contribute to contract enforcement without support from the State, it is necessary to have a closer look at their functioning.

In current literature, the possibility that parties to a contract can self-enforce their agreement without recourse to law is generally addressed by combining TCE with insights from game theory. In game theory, cooperative behaviour is seen as resulting from the self-interested pursuit of economic ends by two or more "players". It is expected to persist only as long as the returns from cooperation exceed the returns from defection. It has been suggested that business dealings often correspond to the particular game known as the 'prisoner's dilemma'. In this game, the best outcome for both parties to a transaction is that neither of them

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[122] Her conclusion is based on the fact that "keeping the number of disputes low and minimizing the frictions and uncertainties involved in trade are essential to running a profitable concern": Bernstein, "Private Commercial Law", *supra*, note 110, at 1755.

[123] Richman, *supra* note 113, at 2332.

cheats; however, both may have an incentive to do so, leading to a less favourable outcome. In order to induce cooperation, one must provide sufficiently severe sanctions for cheating to make it rational not to cheat.

One way to induce cooperation between parties to a game is to require them to repeat the game (i.e. enter into other transactions) in the future. In this case, parties acting in their own interest will be expected to cooperate for fear of later retaliation by the other.[124] The same logic can be extended to situations where interactions do not take place among the same individuals but among a pool of individuals. In such cases, the threat of retaliation can remain a deterrent against breach if information becomes known to potential future counterparts and these persons rely on it to refuse interaction. The key incentive here is the preservation of one's reputation, on which future interactions depend.

Recent literature has shed light on diverse enforcement mechanisms based on relationships or reputation.The term "bilateral mechanisms" will be used to designate mechanisms geared to the preservation of bilateral relationships, while "reputation mechanisms" will be used with respect to multilateral mechanisms involving people not parties to the business transactions concerned.

1. Bilateral enforcement mechanisms

Discrete transactions, to the extent that they exist at all, [125] form only a small part of all the transactions that take place in everyday life. Most transactions do not take place instantaneously between anonymous partners, but in the course of a

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[124] Repeating the game thus makes contracting "self-enforcing through the threat of retaliation and consequent loss of business": John McMillan & Christopher Woodruff, "Private Ordering Under Dysfunctional Public Order" (2000) 98 Michigan Law Review 2421, at 2424.

[125] See Macaulay, "Real and Paper Deal", *supra,* note 98, at 66: "We can debate whether there are any real world discrete transactions: parties must have some sort of relationship in order to have at least the minimum trust needed to bargain." See also Macneil, "New Social Contract", *supra* note 93, at 11: "the discrete transaction is entirely fictional. There we postulate specialization and choice-determined projections of future exchange in the total absence of any society whatsoever. Even in the modern mythical world of neoclassical microeconomic theory such conditions do not exist."

relationship of variable duration. Frequent and/or long-term interaction is said to play a positive role on enforcement because partners in such relationships are likely to refrain from cheating in order to maintain the relationship. People have an incentive to be honest for fear of losing the benefits of future exchange.

Ending a relationship constitutes a punishment only where switching is costly, i.e. where transactors cannot find equivalent goods from other sources without incurring additional costs. In other words, bilateral enforcement mechanisms can only work where there is some degree of "lock-in" in the relationship. Such lock-in can arise from many sources. One of them relates to the structure of the market in which exchange takes place. For example, a buyer may be locked-in with particular vendors if no alternative supplier exists or can be found (at low cost) for the particular good they need.

Lock-in can also derive from the specific investment made to screen potential partners, create the relationship, and make it run smoothly. Such investments are more likely to occur where benefits can be derived from familiarity with one another's needs, standards and modes of operation.[126] In such cases, the significant costs that would need to be incurred before similar efficiencies could be achieved with a new partner represent an important incentive for firms to comply and cooperate.

Bilateral mechanisms can also prevent opportunism in cases where multiple partners can be found, but information is asymmetrically distributed between the parties, opening the door to opportunistic exploitation of informational advantages.[127] Trade in non-standardized goods, for example, necessarily involves "a high degree of risk for the buyer in what precisely he buys, because no good is

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[126] Or, in other words, where "the transaction costs of performing the contract, tend to decrease over the life of [the] contracting relationship": Bernstein, "Private Commercial Law", *supra* note110, at 1763.

[127] A classical example of this is the "market for lemons" described by Akerloff: George Akerloff, "The Market of "Lemons" : Quality Uncertainty and the Market Mechanism" (1970) 84 Quarterly Journal of Economics 488.

exactly like another he can buy from the same or a different seller or might have bought in the past."[128] These risks can be mitigated by creating long-term relationships by establishing privileged relationships with sellers who will in turn deliver them their best products. In such cases, lock-in occurs from the trust that develops between partners in the course of the relationships and the difficulty to locate trustworthy partners at low cost. For example, Geertz's classical description of Moroccan bazaars shows that buyers find it rational to return to the sellers they know, even if others may offer better prices. [129] Similar solutions can be expected to emerge where large quantities of products are sold in bulk, making the evaluation of the exact quantity provided problematic, and for commodities whose grading is a subjective process that the buyer cannot be expected to be able to carry in person.[130]

2. Reputation mechanisms

The potential termination of a relationship may constitute an effective sanction where the relationship used as hostage is valuable to both parties. Conversely, threats of termination will have little impact on parties who ascribe little value to the relationship in question. In such cases, it may be necessary to attach additional adverse consequences to breach. This is what reputation mechanisms aim at doing, by allowing reputation to replace relationships as a bond. It is then the prospect of losing a range of profitable, reputation-dependent business relationships that deters transactors from breach. Two conditions are essential for such reputation mechanisms to work effectively. First, information about breach has to circulate easily among a group of people. Only then do their decisions about who to deal with stand to be affected. Secondly, threats of boycott have to

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[128] Frank S. Fanselow, "The Bazaar Economy or How Bizarre is the Bazaar Really?" (1990) 25 Man 250, at 252.

[129] Clifford Geertz, "The Bazaar Economy: Information and Search in Peasant Marketing" (1978) 68(2) Am. Econ. Rev. 28.

[130] See Bernstein, "Private Commercial Law", *supra* note110.

be both credible and significant: information about past conduct has to reach people with the capacity to apply sanctions in case of breach.

A good proportion of the work done on the operation of reputation mechanisms so far relates to relatively small and homogeneous groups of people corresponding to Ellickson's definition of a "close-knit community".[131] Those groups are said to be composed of a relatively small number of people who interact frequently with each other and share some common characteristics such as language, religion, ethnicity, or culture.[132] Consequently, multilateral enforcement mechanisms tend to be seen as depending on the existence of relatively homogeneous groups of related people.[133]

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[131] Ellickson defines a "close-knit community" as "a social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events." (Ellickson, *supra* note 109, at 181).

[132] See Manuel A. Gómez, "All in the Family: The Influence of Social Networks on Dispute Processing (A Case Study of a Developing Economy)" (2008) 36 Georgia Journal of International Law 291, at 301: "[Informal institutions] are described as if they only pertain to small, closed communities and are generally portrayed as an exception or rare event […]. In this sense, examples of informality within modern and complex societies are seen as mere "pockets" of indigenousness". Among the ethnic and religious minorities which have attracted the attention of researchers are Orthodox Jews in the diamond trade (Bernstein, "Opting Out", *supra* note 110, Barak D. Richman, "How Communities Create Economic Advantage: Jewish Diamond Merchants in New York" (2006) 31 Law and Social Inquiry 383), Chinese immigrants (Janet Tai Landa, *Trust, Ethnicity, and Identity: Beyond the New Institutional Economics of Ethnic Trading Networks, Contract Law and Gift-Exchange* (Ann Arbor: University of Michigan Press, 1994)) and Maghribi traders (Greif, "Early Trade", *supra* note 119).

[133] A conventional wisdom in the literature is to contend that self-enforcement mechanisms are bound to break down outside the bounds of such homogeneous communities: see Peter T. Leeson, "Cooperation and Conflict: Evidence on Self-Enforcing Arrangements and Heterogeneous Groups" (2006) 65 American Journal of Economics and Sociology , at 892. See also Bernstein, "Opting Out", *supra*, note 110, at 140: "Reputation bonds are generally assumed to be effective only within geographically concentrated, homogeneous groups who deal with each other in repeated transactions over the long run."

Aviram attempts to account for this by evidencing the existence of a "chicken and egg" paradox confronting private legal systems: they can be effective at enforcing behaviour as long as they secure the cooperation of their members, but members will cooperate (i.e. comply with rules and apply sanctions) only as long as they receive benefits from membership. Since reputation-based systems that are in their infancy do not yet provide benefits to their members, reputation will work only as long as it affects interaction in some other network that provides such benefits. Consequently, "PLSs typically do not form spontaneously but build on existing institutions infrastructure: networks that originally facilitated low-enforcement-cost norms": Amitai Aviram,

Homogeneous, concentrated groups indeed share a feature that seems to allow reputation mechanisms to work particularly well. This feature, which Richman calls the "orthogonality principle", concerns their tendency "to contain cross-cutting webs of dyadic relationships, each of which may vary in intimacy and continuity."[134] In such communities, "primary social bonds" − those bonds which have a direct impact on one's ability to share information and thus be successful in business − are intermingled with secondary social bonds, such as a shared culture, language, or religion.[135] The fear of losing pleasurable relationships with others, one's self-esteem, or access to the goods reserved to members of the community[136] provides merchants with additional disincentives to break their contractual obligations.

Social ties, such as those based on shared personal characteristics, thus provide groups based on these characteristics with "a wider range of methods of influence at their disposal than do groups of merchants connected only by their commercial interests."[137] The orthogonality principle also contributes to solving the "endgame problem" − the fact that reputation-based mechanisms restricted to business matters tend to become less efficient with time, as people approach retirement and the prospects of future transactions diminish. The intermingling of business and personal relationships allows reputation to be bequeathed to descendants remaining in the industry and to determine one's status in the community after retirement, providing additional incentives to cooperate.

"A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems" (2004) 22 Yale Law and Policy Review 1, at 6.

[134] Ellickson, *supra* note 109, at 181

[135] For the distinction between primary and secondary social bonds, see Bernstein, "Opting Out", *supra* note 110, at 139.

[136] For example, a businessperson "may be snubbed at the local club or suffer pangs of guilt during the Sunday sermon": David Charny, "Non Legal Sanctions in Commercial Relationships" (1990) 104 Harvard Law Review 373, at 394.

[137] McMillan & Woodruff, *supra* note 124, at 2433.

To the extent that a pre-existing network is indeed necessary for the emergence of a reputation-based contractual regime, it seems that these conditions are not required for the maintenance of such a system. For instance, frequent interaction is not the only way by which information can be disseminated within a group. Early examples of alternative ways to share information comprise the system of private judges used in the Medieval Champagne fairs, whose function was to reduce the costliness of generating and communicating information, thus allowing traders to boycott dishonest merchants.[138] Nowadays, technological tools can also provide means to efficiently convey up-to-date information to large groups of transactors, thus allowing the creation of mass markets based on reputational bonds.[139] It could also be argued that membership in a formal professional association may substitute for membership in a community.[140]

In order to work, however, such institutions require the existence of some barriers to exit: members have to value membership enough to find threats of exclusion dissuasive. In consequence, members have to be selected according to the value they give (or are assumed to give) to the preservation of their reputation and membership. In the absence of "secondary social bonds", reputation-based mechanisms will be efficient only to the extent that exclusion threatens one's capacity to do business or make a profit; for example, in the US fish market, the

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[138] See Paul R. Milgrom, Douglass C. North &Barry R. Weingast, "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs" (1990) 2 Economics and Politics 1, at 5: "Ostracism played an important role here, for merchants that failed to abide by the decisions of the judges would not be merchants for long."

[139] Charny, *supra* note 136, at 419.

[140] However, the presence of some sense of community might allow sanctions to work better. Bernstein, for example, notes that the World Federation of diamond traders has induced dealers to set up regional bourses with a high measure of social and ethnic homogeneity that "can take advantage of preexisting social relationships and therefore be achieved at a lower cost than regulation by an outside body that cannot take advantage of the preexisting relationships" (Bernstein, "Opting Out", *supra* note 110, at 144). Similarly, West notes that the existence of geographical coalitions within Osaka's Dojima Rice Exchange discouraged contractual breach, since "[m]erchants within a particular coalition would be unlikely to cheat one another for fear of being barred from the coalition [and] merchants from other coalitions would think twice about cheating a member of another coalition for fear of mass reprisal" (Mark D. West, "Private Ordering at the World's First Futures Exchange" (2000) 98 Michigan Law Review 2574, at 2596).

creation of a firm providing credit information to wholesalers on the internet proved an effective way to prevent non-payment by buyers because it made them unable to find an uninformed wholesaler to buy from.[141] The enforcement system devised in Mexico's footwear industry documented by Woodruff was also contingent on the presence of a captive set of partners. Once trade liberalization allowed Mexican retailers to buy from foreign firms, manufacturers lost their power to sanction them, leading to the collapse of the structured information system they had put into place.[142] Similarly, threats of exclusion are taken seriously in the diamond trade because the central organization created by traders can rely on its tremendous market power to make it clear to new entrants that securing a steady supply of diamonds for their cutting centres depends on their respect of the established rules.[143]

3. Efficiency and the question of entry

The works reviewed above indicate that bilateral and reputation mechanisms can provide transactors with non legal ways to enforce their contracts. Yet, while these mechanisms constitute attractive options in the case of transactions which courts are unable to enforce, they also present some drawbacks which limit their overall efficiency.

The major criticism addressed to bilateral and reputation mechanisms is that they erect costly barriers to entry for outsiders. Because game-theory approaches rest on the basic belief that the availability of sanctions for defection influences how transactors choose their contracting partners, they assume that those who have non-legal mechanisms at their disposal will refrain from contracting with "outsiders" untouched by the operation of such mechanisms. Because they incite firms to stick with their partners and make them reluctant to enter into new

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[141] McMillan & Woodruff, *supra*, note 124, at 2436.

[142] See Woodruff, *supra*, note 117 at 987.

[143] Bernstein, "Opting Out", *supra* note 110, at 143.

partnerships − even with lower-cost producers − these mechanisms thus make it difficult for new firms to attract customers. In the case of reputation mechanisms, the reluctance of members to deal with non members means that newcomers find it hard to establish the reputation of reliability and honesty necessary to become a member. Similarly, new entrants who wish to acquire the personal characteristics needed for membership in a particular community may find it difficult and lengthy, if not altogether impossible.[144]

The idea that "exclusion is the corollary of ongoing relationships"[145] − be they bilateral or reputation-based − suggests that, while non-legal mechanisms can constitute an efficient solution in industries that confront difficult-to-enforce transactions and do not prohibitively suffer when entry is limited,[146] their potential effect in other cases is to shelter inefficient incumbents to the detriment of more efficient entrants. Ultimately, "potentially productive entrepreneurs are prevented from setting firms [and] efficient firms [are] unable to grow, since potential new customers would not look beyond their current suppliers".[147] As a result, private-sector growth is limited. Legal institutions are thus required in order to encourage firms to try out new partners and allow new relationships to start and develop. Even though informal mechanisms may substitute for law in the case of specific transactions, the presence of efficient legal institutions is nevertheless essential to support the other transactions that could not take place without them.

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[144] Religion may deserve a separate treatment, since religious conversion is generally possible. It has also been noted that conversion can result from economic motivations: see *e.g.* Ensminger, *supra* note 27, at 169. Switching costs also vary in function of the level of competition between networks; see Aviram, *supra* note 133, at 25 ("Enforcement mechanisms would be more effective in the single rural network than in any one urban network, which a rogue member could abandon in favour or another social network.").

[145] Simon Johnson, John McMillan &Christopher Woodruff, "Courts and Relational Contracts" (2002) 18 Journal of Law, Economics & Organization 221, at 259.

[146] Richman, *supra* note 113, at 2351.

[147] McMillan & Woodruff, *supra*, note 124, at 2454.

C. Enforcement costs in developing countries

A striking point about studies of non-legal enforcement mechanisms concerns the different treatments they are given depending on the settings in which they operate. In the case of Western countries, bilateral and reputation mechanisms are generally accounted for by pointing to the incapacity of courts to enforce certain types of transactions. In contrast, the "hybrid" structures existing in developing countries tend to be viewed essentially as deriving from the legal system's inefficiency. In other words, whereas Western firms are said to resort to relational mechanisms because of their superiority over efficient legal systems, firms in developing countries are assumed to stick to "old ways" of doing business for want of better, State-provided alternatives. This suggests that relational mechanisms in fact form two quite different categories: those that develop (or remain in place) in spite of the presence of efficient legal institutions, and those institutions whose existence is contingent on the inadequacy of the legal system and are expected to wither with legal reform. In the case of developing countries, the provision of new sanctions through law reform is expected to directly impact on contracting patterns, and thus on economic activity. Being provided with additional contractual assurance, transactors will contract with a wider range of partners than those currently touched by the operation of non-legal mechanisms, and enter into more efficient transactions.

This theory is based on two basic hypotheses. The first is that enforcement considerations play a major role in how individuals and firms choose their business partners. The second is that "sanctions" are the main determinants of contracting behaviour and account for the use of non-legal enforcement mechanisms. These two hypotheses seem problematic, however, when compared with the reality of developing countries. They will be reviewed in turn.

1. The failure to "switch"

Economic approaches hold that concerns with the enforcement of contracts are important determinants in decisions whether to contract with a particular partner. One hypothesis stemming from this approach is that firms with more confidence that breach would be sanctioned efficiently are more likely to try out new, unrelated partners.

This hypothesis was recently tested in an ambitious, comparative study of six transition economies. [148] In this study, firms were asked whether they would abandon their current long-term supplier for a new one offering a price 10% less. Firms who perceived courts to be effective were 7% less likely to reject the deal with the new suppliers, leading the authors to conclude that courts lower switching costs and barriers to entry.[149] However, this constitutes only one way to look at this data. Another interpretation of Johnson, McMillan and Woodruff's findings would rather point to the absence, among their respondents, of a significant reluctance to switch: only 22% of the surveyed firms who did not trust courts, and 14% of those who did, totally rejected the better offer and said they would not even try out the cheaper partner. In other words, a large majority of firms were ready to initiate business relationships with new partners or even abandon their current partners for new ones, even with justice systems that were "very far from perfect".[150]

Another point concerns the reasons behind firms' willingness or reluctance to "switch" to new partners, irrespective of legal efficiency. Many factors other than price and contractual risk can be hypothesized to play a role in this respect.

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[148] The results of this study covering six countries in transition from central planning to a market economy (Vietnam, Russia, Slovakia, Ukraine, Romania, Poland) are reported in Johnson, McMillan & Woodruff, *supra*, note 145, and McMillan & Woodruff, *ibid.*

[149] Johnson, McMillan & Woodruff, *ibid.*, at 257. It must be noted that the question concerned firms' intention to switch in a hypothetical situation, rather than their actual number of trading partners and switching rates.

[150] *Ibid.* at 261

Reluctance to switch, even if cheaper prices are offered, may be explained by the numerous non-price advantages deriving from existing relationships; for instance, in sectors where supply, demand, and/or prices are unstable and unpredictable, (exclusive) long-term relationships often provide a minimum level of security which compensates for the higher prices paid. In peasant marketplaces, for example, one often finds "equilibrating relationships" [151] in which buyers and sellers trade some parts of the gains they could make by trading with other partners for some protection from the vagaries of the market.[152] Similarly, Acheson has found that seasonal variations in the availability of lobster combined with the inelasticity in demand have led firms in the marketing chain to deal with "steady" customers and suppliers, under an informal understanding that they will do business with each other over the long run.[153] Another advantage is related to the fact that supplier credit is more likely to be offered to "good clients" who have established their reliability and whose orders reach a certain volume. Firms with cash-flow problems may be tempted to stick with those suppliers from which they obtained favourable credit terms rather than "split" orders and risk losing their privileges. It must also be noted that "switching" is not the only way to react to the presence of a new player in an industry; even firms with a significant degree of lock-in with their current supplier can be expected to use the concurrent offer as leverage to obtain price reductions from their suppliers.

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[151] See Stuart Plattner, "Equilibrating Market Relationships" in Stuart Plattner, ed., *Markets and Marketing* (Lanham, MD: University Press of the Americas, 1990) 133, at 134-39.

[152] Braadbaart, for example, notes that "[m]icro-level studies of developing economies abound with references to personalistic business dealings." (Okke Braadbaart, "Business Contracts in Javanese Vegetable Marketing" (1994) 53 Human Organization 143at 143); see also Richard A. Posner, "A Theory of Primitive Society With Special Reference to Primitive Law" (1980) 23 Journal of Law and Economics 1, at 26 (describing such mechanisms as a form of insurance developing in response to the uncertainty and high information costs characterizing primitive societies).

[153] See Acheson, "Lobster Market", *supra* note 110, at 117: These arrangements, which involve an intricate set of exchanges, "are highly valued because they go a long way toward stabilizing the supply of lobsters" and give a certain amount of financial security.

Willingness to "switch" may also be interpreted in diverse ways. There are reasons to believe that "partial switching" obeys to a different logic than "total switching", and may not mean agreeing to take more risks, but represent an effort to reduce risk through diversification. For example, in Russia and Ukraine, the two countries where courts were seen as the least effective, 90% of firms indicated that they would buy from both suppliers,[154] suggesting that they stick to their partners mainly because of the lack of suitable alternatives. In those circumstances, which undoubtedly prevail in many sectors of activity in developing countries, the presence of efficient courts is unlikely to have a significant impact on partners' choice.[155]

What this suggests is that legal reform is likely to make a contribution to economic development only where market institutions already exist and switching costs are low. And yet, these circumstances are exactly those in which bilateral and reputation mechanisms are hypothesized to be ineffective. Law reform does not break existing barriers to entry, but rather fills the void left by former informal mechanisms rendered ineffective by lowered switching costs; conversely, where (non enforcement-related) switching costs remain high, the prospects of legal reform appear limited.

2. The failure to sanction

Economic analyses consider the presence of potential sanctions a main determinant of contracting decisions. The fact that non-legal mechanisms provide efficient sanctioning mechanisms is said to account for patterns of intra-

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[154] Johnson, McMillan & Woodruff, *supra*, note 145, at 249.

[155] It could be argued that legal and judicial reform could have an indirect impact on contracting partners to the extent that, as argued by law and development proponents, it drives new investments by providing incentives to create new firms or operate in a new market. However, there is little empirical evidence that legal enforcement mechanisms actually have an impact on decisions to invest: see Perry, supra note 3, at 784-87.

community contracting. Conversely, where sanctions do not exist, no contracting can take place.

This "sanction-centred" perspective is ultimately based on the assumption that wronged parties, or members of their "communities", actually deal with cheaters by applying the available sanctions. One major problem with this assumption is that it has so far received little empirical support. The oft-cited, praradigmatic case of the 11th century Maghribi traders – who, as documented by Grief, ostracized cheaters until they compensated the injured[156] – appears somewhat exceptional when compared to contemporary data from developing countries. For example, Fafchamps notes that, following years of empirical work on contract enforcement, he has never come across such coalitions and forms of collective punishment.[157] Similarly, McMillan and Woodruff indicate that Vietnamese firms are reluctant to sanction breaching partners: "[a]s a result the retaliation is not as immediate or predictable as in the simple-repeated game story and therefore not as effective a sanction."[158]

One way to account for this situation is to point to the fact that parties who could in theory apply sanctions do not always have the incentives or capacity to do so in practice. In fact, real opportunities to apply sanctions seem to be conspicuously missing in many situations. In bilateral contracting, for example, threats to sever a business relationship can only be credible where both parties have a real opportunity to deal with other, equivalent partners. In other cases, applying sanctions is a form of self-punishment. For example, Clay notes the strikingly infrequent use of collective punishment by Mexican California merchants, a phenomenon she attributes to the fact that, in many towns, there were often only

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[156] Greif, "Early Trade", *supra* note 119, at 214

[157] Marcel Fafchamps, "Spontaneous Market Emergence" (2002) 2 (1) The B.E. Journal of Theoretical Economics, online: The Berkeley Electronic Press http://www.bepress.com/bejte/topics/vol2/iss1/art2, at 2.

[158] John McMillan & Christopher Woodruff, "Dispute Prevention without Courts in Vietnam" (1999) 15 Journal of Law, Economics, and Organization 637, at 638.

one or a few active merchants. Since defaulting agents could not be replaced easily, merchants generally punished cheating by refusing to grant further credit, rather than refusing future interactions, and resorted to ostracism only where it was inexpensive to do so.[159] Similarly, Hendley's case study indicates that Russian firms with a finite customer base and direct competitors see insisting on timely payment from their customers as a sure road to bankruptcy. In consequence, "[w]here management fears that losing customers will threaten its viability, disputes are resolved informally" and "negotiations […] will go to virtually any length to avoid alienating the customer (even though the customer is in breach)."[160] In such cases, the preservation of relationships might not be as much a way to make business run smoothly as the only way of allowing some firms to remain in business.

Additional problems come from the fact that, even where opportunities to switch exist, switching often carries different costs for both parties. This is because parties to relational contracts rarely make strictly equivalent investments in the relationship. For example, one party may have incurred significantly higher search and screening costs than the other, or may derive more benefits from the "cooperative framework" that developed in the course of the relationship, resulting in higher levels of lock-in. Where investment is one-sided, the party who made the investment is the only one who is deterred from breaching and prevented from applying sanctions, leaving the other party even freer to breach than in the absence of a relation.

An alternative explanation for the failure of rational actors to punish cheaters would entail departing from the game-theory model, and suppose that businesspeople are not primarily concerned with the strict enforcement of their contracts. A number of studies have evidenced the fact that businesspeople tend to

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[159] Clay, *supra* note 120, at 203-204.

[160] Kathryn Hendley, "Beyond the Tip of the Iceberg: Business Disputes in Russia" in Peter Murrell, ed., *Assessing the Value of Law in Transition Economies* (Ann Arbor: University of Michigan Press, 2001) 20, at 46.

see non-compliance as problems to be solved in negotiations rather than instances of contractual breach requiring retaliations.[161] Insisting on strict compliance entails performing one's side of the bargain to its letter and losing the "flexibility" needed in business.[162] In developing countries, where firms face tight financial constraints and the business environment is highly uncertain, strict compliance is often impossible. Applying sanctions in all cases of breach, including involuntary breach, would entail ending a wide range of profitable relationships, with no deterrent effect on the remaining partners. In such circumstances, renegotiation is likely to constitute the standard response to breach, sanctions being restricted to cases of "faulty" breach.[163]

The fact that relational contracts often exhibit a high degree of flexibility indicate that parties to such contracts are not concerned with limiting the frequency of contractual breach as much as with finding mutually beneficial ways to deal with such breach. The ties that develop between firms cooperating over a long period of time are of particular importance in devising ways to manage crises. In addition, transacting on an ongoing basis allows problems occurring at one point to be fixed later in the course of the relationship. In other words, transactors may agree to cope with breach at one point in time, under the understanding that the other party will eventually make up for the breach. Flexibility can also by itself constitute a form of insurance in which a party refrains from retaliating after a breach under the understanding that the other party will reciprocate down the road. From this perspective, continuing business relations do not focus on limiting breach, but on ensuring that it will be dealt with in a cooperative manner. In addition, a norm of flexibility may impact on behaviour notwithstanding one's personal commitment to it. A number of studies, for instance, have documented

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[161] For early examples, see Macaulay, "Non-Contractual Relations", *supra* note 88; Hugh Beale & Tony Dudgale, "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 Brit. J. Law and Society 45.

[162] Macaulay, "Non-Contractual Relations", *ibid.*, at 15.

[163] See McMillan & Woodruff, *supra*, note 158, at 542 ss.

the fact that firms sometimes refrain from punishing bad payers for fear of alienating their other customers.[164] In such cases, the presence of reputation mechanisms in fact impedes, rather than favours, the application of effective sanctions against breach.

D. The future of economic approaches

Even though the economic approaches reviewed in the present chapter purport to describe universal phenomena, it is worth noting that they have emerged primarily in response to concerns about the emergence and persistence of non-legal mechanisms in settings with "functional" legal systems. In contrast to Western instances, which are accounted for by pointing to their superior efficiency, the mechanisms subsequently observed in developing countries have been said to merely compensate the dysfunctionality of local legal systems. The continuing reliance of researchers on this opposition between functional and dysfunctional legal orders has deeply coloured the way in which enforcement matters have been investigated in developing countries.

From a methodological perspective, an important issue concerns the tendency of researchers to assume, rather than document, the existence of non-legal enforcement mechanisms in developing countries. In contrast to Western settings, where researchers have resorted to detailed, qualitative studies to record the presence and workings of non-legal mechanisms, their existence in developing countries is generally taken for granted, as a necessary consequence of the assumed need for contractual assurance and inefficiency of the local legal systems. The tendency is then to look for mechanisms (such as patterns of repeat dealings of intra-community trade) to which theory ascribes an enforcement function. In return, these mechanisms, where they are found, are assumed to exist primarily because they serve enforcement purposes rather than because of other

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[164] McMillan & Woodruff , *ibid.*, at 643; Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa* (Cambridge, MA: The MIT Press, 2004), at 67 [Fafchamps, *Market Institutions*].

considerations. Reliance on theory thus allows researchers to dispense with documenting the diverse reasons why such patterns could have emerged as well as their actual impact on the enforcement of contracts. This seems particularly problematic with respect to reputation mechanisms. The theoretical focus put on social sanctions, ostracism, and shared norms seems to have given birth to a general assumption that a good proportion of, if not all, trade in developing countries takes place among members of close-knit communities formed on the basis of personal ties or identity characteristics. Conversely, ethnic and religious, or "family" characteristics are often seen as evidence that membership in a specific community involves access to specific enforcement mechanisms.[165] The presumption that business communities organize themselves around pre-existing, non business groupings remains widely shared despite evidence that factors such as ethnicity, family, and religion do not play a major role in the formation of business networks.[166]

An accurate understanding of contract enforcement in developing countries requires us to go beyond the study of firms' contracting patterns and take a look at the wide range of factors likely to have an impact on contractual dealings. This can only be done by adopting a bottom-up, descriptive approach to business relationships. Departing from enforcement-based conceptions, such an approach would allow for the investigation of a number of issues that current economic models fail to address. One of them concerns the kind and degree of contractual assurance actually sought by firms operating in developing countries, and how

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[165] A related assumption is that the "formal" and "informal" sectors form "culturally-distinct" communities whose members differ in terms of personal characteristics and enforcement preferences. A striking example of the association between "community membership", "informal enforcement" and "informality" is provided in the questionnaire designed by the World Bank to investigate the practices of firms operating in the Senegalese "formal" and "informal sector": whereas formal firms were asked whether they had resorted to courts in the previous two years, informal firms were asked how many disputes were solved through the mediation of a "sage" or "respected member of the community"; see World Bank, *Enquête Climat des Investissements Auprès des Entreprises Informelles*, 2004 [on file with author].

[166] Marcel Fafchamps, "The Role of Business Networks in Market Development in Sub-Saharan Africa" in Masahiko Aoki & Yujiro Hayami, eds., *Communities and Markets in Economic Development* (Oxford: Oxford University Press, 2001) 186, at 25.

they manage or fail to obtain such assurance. A better understanding of the actual role that enforcement considerations play in firms' choices would involve departing from the notion of "entry" and "switching costs", which focus on the number of partners with which firms deal or could deal, studying instead the ways in which these partners are selected and replaced. More work is also needed on the notion of contractual flexibility and its relevance in the context of developing countries. The possibility that a flexible attitude toward contractual commitment constitutes an adaptation to local constraints rather than a response to the absence of adequate enforcement mechanisms has to be investigated. Finally, it seems necessary to go beyond the notion that communities enforce contracts and look more closely at the role actually played by trading or social groups and norms in contracting practices. This, as well as the ambiguity and shifting nature of ethnicity, religion, language, and many other identity markers, points to the need to depart from the notion of "close-knit community" as sanctioning devices in favour of a more empirically grounded study of business networks, the way they form, and the role they play in bilateral business relationships.

Chapter 3. Cultural aspects of contract enforcement[167]

By focusing on self-interest as the essential determinant of economic behaviour, proponents of economic approaches basically assume that the spirit of capitalism is alive and well within each informal entrepreneur and needs only the right institutional conditions to express itself.[168] Similarly, since the law and development literature generally ignores the possibility that certain groups of people may be unable to embrace "pro-development" values, it fails to confront the extent to which cultural change may be a prerequisite to economic development.

The notion that culture could be an impediment to legal change, or that law should aim at modifying certain undesirable cultural traits, seems to have been quasi-taboo in the law and development community for the last thirty years.[169] The overall impression is that the new movement tries to avoid facing accusations of imperialism and ethnocentrism by deliberately eschewing the thorny question of the level of "cultural fit" needed for transferred legal models to work in different cultural environments. Debates around rule of law reforms are generally framed in ideological rather than practical terms, and revolve around the issue of whether human rights and the rule of law constitute universal ideals attainable by peoples of all culture or are Western impositions of a neo-colonial character.[170]

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[167] A preliminary version of part of this chapter has been published in Paquin, *supra* note 8.

[168] See *e.g.* Hernando de Soto, *The Mystery of Capital* (New York: Basic Books, 2000), at 225: "[C]ultural arguments will peel away as the hard evidence of the effects of good political institutions and property law sink in."

[169] This phenomenon might be in reaction to the culturalist orientation taken by the first law and development movement: see Trubek, "Development Assistance", *supra* note 10, at 76 (citing as the "primary goal of these programs" the "transform[ation of] legal culture and institutions through educational refrom and selected transplants of "modern" institutions.")

[170] See *e.g.* Peter Fitzpatrick, "Law's Infamy" in Sammy Adelman & Abdul Paliwala, eds., *Law and Development in Crisis* (London: Hans Zell, 1993) 27*;* Sally Engle Merry, "Colonial and Postcolonial Law" in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Malden, MA: Blackwell Publishing, 2004) 569; Giles Mohan & Jeremy Holland, "Human Rights & Development in Africa: Moral Intrusion or Empowering Opportunities?" (2001) 88 Review of African Political Economy 177.

The backdrop of this rhetoric is a general failure to give satisfactory answers to the question of the need for cultural change and the possibility to effect it through legal education programs. This is particularly problematic in view of the fact that past experiences with legal transfers have already shown that cultural factors are to be fully considered in order to ensure that reforms reach their objectives. In addition, cultural explanations for "underdevelopment" have not only persisted in the last thirty years, but have found new forms of expression which make them impossible to discard without careful examination.

In this chapter, various "culture-based" approaches that have been taken with respect to the issue of cross-cultural legal transfers will be presented. After an overview of the treatment of the question of culture in the law and development literature, a first section will present the notion of legal culture developed in legal sociology. The following two sections will review the relevant literature in the fields of cross-cultural psychology, management, and social capital research. Finally, the limitations of existing research will be underlined with a view to opening new perspectives on the investigation of the relationship between law and culture in developing countries.

A. Law, development, and culture: an overview

The idea that some elements present in local cultures prevent some communities from engaging in productive activity has been the object of extensive discussion in a number of fields and for quite a long time. In the "age of empire" that started in the late 19th century, non-Europeans, who had previously been seen as different but not unequal, became "savages" whose racial, and later cultural, characteristics made them unable to follow the same path as their civilized colonial masters.[171] There was a similar insistence, during the decolonization

[171] See *e.g.* Philip D. Curtin, *Imperialism* (New York: Walker, 1971), at xvii: "most imperial theory between the 1870's and the 1920's was based on racist assumptions with evolutionary overtones."

process, on the need for former colonies to undergo the cultural transformation required for their entry into "modernity". Original development economists also attributed the failure of their prescriptions to the irrational character of traditional cultures that were holding the poor nations back from development.[172]

A revival of interest in culture as an explanatory variable for differences in levels of economic development was sparked in the 1980s by the work of Lawrence Harrison, a former USAID official who argued that culture was the primary cause of Latin America's underdevelopment.[173] Less than ten years later, in another widely read book, Samuel Huntington described the contemporary world as divided between a small number of civilizations based on enduring cultural differences, and underlined the increased salience of culture in the new global order.[174] Following suit, a growing number of scholars and practitioners from diverse fields began to focus explicitly on the role of cultural values as obstacles to economic development, leading Harrison to note the articulation of a "new culture-centered paradigm of development"[175] by "intellectual heirs of Alexis de Tocqueville, […] Max Weber […] and Edward Banfield."[176] Many of the authors associated with this paradigm have not shied away from taking categorical and controversial stances such as saying that "culture makes almost all the difference"[177] or that there is "no alternative to the promotion of cultural change"

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[172] See Mary Douglas, "Traditional Culture - Let's Hear No More About It" in Vijayendra Rao & Michael Walton, eds., *Culture and Public Action* (Stanford, CA: Stanford University Press, 2004) 85, at 87.

[173] An updated edition of Harrison's book was published in 2000, evidencing the enduring popularity of the ideas it expresses: Lawrence Harrison, *Underdevelopment is a State of Mind: The Latin American Case* (Lanham: Madison Books, 2000).

[174] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

[175] Lawrence E. Harrison, "Why Culture Matters" in Lawrence E. Harrison & Samuel P. Huntington, eds., *Culture Matters: How Values Shape Human Progress* (New York: Basic Books, 2000) xvii-xxxiv, at xxii.

[176] *Ibid.* at xxi.

[177] David Landes, "Culture Makes Almost All the Difference"*, in* Harrison & Hungtington, *supra* note 175, 2.

to foster economic development in places where cultural values are "fundamental obstacles to progress."[178]

More recently, the question of the relationship between culture and development has managed to push the door of the legal community under the guise of what has been called "the problem of ethnic minority market dominance." This problem, which had drawn the attention of sociologists and historians for some time, [179] gained prominence in the legal community through the ambitious work of Amy Chua, who invited policymakers to consider the consequences of the introduction of good governance reforms where minority groups dominate the market.[180] According to Chua, the introduction of marketization and democratization reforms in such settings will tend to favour different ethnic groups and will end up catalyzing ethnic tensions, leading to one of three non exclusive outcomes: an ethnically fuelled anti-market backlash, attempts at the elimination of the market-dominant minority, and a retreat from democracy.[181] Chua recognizes the possibility that cultural factors may partly account for the existence of dominant minorities; however, she also discards the possibility of cultural change through law,[182] and thus displays little interest in identifying the root causes of ethnic disparities or eliminating them. As a result, her policy recommandations consist in the adoption of "ethnically conscious" adjustments to the functioning of the

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[178] Harrison, *supra* note 175, at xxxi.

[179] See *e.g.* Clifford Geertz, *Peddlers and Princes: Social Change and Economic Modernization in Two Indonesian Towns* (Chicago: University of Chicago Press, 1963) (describing the dominance of Chinese traders in Java); Jean-Loup Amselle, *Les négociants de la savane* (1977) (describing the dominant Kooroko community of Mali); Landa, *supra* note 132; Mark Granovetter, "The Economic Sociology of Firms and Entrepreneurs" in Alejandro Portes, ed., *The Economic Sociology of Immigration: Essays on Networks, Ethnicity and Entrepreneurship* (New York: Russell Sage Foundation, 1995) 128 [Granovetter, "Firms and Entrepreneurs"].

[180] Amy Chua, "Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development" (1998) 108 Yale Law Journal 1

[181] *Ibid.*, at 10.

[182] *Ibid.*, at 266: "governmental "cultural revolutions" - attempting to change culture from the top down - have been notoriously unsuccessful."

market and the democratic process aiming at mitigating the potential negative consequences ethnic disparities on the democratic process.

Chua's pragamatic recommandations have raised a number of criticisms among advocates of cultural change. One of them concerns the relationship between disparities in levels of entrepreneurship and disparities in wealth and income and the consequent need to distinguish between these two kinds of differences between ethnic groups in addressing inequalities. For Lan Cao, for example, while dominance related to corrupt alliances and cronyism involve relatively uncontroversial measures, measures aimed at reducing minority wealth "derived from superiority in skill, hard work, and entrepreneurialism […] are more difficult to justify".[183] In the latter case, policies should be aimed at changing the attitudes and behaviours that impede economic growth among the disadvantaged groups. In cases where a country is unwilling to invest in cultural change, "ethnically neutral" measures to enhance competition are preferrable to policies based on affirmative action or positive discrimination. A similar argument is made by Davis, Trebilcock, and Heys,[184] for whom, while a strong case can be made for policies to reduce differences in wealth, there is little justification for attempting to alter the ethnic composition of the commercial elites by promoting entrepreneurship among disadvantaged groups.

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[183] Lan Cao, Lan, "The Ethnic Question in Law and Development" , Book Review of *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* by Amy Chua (2003-2004) 102 Michigan Law Review 1044, at 1053-54.

[184] Kevin Davis, Michael J. Trebilcock &Bradley Heys, "Ethnically Homogeneous Commercial Elites in Developing Countries" (2001) 32 Law & Policy in International Business 331, at 354: "[I]t will be inefficient to remove disparities in entrepreneurship that are attributable to significant differences in productive abilities and preferences. In these circumstances, corrective state action seems to imply inducing a number of individuals to do things that they either would prefer not to do or are not particularly good at completing."

The question of the relationships between culture and entrepreneurship is of great relevance in the sphere of business law transplants, even where no dominant ethnic minority can be found. By facilitating impersonal contracting among a wider array of potential partners, business legal reforms are meant to decrease reliance on intra-ethnic or other kind of closed networks and thus allow a wider variety of actors to enter into productive economic activity. But suggestions that institutional factors may not be the sole determinant of market performance differentials among ethnic groups raise doubts about the capacity of legal reform to have such an effect. To the extent that they promote values that run contrary to the spirit of entrepreneurship, local cultures can seriously affect law's ability to convert people to new and better ways to do business. Assessing the potential of business law transplants to impact on economic development thus requires a fuller treatment than that provided by current law and development proponents. In the following sections, contributions from the fields of legal sociology, cross-cultural psychology, and social capital research will be reviewed, with a view to identify their implications for cross-cultural law reform.

B. Mixing "legal cultures"

The apparent disinterest of law and development experts for cultural issues contrasts with the importance of this question in the fields of comparative law and legal sociology, where culture-based explanations for differences in legal behaviour have been put forward with respect to a number of settings.

The idea that legal institutions have a close relationship with the society in which they are born and grow can be traced far back in history, including in Montesquieu's work on "l'esprit des lois".[185] As to the term "legal culture", it is

[185] "La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles ne doivent être que les cas particuliers où s'applique cette raison humaine. Elles doivent être tellement propres au peuple pour lequel elles sont faites que c'est un très grand hasard si celles d'une nation peuvent convenir à une autre.": Charles-Louis de Secondat de Montesquieu, *De l'Esprit des lois* (Genève: Barillot, 1748), livre I, ch. III.

generally attributed to legal sociologist Lawrence Friedman, who defined it as "those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways."[186]

Although the notion of legal culture has been used in the study of numerous legal settings, it has been particularly popular with respect to the case of Japan. Debates about the existence of a distinct Japanese legal culture started in the 1960s, when legal sociologist Tayekoshi Kawashima first identified a distinct national legal consciousness as accounting for the low litigation rates observable in Japan.[187] Many authors subsequently interpreted Kawashima's work as an assertion that specific cultural values such as deference to authority and harmony have generated a general antipathy for law and distaste of litigation among Japanese people,[188] and attempted to evidence the existence of such distinct attitudes on the basis of anecdotal evidence as well as national and comparative surveys.[189] Cultural explanations are still widely used to account for the reluctance of Japanese entrepreneurs to document agreements, the brevity and lack of precision of their contracts, the flexibility observed in their application, and, more

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[186] Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), at 15 [Friedman, "Legal System"].

[187] Tayekoshi Kawashima, "Dispute Resolution in Contemporary Japan" in Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order of a Changing Society* (Cambridge: Harvard University Press, 1963) 41.

[188] For a review of the culturalist approaches derived from Kawashima's work, see Eric A. Feldman, "Law, Culture, and Conflict: Dispute Resolution in Postwar Japan" in Daniel H. Foote, ed., *Law in Japan: A Turning Point?* (University of Washington Press, 2007) 50, at 58-61 [Feldman, "Postwar Japan"].

[189] For a review of these studies, see Setsuo Miyazawa, "Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior" (1987) 21 Law and Society Review 219, at 223-224. The idea that legal cultures could be discovered by resorting to cross-national surveys is still popular in Japan, as evidenced by the existence of a Research Centre for the International Comparison of Legal Consciousness at Nagoya University; for a description of some results of this research project, see Luke R. Nottage, "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study" (1997) 27 Victoria University of Wellington Law Review 59; Michael K. Young, Masanobu Kato &Akira Fujimoto, "Japanese Attitudes towards Contracts: An Empirical Wrinkle in the Debate" (2003) 34 George Washington International Law Review 789.

generally, the gap between the law in the books and the law in action.[190] They also have long been popular with respect to sub-saharan Africa in general. In line with the assertions of colonial law experts about the unity of African legal systems,[191] most notably with respect to their common reliance on "the community principle",[192] numerous contemporary studies see the pervasiveness of local practices emphasizing relational harmony within the community over the rights of individuals as characteristic of many sub-Saharan African settings.[193]

The notion that specific cultures call for specific laws has led to intense discussions about the feasibility of "legal transplants". A notable debate on this issue took place between comparatists Alan Watson and Pierre Legrand. Relying on historical evidence about the pervasiveness of legal transfers, Watson first argued that they prove that there is no need for a close relationship between law

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[190] See *e.g.* the contributions to the 1996 EU-Japan "legal dialogue" on contracts held in Kyoto, currently available at http://www.kclc.or.jp/japanese/sympo/EU.htm (last viewed Nov 1 2006).

[191] See *e.g.* André Robert, *L'évolution des coutumes de l'Ouest african et la législation française* (Paris : Éditions de l'encyclopédie d'outre-mer, 1955), at 23 (concluding that, despite local differences attribuable to historical factors and geography, "il existe un fonds commun de pratiques juridiques valables pour l'ensemble des peuples de l'Ouest africain"); see also Taslim Olawale Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956), at 8: "we sometimes get variations of details, if not of essentials, as we pass from one society to another. But, in spite of this diversity, we have to bear in mind the strong evidence of general similarities which writers who have studied Africa at first hand, and appreciatively, have vouchsafed to us."

[192] Antony Allott, *Essays in African Law*, (London: Butterworths, 1960), at 70.

[193] See *e.g.* Prosper Nkou Mvondo, "La Justice parallèle au Cameroun: la réponse des populations camerounaises à la crise de la Justice de l'État" (2002) 51-52 Droit et Société 369, at 213 ("toute la philosophie repose sur la recherché de l'harmonie entre les hommes, sur la solidarité entre les membres du corps social […] une justice qui sème la rupture est automatiquement vouée à l'échec"); Étienne Le Roy, "La face cachée du complexe normatif en Afrique noire francophone" in P. Robert, F. Soubiran-Paillet & M. van de Kerchove, eds, *Normes juridiques, normes pénales - Pour une sociologie des frontières - Tome 1* (L'Harmattan, 1997) 123; Maurice Kamto, *Pouvoir et droit en Afrique noire* (Paris: Librairie générale de droit et de jurisprudence, 1987) ; Mamadou Dia, "Development and Cultural Values in Sub-Saharan Africa" (1991) 28 Finance and Development 10; Kéfing Konde, Camille Kuyu &Étienne Le Roy, "Demandes de justice et accès au droit en Guinée" (2002) 51-52 Droit et Société 383; but see Deyssi Rodriguez-Torres, "La justice expéditive à Nairobi - Informalité ou formalité juridique?" (1998) 42 Journal of Legal Pluralism and Unofficial Law 179, for whom the mechanisms he observed in Nairobi: "seraient plutôt des adaptations judiciaires autonomes dans les communautés locales urbaines qui se livrent à des exécutions, mais sans le faire au nom des ancêtres, ni au nom de la tradition." (188).

and society.[194] Legrand responded by arguing that legal rules do not exist in a vacumm but receive their meaning from the society in which they are applied. In consequence, the transplantation of a rule from one society to another necessarily involves a change in the meaning of the rule and, thus, in the rule itself,[195] making legal transplants impossible.

A third avenue is presented by Gunther Teubner, who proposes the notion of "legal irritants" as a way to go beyond the "simple alternative context versus autonomy".[196] Teubner submits that foreign legal rules imported in a domestic culture work "as a fundamental irriation which triggers a whole series of new and unexpected events [through which] the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."[197] Teubner also suggests modifying the distinction between "organic" and "mechanical" transplants proposed by Kahn-Freund[198] to distinguish areas where legal and social processes are "loosely coupled" (and transfers easier to accomplish), and those of "loose coupling", in which "[t]ransfers will not only be confronted with the idiosyncrasies of the new legal culture, they will have to face resistance which is external to the law."[199]

Teubner's distinction between the legal culture and the aspects of culture which are "external" to the law recalls of the distinction first introduced by Lawrence

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[194] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2th ed. (Athens, GA: University of Georgia Press, 1993), at 100: "the creation of law for that precise society in which it is operating is neither always common nor very important" .

[195] "As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes": Pierre Legrand, "What 'Legal Transplants'?" in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publications, 2001) 55, at 61.

[196] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61 Modern Law Review 11, at 17.

[197] *Ibid,* at 27.

[198] See Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Modern Law Review 1.

[199] Teubner, *supra* note 196, at 21.

Friedman between the "internal" legal culture and the "external" legal cultures of a society, the former referring to the ideas and practices of legal professionals, and the latter to the ideas and opinions about law held in society in general.[200] Most of the work done so far on legal cultures has related to the compatibility of transplanted laws with the *internal* legal culture of the receiving societies. Most of the attention has been devoted to the transfer of legal institutions across legal families, as well as to the mechanics of transplantation. Local legal professionals have often played a prominent role in the evaluation of the compatibility with, and adaptation of, imported norms to local conditions. Issues of relevance to the member of the legal profession, such as the internal consistency of the legal system or the impact of the reform of the judicial process, have figured prominently in discussions about comptability, to the detriment of broader questions about the compatibility of the imported norms with laypeople's legal cultures and practices.[201]

Assessing the potential effects of law reform on economic activity entails broadening the scope of the inquiry to include issues pertaining to the *external* legal culture of the receiving society. For this purpose, many authors have proposed to abandon traditional classifications based on the notion of legal families[202] in favour of alternative, more encompassing classificatory systems. Ugo Mattei, for example, has proposed a taxonomy in which legal systems are classified according to the type of norms (politics, law, philosophical/religious tradition) that play a leading role in behaviour, and fall into three main categories:

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[200] Friedman, *supra* note 186, at 223.

[201] As rightly noted by Pistor, the fact that legal borrowings do not always go unchallenged by representatives of the domestic legal system does not necessarily mean that local needs were taken into account, since the concerns raised may be related to the particular interests of the legal profession itself rather than issued on behalf of the intended end-users of the reform, including the business community: see Katharina Pistor, "Supply and Demand for Law in Russia" (1999) 8 (4) East European Constitutional Review 105.

[202] See *e.g.* René David & Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains,* 9th ed. (Paris: Dalloz, 1988).

professional law, political law, and traditional law.[203] Similarly, legal anthropologist Étienne LeRoy, who sees law as resting on three distinct bases (loi, coutume, habitus), classifies legal systems according to the hierarchy they establish between these three types of norms.[204] However, such types of classifications seem of limited relevance in practice: the classification of all legal cultures in a small number of very broad categories based on a small number of salient characteristics mean that each of these categories ends up regrouping fundamentally different societies, irrespective of fundamental differences in their relationship to law. By treating cultures as belonging to monolithic "types," such general classifications do not allow for the identification of precise potential "conflict zones" between legal cultures, and prevent the development of testable hypotheses. The scarcity of data constitutes another major constraint in the elaboration of more precise descriptions of "legal cultures". In current accounts of legal cultures, anecdotal evidence and personal views often replace data derived from than rigorous observation. One can also observe a tendency to compensate for the lack of detailed empirical data on real behaviour and motivations by relying on official declarations or "expert" views as to the legal culture of a specific community. By allowing unverified stereotypes to replace detailed descriptions of "culture in action", such an approach may in fact lead to the magnification of cultural gaps whose existence and importance have not been clearly evidenced.[205]

One of the factors which may account for the disinterest of researchers in non Western business legal norms and practices (and the consequent lack of data on legal cultures) concerns their deeply-held beliefs in both the necessity of Western law for the development of capitalism and the "loose coupling" of economic and

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[203] Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 American Journal of Comparative Law 5.

[204] Étienne Le Roy, *Le jeu des lois - Une anthropologie "dynamique du Droit* (Paris: LGDJ, 1999).

[205] See Carol V. Rose, "The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study" (1998) 32 Law and Society Review 93, at 130-31.

social life. Conceptions of Western legal models as absolute prerequisites to economic development has led scholars to see them as reflections of "rational", "efficient" and "universal" ways of doing business, and consider their transfer as "mechanical" and unproblematic. The necessity and exportability of Western business law models have been taken for granted at least since the colonial period, where it was held that business law transfers were essential to support economic activity in the colonies. This view was also prevalent in the modernization era. Even the most fervent advocates for the preservation of customary law in former colonies were of the view that "existing law is adequate to deal with other fields of relations, but not with the expanding commerce between previously unrelated persons."[206] Since they did not have to compete with well-established, traditional norms applying in the sphere of commerce, legal transfers were also thought to face no major impediment to their successful implementation.[207] Similarly, it was believed that postwar Japan's "problem" of the low level of penetration of law into a social life, as evidence by low litigation rates and the small size of the legal profession, would resolve itself following the overall modernization of the Japanese society.[208]

The "modern/traditional" opposition, which contrasts neutral, Western law with cultural traditions, went basically unchallenged until the second part of the 20th century, when the economic success of Japan, followed by a number of other Asian countries without a "modern legal consciousness", forced its reconsideration. The economic development of Asia during this period constituted a major impetus in the emergence of a new line of thinking seeking to challenge

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[206] Max Gluckman, "Legal Aspects of Development in Africa: Problems and Research Arising from the Study of Traditional Systems of Law" in André Tunc, *Les aspects juridiques du développement économique - Legal Aspects of Economic Development* (Paris: Dalloz, 1966) 59, at 73.

[207] See *e.g.* Jacques Vanderlinden, *Les sytèmes juridiques africains* (Paris: PUF, 1983), at 111; Philippe Tiger, *Le droit des affaires en Afrique (OHADA)* (Paris: PUF, ; Eugène Schaeffer, "Aliénation-Réception-Authenticité: Réflexions sur le droit du développement" (1974) 84 Recueil Penant 311.

[208] Feldman, "Postwar Japan", *supra* note 188, at 55.

the centrality of Western law and revalorize the local ways of doing business condemned by the modernization logic. Arguments were first developed that Japanese culture was a contributing, rather than inhibiting, factor in the country's economic development, and were subsequently extended to the cases of China and East Asia (more particularly Singapore, Taiwan, Hong Kong, and South Korea), whose common Confucian heritage and use of *guanxi* was identified as constitutive of a Confucian form of capitalism accounting for their success.[209] However, this new state of affairs did not survive the 1997 financial crisis, which for many observers signalled the failure of Asian development models.[210] Formerly celebrated forms of Asian capitalism came to be seen as manifestations of a crony capitalism which was at worst a contributing factor to the crisis, and at best a transitional form of capitalism bound to decline with greater integration within the global market. Rather than an asset, *guanxi* became equated with a cultural tradition ultimately incompatible with long-term development. [211]

C. Cultures in cross-cultural research

Cross-cultural studies researchers have tried for some time to address the difficulties related to the assessment and comparison of cultures by proposing

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[209] See *e.g.* Carol A. G. Jones, "Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China" (1994) 3 Social and Legal Studies 195; Jane Kaufman Winn, "Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan" (1994) 28 Law and Society Review 193; Frank K. Upham, "Speculations on Legal Informality: On Winn's 'Relational Practices and the Marginalization of Law'" (1994) 28 Law and Society Review 233.

[210] For a review and critique of the "official-academic consensus" blaming the crisis on the failure of Asian governance, see Robert Wade, "Wheels Within Wheels: Rethinking the Asian Crisis and the Asian Model" (2000) Annual Review of Political Science 85.

[211] See *e.g.* Hilton L. Root, "Asia's Bad Old Ways" *Foreign Affairs* 80:2 (March 2001) 9; Nicholas D. Kristof "Crisis Pushing Asian Capitalism Closer to U.S.-Style Free Market" *New York Times* (17 January 1998), A1; Timothy M. Devinney, "The Asia Crisis: Causa Sine Qua Non" (1998-1999) Policy 35. For a review and critique of this argument, See Mayfair Mei-Hui Yang, "The Resilience of Guanxi and its New Deployments: A Critique of Some New Guanxi Scholarship" (2002) 170 The China Quarterly 459; Jones, *supra* note 209.

various frameworks for their classification.[212] Contrary to theoretical work relying on superficial observations or general impressions, the cultural dimensions identified by these researchers are derived from data about attitudes, behaviours, or values obtained through large-scale surveys. These cultural dimensions thus provide a way to measure and classify cultures which facilitate research that can be adapted to take into account the existence of distinct sub-cultures within a society. One of the main advantages of cultural dimensions is that they allow for the elaboration of testable hypotheses about the relationships between cultural traits and measurable behaviour or attitudes, without having to resort to crude proxies such as religion, legal families, or ideal types. They have been used extensively for this purpose in the study of the effects of diverse cultural variables on diverse aspects of management.[213]

Despite obvious commonalities between the issues at stake, the legal sphere has not generally exhibited a great degree of openness to the approaches developed in cross-cultural psychology. [214] One aspect of cross-cultural studies that has nevertheless proven relatively popular in law-related research concerns the distinction between individualist and collectivist societies, particularly with respect to its impact on disputing behaviour. [215] With respect to litigation, the

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[212] The most commonly cited work in this respect remains Hofstede's classification according to five basic "cultural dimensions": See Geert H. Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (Sage, 1980)

[213] See *e.g* the research program on the relationship between culture and leadership in 61 nations described in Robert House et al., "Understanding Cultures and Implicit Leadership Theories Across the Globe: An Introduction to Project Globe" (2002) 37 Journal of World Business 3 and Mansour Javidan et al., "In the Eye of the Beholder: Cross Cultural Lessons in Leadership from Project Globe" (2006) 20 Academy of Management Perspectives 67.

[214] Cross-cultural approaches have however recently found application in the field of law and economics: see Amir N. Licht, Chanan Goldschmidt &Shalom H. Schwartz, "Culture, Law, and Corporate Governance" (2005) 25 International Review of Law and Economics 229 (examining the relationship between corporate governance rules and defined cultural attributes).

[215] Despite early and well-known warnings about the potential fallacy of the distinction between individualist and collectivist societies, individualism is still generally considered one of the main feature distinguishing Western countries from other societies: see Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: The Humanities Press, 1951), at 56:"The savage is

conventional wisdom has long been to consider "litigiousness" as a characteristic of modern societies. Collectivist cultures, which were said to put more emphasis on people and relationships within large groups, were expected to be more reluctant to litigate than individualist cultures, whose members to value self-reliance and are more likely to bring conflict to the open.[216] In the modernization era, increases in litigation rates were interpreted as indicators that society was actually "developing" by giving up "tribal" ways of solving disputes in favour of individual ones.[217] More recently, in the 1980s and early 90s, the "litigation explosion" purportedly observable in the United States was sometimes described as the expression of a typically American cultural trait.[218]

However, it has also been convincingly argued that variations in litigation rates can be best explained by institutional, rather than cultural, factors. For Blankenburg, for instance, institutional factors are sufficient to account for the observed differences between German and Dutch litigation rates, since they make litigation a rational choice in Germany, but not in the Netherlands.[219] Similarly, Haley attributes Japan's limited recourse to litigation to the fact that Japanese legal institutions inhibit rather than facilitate it, and qualifies as a myth the notion

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neither an extreme 'collectivist' nor an intransigeant 'individualist' - he is, like man in general, a mixture of both."

[216] See *e.g.* Harry C. Triandis et al., "Individualism and Cross-Cultural Perspectives in Self-Ingroup Relationships" (1988) 54 Journal of Personality and Social Psychology 323.

[217] See *e.g.* Richard L. Abel, "Western Courts in Non-Western settings: Patterns of court use in colonial and neo-colonial Africa" in Sandra B. Burman & Barbara E. Harrell-Bond, eds., *The Imposition of Law* (New York: Academic Press, 1979) 167 (concluding that the patterns of court use in Kenya between 1944 and 1969 confirmed an increase in litigation rates associated with "detribalization"); John O. Haley, "The Myth of the Reluctant Litigant" (1978) 4 Journal of Japanese Studies 359, at 361 (noting the tendency to see Japanese aversion seen as a gradually fading, traditional response, and rising litigation rates in postwar Japan as index of Japan's progress toward modernity).

[218] Kritzer, for example, has ascribed differences in litigation patterns between England and the United States to cultural differences with respect to adversity, noting that "[t]he stereotypical images of the stoic English person and the complaining American are more than just stereotype": Herbert M. Kritzer, "Propensity to Sue in England and the United States: Blaming and Claiming in Tort Cases" (1991) 18 Journal of Law and Society 400, at 422.

[219] Erhard Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behvior in the Netherlands and West Germany" (1994) 28 Law and Society Review 789.

that Japanese have a "deeply rooted cultural preference for informal, mediated settlement of private disputes and a corollary aversion to the formal mechanisms of judicial adjudication."[220]

The difficulties encountered in the comparison of societies with different institutional contexts may be partly avoided by moving the focus away from strictly legal behaviour toward dispute resolution preferences in general. A number of studies have shown correlations between levels of individualism as well as other cultural dimensions and attitudes toward conflict. Whereas individualistic cultures have been shown to emphasize the values of autonomy, competitiveness, and the need for control, collectivistic cultures have been said to prefer styles favouring the preservation of relational harmony.[221] For example, Bierbrauer's[222] comparison between (individualist) Germans and (collectivist) Kurds and Lebanese showed that the latter two had a greater preference for abiding by the norms of tradition and religion than State law, whereas Germans showed a clear preference for formal procedures and guidelines. Comparing Japanese, American, and Russian legal cultures, Sanders and Hamilton showed that "the modal response of the Japanese was a form of relationship restoration," whereas "[t]he sanctions chosen by the Russia and U.S. respondents were rarely directed at the restoration of bonds and often served to isolate the wrongdoer."[223] Leung's study of disputing styles also showed that Chinese participants preferred bargaining and mediation to a larger extent than their American counterparts.[224]

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[220] Haley, *supra* note 217, at 369.

[221] Paula Trubisky, Stella Ting-Tommey &Sung-Ling Lin, "The Influence of Individualism, Collectivism and Self-Monitoring on Conflict Styles" (1991) 15 International Journal of Intercultural Relations 65.

[222] Günter Bierbrauer, "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans" (1994) 28 Law and Society Review 243.

[223] Joseph Sanders & V. Lee Hamilton, "Legal Cultures and Punishment Repertoires in Japan, Russia, and the United States" (1992) 26 Law and Society Review 117.

[224] Kwok Leung, "Some Determinants of Reaction to Procedural Models for Conflict Resolution: A Cross-National Study" (1987) 53 Journal of Personality and Social Psychology 898.

Later comparisons between two collectivist societies (Japan and Spain) revealed that harmony-enhancing procedures are more, and confrontational procedures less, endorsed in collectivist than in individualist societies.[225] Following an historical study of a collectivistic and an individualistic society, Grief has also suggested that legal institutions that work well in individualist societies will probably not have the same effects if transplanted to collectivist ones.[226] Finally, Fafchamps concluded from a study of nine African countries that business owners of African origin were more likely than non-Africans to favour direct negotiation to solve their contractual disputes, and suggested that "[t]his may reflect a cultural preference for non confrontational methods of dispute resolution."[227] However, in view of the dearth of data on African dispute resolution practices, additional studies would be needed to validate this claim.

Studies of the impact of individualism on disputing show that a cross-cultural methodology could indeed be put to good use in the assessment of legal cultures. However, focusing on specific supposedly stable traits also entails the risk of creating fossilized and monolithic images of legal cultures that would inadequately reflect the shifting and multi-faceted character of "national" cultures in general. For example, Conley and O'Barr's study of the discourse of small claims court users [228] reveals that people held to belong to a single legal culture may in fact exhibit quite different legal "orientations", whose distribution is function of one's personal history and social position. From this perspective, legal

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[225] Kwok Leung et al., "Preference for Modes of Conflict Processing in Two Collectivist Cultures" (1992) 27 International Journal of Psychology 195 (indicating that previously noted differences between the United States and Hong Kong were not due to East-West differences other than individualism-collectivism).

[226] Avner Greif, "Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies" (1994) 102 The Journal of Political Economy 912 (highlighting the cultural factors which led two groups of traders operating in similar environments in the late medieval period to evolve along distinct trajectories in terms of institutional structure).

[227] Fafchamps, *Market Institutions, supra* note 164, at 104.

[228] John M. Conley & William M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990).

cultures might be better seen as sets of sub-cultures determined by class and other personal characteristics as much as "national traits".

D. Culture as social capital

In recent years, research focusing on cultural traits such as individualism has decreased in importance with the emergence of the notion of "social capital". This concept started to attract academic attention in the 1980s and rapidly rose to prominence to become the latest conceptual fad consecrated by the World Bank as "having implications for enhancing the quality, effectiveness and sustainability of World Bank operations."[229] In recent years, it has become a central concept in the investigation of the role of cultural beliefs and values in development.

Although the notion of social capital has been widely discussed in a large number of research fields, there is still no consensus on a definition among those who use it. Initially conceived by sociologists as the ability of individuals to secure resources by virtue of various social ties, it eventually became an attribute of communities conducive to a range of collective social goods such as lower corruption and better governance. In many definitions, the notion of social capital comprises two different elements that Putnam calls "norms of reciprocity and networks of civic engagement."[230] Under its associational aspect, social capital refers to the diverse organizations in which citizens can participate and be educated in the art of citizenship. Under its normative aspect, it designates the

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[229] World Bank, "Social Capital", online: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTTSOCIALCAPITAL/0,,contentMDK:20642703~menuPK:401023~pagePK:148956~piPK:216618~theSitePK:401015,00.html)> (last visited Jan. 22, 2007).

[230] Robert D. Putnam, Robert Leonardi, &Raffaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Italy* (Princeton, NJ: Princeton University Press, 1993).

norms, values, and virtues prevailing in a community which allow people to cooperate with each other, and constitutes an equivalent to the notion of "trust".[231]

Social capital perspectives hold that, since it allows people to cooperate more efficiently, trust can contribute significantly to market success. However, the actual relationship between social capital and development is neither well understood nor well documented. Although resort to the term "capital" itself suggests that social capital constitutes an unqualified good positively correlated to development, the few studies that have attempted to provide evidence of this relationship have so far produced inconclusive and sometimes contradictory results. In their examination of the correlation between trust and the performance of large organizations, La Porta et al.[232] confirmed Fukuyama's hypothesis that trust, as measured using answers to the World Values Surveys, promotes cooperation and enhances economic performance across countries. Similarly, using data from the same surveys for a sample of 29 market economies, Knack and Keefer[233] found that trust and civic cooperation, but not associational activity, have an impact on economic performance. In contrast, Beugelsdijk and van Schaik's comparison of 54 European regions supported the hypothesis of a correlation between associational activity and economic growth, but not between trust and growth.[234] Finally, Helliwel's study of the United States and Canadian

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[231] Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995), at 26-27: "[social capital] requires habituation to the moral norms of a community and, in its context, the acquisition of virtues like loyalty, honesty, and dependability."

[232] Rafael La Porta et al., "Trust in Large Organizations" (1997) 87 American Economic Review 333 [La Porta et al., "Trust"].

[233] Stephen Knack & Philip Keefer, "Does Social Capital Have an Economic Payoff? A Cross-Country Investigation" (1997) 112 The Quarterly Journal of Economics 1251.

[234] Sjeord Beugelsdijk & Ton van Schaik, *Social Capital and Regional Economic Growth*, Tilburg University Center for Economic Research Discussion Paper No. 102 (2001); the authors attribute the difference between their findings and those of Knack & Keefer (*ibid.*) to the lack of statistical robustness of the latter, and the use of a sample of nations ranging from a less developed country to wealthy countries, leading to a sample selection bias.

provinces showed no evidence that faster per capita growth was associated with higher levels of trust.[235]

Two main hypotheses can be drawn to account for the inconclusiveness of the available evidence. The first one is that the relationship between development and social capital is not linear but obeys a more complex logic. Stiglitz, for example, has suggested that it is in fact closer to an inverted U-shape: by providing adequate mechanisms for contract enforcement and monitoring, networks of interpersonal relations allows for the initial development markets. As markets grow, however, the value of these relationships, and with it the value of social capital, declines, and formal legal institutions come to replace informal mechanisms.[236]

The second hypothesis is that social capital actually constitutes a qualitative, rather than quantitative, variable. In this case, societies would be expected to differ not in their "levels" of social capital but with respect to the "kinds" of social capital they exhibit. A number of scholars have indeed suggested that development implies not so much increasing a society's total stock of social capital, but moving from a social capital rooted in interpersonal relations within closed communities to a form of generalized trust more open to inter-group relationships. For Fukuyama, for example, societies can be classified in three broad categories: truly individualistic societies, such as Russia or some other post-communist countries, where both families and voluntary associations are weak, familistic societies, like China, Taiwan, and Hong Kong, where family bonds are elevated above other social loyalties, leading to a deficit of trust among unrelated people, and high-trust societies, such as the United States, Japan, and Korea,

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[235] John Helliwell, *Do Borders Matter for Social Capital? Economic Growth and Civic Culture in U.S. States and Canadian Provinces*, NBER Working Paper No. 5863 (1996).

[236] Joseph E. Stiglitz, "Formal and Informal Institutions" in Partha Dasgupta & Ismail Serageldin, eds., *Social Capital: A Multifaceted Perspective* (Washington, D.C.: World Bank, 1999) , at 66.

which exhibit a high degree of generalized trust and a rich network of voluntary associations.[237]

The idea that there exist different kinds of social capital may be theoretically appealing. At the methodological level, however, it only compounds the problems already faced in the investigation of social capital as an asset to "stock". These problems derive from the multi-faceted aspect of the notion, which is used to designate quite different phenomena such as personalized and generalized trust, membership in associations, and personal values. In consequence, it is often conceived of as the aggregate of a number of interrelated variables that are difficult to measure in isolation, and whose mode of influence on performance is far from clear. For this reason, the notion of social capital has proved rather difficult to use as a research tool. Its key theoretical components, such as trust, civic norms, and associations, are often operationalized in terms of the outcomes they are assumed to generate, such as blood donation or newspaper readership.[238] Even though they claim to establish a significant relationship between social capital and development, the only thing that the studies prove is that there is a correlation between these so-called indicators of social capital and development, without offering a credible explanation for this correlation.[239] As noted by Portes and Landolt, there is a possibility that external factors can lead to both development and social capital (however measured), without a direct causal

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[237] Fukuyama, *supra* note 231, 28-29. See *also* Michael Woolcock, "Social Capital and Economic Development: Toward a Theoretical Synthesis" (1998) 27 Theory and Society 151 (describing societies as falling into one of four categories depending on the degrees of "embeddedness" and "autonomy" of their social ties); Stiglitz, *ibid.* (asserting that, in advanced economies, social capital is restructured; society moves from being ruled by mutually exclusive groups united by "community trust" to being ruled by citizens united by "public trust").

[238] See *e.g.* John F. Helliwell & Robert D. Putnam, "Economic Growth and Social Capital in Italy" (1995) 21 Eastern Economic Journal 295 (measuring civic community on the basis of newspaper readership, availability of sports and cultural associations, turnout at referenda, and incidence of preference voting); Luigi Guiso, Paola Sapienza &Luigi Zingales, "The Role of Social Capital in Financial Development" (2004) 94 The American Economic Review 526 (measuring social capital using blood donation and electoral participation).

[239] Fabio Sabatini, *The Empirics of Social Capital and Economic Development: A Critical Perspective*, Fondazione Eni Enrico Mattei Note di Lavoro Series No. 15 (2006).

connection between the two.[240] It is also impossible to discard the hypothesis of a reverse causal relationship, with the provision of better government services in developed economies increasing trust.

Social capital research also faces the same problems of any type of research that aims at "comparing" different realities. An important methodological issue in this respect concerns the comparison of answers to questions which, although identical in writing, carry quite different meanings in practice. For example, the question most commonly used to measure "trust" ("[g]enerally speaking, would you say that most people can be trusted, or that you can't be too careful in dealing with people?") is somewhat ambiguous with respect to which 'people' respondents have in mind" when answering it: responses "could easily reflect a varying mix of two concepts across individuals: how much trust one places in people who are not close friends or relatives, and the frequency of encounters with such persons."[241] In other words, responses could reflect levels of general trust or levels of "transaction" trust, without any means of distinguishing between the two.[242] Similarly, levels of "associational activity" are commonly measured by evaluating membership in certain kinds of associations hypothesized to be a source of social capital. This involves identifying in advance what constitutes a relevant association in a given context, and which of these associations are likely to provide valuable resources to their members. This is especially problematic from a comparative perspective, since seemingly similar associations can play different roles depending on the social context in which they operate.

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[240] Alejandro Portes & Patricia Landolt, "Social Capital: Promise and Pitfalls of its Role in Development" (2000) 32 Journal of Latin American Studies 529, at 536.

[241] Knack & Keefer, *supra* note 233, at 1255.

[242] Knack and Keefer (*ibid.*), eventually discard this objection by concluding that "[i]f by "most people" respondents consider most people they transact with, the variation in our trust measure will be reduced", making it even harder to establish a correlation between trust and growth. Although the assumption that levels of "transaction" trust are generally higher than levels of generalized trust seems intuitively appealing, it should not be taken for granted in all settings, and especially not in the case of small economies in which the number of players is limited.

From a policy perspective, the question whether social capital can be either increased or transformed from one type to another through external measures has not yet been fully investigated. With respect to legal reform, little, and inconclusive, evidence is currently available about the impact of formal institutions on levels of trust. Even though Knack and Keefer found a correlation between the presence of formal rules constraining government action (measured by the level of judicial independence) and trust, they recognized that this result was "perhaps fraught with multiple directions of causation."[243] In other words, it is possible that law indeed has a role to play in fostering trust, but it may also be that trust is an independent cultural phenomenon, the "bedrock of social and cultural habits"[244] that allows legal institutions to function properly. To the extent that social capital is indeed associated with historically inherited traits such as religion,[245] legal reform's role in trust building is probably limited. Law could make it easier for people to associate and get involved in public life, and reinforce the efficiency of informal enforcement mechanisms by providing a credible threat of enforcement through litigation, but it could only provide a minimal basis for cooperation, in the hope that trust will end up arising from repeated interactions between distrustful individuals. In addition, even such an indirect effect on trust could prove quite limited in the case of societies with high levels of social polarization, which are correlated with low levels of trust.[246]

In many respects, the notion of social capital does not seem so remote from more traditional "cultural approaches" linking development with the presence of particular traits such as individualism. The main difference may reside in the fact that social capital is even harder to define, measure and use in research than

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[243] *Ibid.*, at 1282.

[244] Fukuyama, *supra* note 231, at 150.

[245] La Porta et al., "Trust", *supra* note 232 (finding that trust is lower in countries with dominant hierarchical religions); see also Knack & Keefer, *supra* note 233, at 1283 (finding a correlation between trust and Protestantism).

[246] Knack & Keefer, *ibid.*

cultural traits. This suggests that what has allowed social capital to take over more traditional culture-based approaches has probably more to do with its rhetorical appeal than with its explanatory power. By positing that the same set of basic values underlies the operation of efficient markets and good governments, social capital provides an explicit link between market and good governance reforms, while accounting for the success of Asian capitalist countries and dominant ethnic minorities. By highlighting the commonalities between successful countries (i.e., their high levels of social capital) rather than their differences, social capital approaches provide a seemingly culturally neutral way to talk about interpersonal relationships: what distinguishes developed societies from developing ones is not their different social beliefs, but the kind of social capital they have developed. In theory, *guanxi* and other types of reliance on closed networks of relationships are condemned not because they reflect non-Western values, but because they contribute to inefficient forms of segregation and corruption. In practice, however, economic development remains a matter of being able to deal with others the "right way," i.e., on the basis of the "right" values.

E. The future of cultural approaches

For reformers, the most convenient view to take with respect to the relationship between formal law and legal cultures is that in any case, the spheres which are fundamental to economic development, such as contract and commercial law, are not of a cultural nature but essentially "neutral," "technical" fields, in which legal models can be easily transferred. Despite warning against uncritical legal transfers and claims to take local conditions into account, the new law and development movement essentially embraces this logic by presenting the issue of legal reform in culturally neutral terms of "benchmarking," "best practices," and "social capital." Similarly, law-and-development and other legal scholars have so far failed to display a significant interest in the role of culture in economic activity, and thus to properly address the question of the role of cultural barriers in business law reform.

One important reason for this is undoubtedly the considerable methodological difficulties that the investigation of cultural hypotheses involves and the limitations of the available approaches. Studies that resort to cross-country comparisons are often unable to distinguish between correlation and causality, discarding the possibility that both variables have a common external cause. Consequently, the "proven" relationships have limited explanatory power.

Cross-country studies also involve some general measurement issues that are particularly problematic with respect to cultural variables. Comparisons entail resorting to the same questions in all settings. However, the questions used can easily mean different things in different cultural contexts, making the interpretation of results difficult. Answers to such questions also tend to be highly dependent on a context implied by the respondent rather than explicitly stated in the question itself. For example, the extent to which people are likely to return a found wallet (a question actually used to measure social capital) is likely to vary greatly within a "cultural group," depending on the respondent's view of the circumstances of the event.[247] In addition, since answers depend both on contextual and cultural factors, and since context is a determinant of culture, there is no way of knowing what the question in fact measures, i.e. a general "national trait" or the reflection of local modes of living.[248] Similarly, concepts such as "good governance" or "protection of property rights" are generally measured by resorting to indicators such as court delay that have little meaning when taken outside their overall context. In addition, where the opinions of "local experts" are sought out, these experts are asked to measure variables initially defined in reference to their Western incarnations, then elevated to the status of universal best practices. "Problems" are thus identified on the basis of the degree of

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[247] The most honest answer to this type of question might indeed be "it depends." In most cases, we can suppose that respondents will answer on the basis of what they see as the most likely scenario, which makes their answers highly dependent on a variety of unmeasured social factors.

[248] This question bears some importance since cultural approaches generally assume that modes of living change faster than culture.

conformity to an ideal seen as an unqualified good, rather than local perceptions of what works and what requires reform.

An additional problem with cross-country comparisons is their tendency to see culture as a set of basic values with a limited number of configurations, and the world as a group of "cultural blocks" defined on the basis of these configurations. Such "thin" descriptions of cultures may provide general impressions, but are unable to describe differences within blocks, or within the countries that form the blocks in question. Studies providing "thick" descriptions of the culture of one or more societies provide another type of information that can be more usefully employed to develop hypotheses. However, they present their own limitations, especially in a comparative context. One of them is that they easily tend toward stereotyping. A narrow focus on cultural explanations can lead to a tendency to underplay the role of non-cultural factors in the genesis of legal phenomena[249] and make real societies look more like ideal types than living communities.[250] From a comparative perspective, focusing on the existence of cultural differences can also emphasize contrasts and downplay similarities between societies. For example, studies of legal cultures exhibit a tendency to assume that the "law in the books" of Western societies actually reflects legal practices, and to contrast it with the law in action elsewhere, leading them to account for the differences identified in cultural terms.[251] An additional danger is to assume that a cultural variable

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[249] See *e.g.* Upham, "Mythmaking", *supra* note 3, at 96-97 (stressing that the Japanese informal dispute resolution mechanisms do not have cultural roots but were specifically designed by the government to discourage parties from litigating).

[250] See *e.g.* Yang, *supra* note 211, at 468 (noting that emphasis on the Confucian origins and humanistic side of *guanxi* often means euphemizing the actual *guanxi* violence existing in Chinese firms).

[251] In contrast, any close examination of the operation of law in the West indicates that the "gap" observed is not restricted to the case of legal transfers and cannot be blamed entirely on cultural factors. See Seigo Hirowatari, "Post-War Japan and the Law: Mapping Discourses of Legalization and Modernization" (2000) 3 Social Science Japan Journal 115; Yves Dezalay & Bryant Garth, "Law, Lawyers and Social Capital: 'Rule of Law' versus Relational Capitalism" (1997) 6 Social and Legal Studies 109 (underlining the false opposition between Asian relational capitalism and the rule of law).

identified as relevant in one specific instance will have a similar effect in other situations.[252]

An adequate analysis of cultural factors in business law transfers would entail breaking from approaches that view cultures as blocks of basic values shared by all members of a community and having a uniform effect in all types of situations. It would require moving away from perceiving culture as beliefs or as self-representation toward culture as expressed in action, and from values and attitudes toward behaviour in real-life, rather than hypothetical, situations. From a methodological point of view, the real challenge is to break from deductive approaches in which one looks for the intended consequence of a trait (whose presence is either "measured" or taken for granted), in favour of an inductive method in which relevant traits are first derived from observation, rather than chosen *a priori*, before hypotheses are developed and tested using quantitative methods.[253] The real explanatory power of culture can only be brought to light by letting people express themselves freely, as complex beings for whom "cultural" and "economic" motives are tightly intertwined.

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[252] Fafchamps, *Market Institutions*, *supra* note 164, at 144 (underlining that the cultural explanations cannot account for the existence of economically dominant ethnic minorities since minority groups switch categories depending on the context).

[253] See *e.g.* Julie Paquin, "Avengers, Avoiders and Lumpers: The Incidence of Disputing Styles on Litigiousness" (2001) 19 Windsor Yearbook of Access to Justice 3 (applying such a methodology to the study of landlord-tenant disputes).

Chapter 4. A middle way: the "embeddedness" of contracting

The theories derived from transaction cost economics and game theory reviewed in Chapter 2 are based on the assumption that individuals are rational (although only "boundedly" so), self-interested, and opportunistic, and comply out of fear of punishment or in anticipation of rewards. In consequence, cooperation can only be achieved in the presence of an efficient set of "incentives" designed to ensure contractual compliance, which make it possible to "trust" the other party. In contrast, in the cultural approaches presented in Chapter 3, cooperation arises not because of sanctions but because of particular values and norms that make people trust each other without the need for law. By making people reluctant to litigate and frame problems in legal terms, the same variables may also prevent law from affecting behaviour. From this perspective, legal efficiency entails cultural changes which can be effected only in the long run.

Despite their differences, these two sets of theories share an important feature: their exclusive emphasis on a single explanatory variable − self-interest or culture − to account for contracting behaviour. This makes them unable to account for well-documented phenomena such as the marginal use of law in Western "litigious" societies or the many cases where people choose to cooperate over the satisfaction of their self-interested needs.

An interesting alternative approach to the question of "trust" can be found in the field of economic sociology. For economic sociologists, "trust" is not primarily a matter of sanctions or cultural values, but can be better conceived as the product of ongoing social relations. In order to understand the role it plays in contracting, it is thus necessary to acknowledge the profound "embeddedness" of economic relations into the overall social structure.

The notion of embeddedness, which is often traced back to Karl Polanyi,[254] was revitalized in 1985 by Mark Granovetter, in what became the foundational text of New Economic Sociology. In "Economic Action and Social Structure: The Problem of Embeddedness", Granovetter criticizes both "undersocialized" and "oversocialized" accounts of economic action for their neglect of the ongoing structures of social relations in which economic transactions take place. According to him, "[a]ctors do not behave or decide as atoms outside a social context, nor do they adhere slavishly to a script written for them by the particular intersection of social categories that they happen to occupy. Their attempts at purposive action are instead embedded in concrete, ongoing systems of social relations."[255]

During the twenty years following the publication of Granovetter's piece, the notion of embeddedness has not only taken deep root in economic sociology but has rapidly spread to a number of other sub-fields and social sciences disciplines, including management and economic geography. The dimension of embeddedness which has received the most attention so far is "structural embeddedness", which refers to the to the ongoing systems of social relations in which exchange takes places. A significant amount of research has studied the way in which social relationships between exchange partners affect economic action, including the ways in which firms initiate and manage their business relations.

After reviewing the major findings of research on structural embeddedness with respect to the emergence of cooperation in business relationships, this chapter will contrast them with the treatment reserved with the contracting patterns observed in developing countries. Finally, some implications for research on contract enforcement in developing countries will be drawn.

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[254] See *e.g.* Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957).

[255] Mark Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 American Journal of Sociology 481, at 487 [Granovetter, "Embeddedness"].

A. Embedded ties and the enforcement of obligations

From an economic perspective, what prevents parties from behaving opportunistically is the presence of incentives to comply, such as legal and non legal sanctions. When these incentives are aligned in such as way as to make it reasonable to believe that the other party will cooperate, "trust" is said to arise. However, as noted by Williamson, this calculative form of trust merely constitutes a "functional substitute" which should not be confused with the "real trust" [256] we exhibit when "we expect good behaviour of others *in spite* of their incentives."[257]

In contrast to economists, who hold that non calculative trust has no role to play in commercial relations,[258] economic sociologists believe that it has an important impact on the initiation and management of business relationships and the resolution of disputes. Partners who believe that the other party can be trusted regardless of their "incentives" to cooperate are said to dispense with detailed contractual clauses to plan, monitor, and enforce agreements, to rely on one another's word and to solve disputes amicably.[259] In such circumstances, business relations are essentially "non contractual", with law playing a very minor role in their governance.

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[256] Oliver E. Williamson, "Transaction Cost Economics and Organization Theory" in Neil J Smelser & Richard Swedberg, eds., *The Handbook of Economic Sociology* (Princeton, N.J.: Princeton University Press, 1994) 77, at 97.

[257] Mark Granovetter, "A Theoretical Agenda for Economic Sociology" in Mauro F. Guillén, Randall Collins, Paula England & Marshall Meyer, eds., *The New Economic Sociology: Developments in an Emerging Field* (New York: Russell Sage Foundation, 2002) 35, at 39.

[258] See Oliver E. Williamson, "Calculativeness, Trust and Economic Organization" (1993) 36 Journal of Law and Economics 453, at 486: "Personal trust is made nearly noncalculative by switching out of a regime in which the marginal calculus applies into one of a discrete structural kind. That often requires added effort and is warranted only for very special relations that would be seriously degraded if a calculative orientation were "permitted." Commercial relations do not qualify."

[259] See Danny Pimentel Claro, Geoffrey Hagelaar &Onno Omta, "The Determinants of Relational Governance and Performance: How to Manage Business Relationships?" (2003) 32 Industrial Marketing Management 703, at 706.

1. The emergence of trust

Under the embeddedness perspective, "social relations, rather than institutional arrangements or generalized morality, are mainly responsible for the production of trust in economic life."[260] They play this role in two major ways. First, parties with a prior history of interaction are more likely to trust each other. Secondly, trust is more likely to emerge between parties who do not know each other personally if they are linked through the intermediary of a third party.

In cases where two parties know each other personally, their propensity to trust each other is held to depend on the strength of their relationship, this strength having a temporal and a qualitative dimension. The temporal dimension includes the past history of interaction between the parties (often referred to as "the shadow of the past") and their expectations for future interaction ("the shadow of the future"). Contrary to economists, who look at future interaction as the main incentive to cooperate, sociologists tend to see the past and the future as closely related.[261] Past, repeated experience with a person improves one's knowledge of the person, builds one's confidence in the other's tendency to cooperate, and increases the potential for future interaction. A shared past also strengthens personal relationships between organizations, trust increasing as their attitudes, values and goals become more similar.[262] From this perspective, trust is thus a cumulative process which involves escalation from small to more significant

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[260] Granovetter, "Embeddedness", *supra* note 255, at 491.

[261] See Ronald S. Burt, "Bandwidth and Echo: Trust, Information, and Gossip in Social Networks" in James E. Rauch & Alessandra Casella, eds., *Networks and Markets* (New York: Russell Sage, 2001) 30, at 33: "The information contained in past experience and the potential for future interactions are inextricably linked. A player's willingness to forgo short-term gains is based on the expectation that current behaviour will be used to predict future behaviour."

[262] See Dirk-Jan F. Kamann et al., "The Ties that Bind: Buyer-Supplier Relations in the Construction Industry" (2006) 12 Journal of Purchasing and Supply Management 28, at 30: "'Time' seems to be a vital incubator precondition for growing 'trust' and 'goal congruence'".

forms of exchange. In sum, "trust is a correlate of relationship strength",[263] which itself depends on the sequence of economic exchange between two parties.

Temporal embeddedness is the dimension of embeddedness which has received the most attention in the literature.[264] A number of studies have attempted to assess the effect of temporal embeddedness on transactions. However, few of them have focused explicitly on the impact of ties on the occurrence of contractual problems. Studies usually focus on the more general notions of "performance", measured as the overall satisfaction of a buyer with a supplier[265] or levels of conformity to industry norms.[266] Although these measures generally include elements such as adherence to specifications,[267] timely delivery,[268] and the percentage of acceptable items delivered,[269] they also encompass many dimensions that are distinct from, or even contradict, strict adherence to contractual terms.[270]

The few studies directly that tackle the issue of the impact of temporal embeddedness on contractual compliance provide inconclusive evidence. Examining a sample of 1252 information technology transactions between Dutch

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[263] Burt, *supra* note 261, at 33.

[264] Methodological considerations may account for this situation: duration is by far the aspect of relationships which is the easiest to measure and quantify, *e.g.* by resorting to simple variables such as the number of years parties have dealt together.

[265] L. Poppo & T. Zenger, "Do Formal Contracts and Relational Governance Function as Substitutes or Complements?" (2002) 23 Strategic Management Journal 707.

[266] J. B. Heide & R. L. Stump, "Performance Implications of Buyer-Supplier Relationships in Industrial Markets: A Transaction Cost Explanation" (1995) 32 Journal of Business Research 57, at 60-61.

[267] *Ibid*., at 61.

[268] *Ibid.*; T. G. Noordewier, G. John &J. R. Nevin, "Performance Outcomes of Purchasing Arrangement in Industrial Buyer-Vendor Relationahips" (1990) 54(4) Journal of Marketing 80, at 87.

[269] Noordewier, John & Nevin, *ibid.*

[270] For example, levels of cooperation may be measured with the help of variables such as shared problem solving and willingness to adjust flexibly to changes of circumstances unforeseen in the contract: see Noordewier, John & Nevin, *ibid.;* Jan B. Heide & Anne S. Milner, "The Shadow of the Future: Effects of Anticipated Interaction and Frequency of Contacts in Buyer-Seller Cooperation" (1992) 35(2) Academy of Management Journal 265.

small- and medium-sized firms, Rooks, Raub, and Tazellar[271] found a relationship between the occurrence of problems during a particular transaction with a supplier and buyer satisfaction with respect to previous transactions with the supplier in question. However, expectations of future transaction with a supplier had no impact on the occurrence of problems, arguably because of the impossibility to distinguish cases of unilateral dependence from instances where buyers freely choose to deal with a supplier.[272] In contrast, Kamann et al.'s[273] study of 448 contractor-subcontractor transactions in the Dutch construction industry revealed no significant effect of a shared past on the number of problems. Support for the effect of past interaction between organizations was present only in the cases where no written contract was used. Expectations of future interaction between the same individuals were the only factor with a significant, albeit small, effect on the likelihood of problems.

Focusing on duration as an indicator of economic embeddedness assumes that time is a necessary and sufficient determinant of trust.[274] Although it makes quantitative analysis easier, such an approach fails to address the possibility that duration might be due to other factors than choice based on positive past experience, including unilateral lock-in and lack of alternatives. It also leaves behind the important question of how trust emerges or fails to emerge in the course of relationships.

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[271] Gerrit Rooks, Werner Raub &Frits Tazelaar, "Ex Post Problems in Buyer-Supplier Transactions: Effects of Transaction Characteristics, Social Embeddedness, and Contractual Governance" (2006) 10 Journal of Management and Governance 239.

[272] *Ibid.*, at 263.

[273] Kamann et al., *supra* note 262.

[274] This can be seen as an illustration of a larger tendency to assume intimacy in enduring relationships (Barbara Yngvesson, "Re-Examining Continuing Relations and the Law" (1985) Wisconsin Law Review 623, at 625) and "conflate the duration of a market relationship with the degree to which it is called 'social'" (Greta Krippner, "The Elusive Market: Embeddedness and the Paradigm of Economic Sociology" (2001) 30 Theory and Society 775, at 785). An indication that trust cannot be reduced to relationship length is provided by Claro, Hagelaar & Omta's study of relationships between suppliers and merchant distributors in the Dutch flower industry, that provides evidence that interpersonal trust, but not relationship length, has an effect on problem solving and planning: *supra* note 259.

A more accurate understanding of the development of trust involves paying attention to the qualitative dimension of relationships. It is well recognized that contractual business relationships often co-exist with a variety of other ties, thus forming "multiplex ties in which people are linked by more than one type of role".[275] It has been suggested that the presence and nature of these ties have a direct impact on the strength of relationships and, thus, on cooperation.

One main argument of the embeddedness approach is that "multiplex ties" "build redundancies that reinforce relationships and reduce the risks associated with exchanges."[276] For example, borrowers that rely on a specific bank for additional services such as financial planning or the issuance of personal credit cards have been shown to be able to secure capital at more favourable interest rates than others.[277] It has also been noted that continuing economic relations often lead to the development of personal ties which have an impact on how partners cooperate in economic exchange. Darr's ethnographic study of the relationships between buyers and sellers in the electronic components industry is particularly illuminating in this respect.[278] In this industry, competition between sellers is fierce and clients can easily switch from one seller to another; sellers' main strategy for keeping their clients and gaining new ones consists in visiting clients or potential clients regularly, giving samples, making suggestions, and providing advice, with a view to creating a moral obligation in buyers to sustain the relationship.[279] Darr also shows that, even though they could benefit from low switching costs, buyers do not search extensively for partners before deciding on

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[275] Brian Uzzi & James J. Gillespie, "Corporate Social Capital and the Cost of Financial Capital: An Embeddedness Approach" in Roger Th. A. J. Leenders & Shaul M. Gabbay, eds., *Corporate Social Capital and Liability* (Boston: Kluwer, 1999) 446, at 450.

[276] *Ibid.*, at 451.

[277] *Ibid.*, at 456.

[278] Asaf Darr, "The mutual weaving of obligation networks in mass industrial markets" (2007) 55 Current Sociology 41.

[279] This obligation remains tacit as long as it is adhered to. However, "once a buyer deviated from what salespeople perceived as moral behaviour, they were quick to make the moral obligation explicit": *ibid.,* at 49.

a sale but repeatedly activate existing relationships and are reluctant to break them. They contribute to the "mutual weaving of obligations" which allow sellers to reduce their dependence on buyers, while making life easier for buyers who can rely on their preferred sellers' expertise.

Obligations between two parties can be purposively weaved in the course of their economic relationship, but it can also precede their business interactions, as where they are linked by preexisting, non economic ties. For example, DiMaggio and Lough's[280] investigation of people's use of social ties in the process of purchasing cars, homes, and legal and home maintenance services, revealed that a substantial percentage of major transactions took place between friends, relatives, and acquaintances. They also found that people who transact with friends report greater satisfaction, especially for risk-laden exchanges. Similarly, Buskens' experiment about the purchase of used cars indicated that belonging to the same sports club as a car dealer increases one's propensity to buy a car from him.[281] In an ethnographic study of seven alliances characterized by high levels of collaboration and cooperation, Larson also found that mutual economic advantage was a necessary, but not sufficient, condition for the initiation of such ties. Critical to the development of such alliances was the existence of a past history of personal relations which predisposed the individuals who made the decisions to connections with particular firms and "set a context of expectations and obligations with moral overtones that framed the actions that would follow."[282]

The patterns documented by Darr, Uzzi, and DiMaggio and Lough indicate that people have different expectations concerning strangers and people with which they have built a relationship: the people "one knows" are expected to treat one

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[280] Paul DiMaggio & Hugh Lough, "Socially Embedded Consumer Transactions: For What Kinds of Purchases Do People Most Often Use Networks?" (1998) 63 American Sociological Review 619.

[281] Vincent Buskens, *Social Networks and Trust* (Boston: Kluwer, 2002), at 188.

[282] Andrea Larson, "Network Dyads in Entrepreneurial Settings: A Study of the Governance of Exchange Relationships" (1992) 37 Administrative Science Quarterly 76, at 87.

more fairly and generously than unrelated parties. An interesting question concerns the "personal knowledge" threshold required for such expectations to arise. Although most studies focus on the impact of direct relationships between parties on their expectations, there is some evidence that direct dealings are not necessary for trust to emerge initially. Expectations of fair treatment can also arise in cases where parties do not know each other directly but are introduced by a third party. Nooteboom accounts for this situation by referring to "the transitivity of trust: if X trusts Y and Y trusts Z, then X can be predisposed to trust Z."[283]

An ethnographic account of this process is given in Brian Uzzi's influential study of the cooperation among 23 New York apparel firms.[284] Observing the various forms of cooperation between firms in this industry, Uzzi shows that those firms have two types of relationships with their business partners: "market ties" and "special relationships" that he calls "embedded ties", characterized by a unique "logic of exchange" in which "actors do not selfishly pursue immediate gains, but concentrate on cultivating long-term cooperative relationships that have both individual and collective level benefits".[285] He notes that embedded ties rarely originate from anonymous market ties. Rather, they tend to be established on the basis on previous ties between the parties or through third-party referrals. In the latter case, expectations arising from preexisting relations between the referrer and two members of his network are applied to a new relationship between the referred partner and the referee. Conversely, the creation of social ties with members of one partner's network may also contribute to the creation of shared expectations between partners. For example, another study by Uzzi shows that informal social events involving banker and borrowers as well as persons, such as

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[283] Bart Nooteboom, "The Triangle: Roles of the Go-Between" in Roger Th. A. J. Leenders & Shaul M. Gabbay, eds., *Corporate Social Capital and Liability* (Boston: Kluwer, 1999) 341, at 350.

[284] Brian Uzzi, "The Sources and Consequences of Embeddedness for the Economic Performance of Organizations: The Network Effect" (1996) 61 American Sociological Review 674, at 693 [Uzzi, "Network Effect"].

[285] *Ibid*., at 693.

their respective spouses and children, on which parties confidentially rely on for perceptions of character and trustworthiness, create social attachment which "promote the creation of a common set of inferences among the members of [the] network"[286] and expectations of trust in the exchanges.

2. Trust or contract?

As the studies reviewed in the previous section indicate, social relationships can play a positive role in cooperation even in the absence of sanctioning devices, by modifying expectations concerning the behaviour of potential partners. This has led many authors to point to the "competitive advantages" that firms can expect to gain by adopting an "embedded strategy" rather than an arm's-length, competitive one.[287] Their main argument is that "[e]mbedding spontaneously infuses a business tie with social values and attitudes that would be irrelevant in the market model",[288] thus allowing firms to dispense with external enforcement mechanisms, such as formal contracts, and to achieve efficiencies which are difficult to emulate in arms' length ties. For instance, embedded relationships have been held to allow for the transformation of information that is "more tacit and holistic in nature than the price and quantity data exchanged in arm's-length ties."[289] It has been argued that fine-grained information transfer helps firms understand each other's production methods, allowing them to identify better solutions more quickly, and that "trust" enables parties to dispense with the formal contracting process, lower their monitoring costs and avoid the difficulty

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[286] Brian Uzzi, "Embeddedness in the Making of Financial Capital: How Social Relations and Networks Benefit Firms Seeking Financing" (1999) 64 American Sociological Review 481, at 488 [Uzzi, "Financial Capital"].

[287] Uzzi, "Network Effect", *supra* note 285, at 694.

[288] Uzzi, "Financial Capital", *supra* note 286, at 489.

[289] Brian Uzzi, "Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness" (1997) 42 Administrative Sciences Quarterly 35, at 46 [Uzzi, "Paradox of Embeddedness"].

of planning for hard-to-predict contingencies.[290] By allowing firms to easily adjust their agreements in response to unforeseen conditions,[291] trust is also said to make them more responsive to change, a key advantage in industries that place a high premium on innovation and customization.[292] The fact that problems are dealt with in real time during the production process, rather than in advance or in the course of a legal dispute, also represents economies of time and minimizes the impact on business activities.[293]

Embeddedness research tends to operate from a functional perspective, from which social ties are created and/or activated because they allow the business relationship to be governed by a distinct "non-contractual logic" of exchange emphasizing cooperation. In their absence, parties have to revert to market forms of exchange − "one-shot deals" characterized by the lack of reciprocity between exchange partners,[294] their pursuit of their economic self-interest, and cool relationships lacking social content[295] − and resort to detailed contractual provisions to ensure compliance. In line with its emphasis on the contrast between the "logic of embeddedness" and "contractual logic", the embeddedness approach tends to see trust and contract as substitutes, "with contract leading to less trust, and trust leading to decreased contract completeness".[296] This entails that legal contracts play at best an insignificant role in transactions between embedded partners, and may even have negative impacts on trust and cooperation. Resorting

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[290] See *e.g.* Jeffery H. Dyer & Harbir Singh, "The Relational View: Cooperativ Strategy and Sources of Interorganizational Competitive Advantage" (1998) 23 Academy of Management Review 660, at 670.

[291] *Ibid*.

[292] Walter W. Powell, "Neither Market nor Hierarchy: Network Forms of Organization" in Barry M. Staw & L. L. Cummings, eds., *Research in Organizational Behavior* (Greenwich, CT: JAI Press, 1990) 295, at 325.

[293] Uzzi, "Paradox of Embeddedness", *supra* note 289, at 49.

[294] *Ibid*., at 41.

[295] *Ibid*.

[296] RK Woolthuis, B Hillebrand &Nooteboom B, "Trust, Contract and Relationship Development" (2005) 26 Organization Studies 813, at 818.

to contractual safeguards in embedded relationships is not only unnecessary, but also "indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade".[297]

Despite its intuitive appeal, the trust/contract dichotomy suffers from one important limitation: the mixed empirical support provided to the proposition that trust is incompatible with contract. While some have found that a shared past between parties reduces their use of formal contracts, the number of contractual commitments they make as well their investments in the negotiation and drafting of their contracts,[298] others have shown that parties with a shared history are more likely to rely on relational norms to govern their exchanges *and* employ greater contractual complexity than parties without a shared past.[299] It has also been shown that contingency planning clauses are more likely to be included in contracts between partners with longer relationships, in apparent contradiction to the hypothesis that trust gradually replaces contract terms as contractual relationships develop.[300]

Such contradictory findings on the impact of trust on the use of contract could be attributed to how trust has typically been measured, i.e. as a function of the length of the relationship between two parties, without any way to differentiate the relationships that last because of the presence of trust from those that endure for other reasons, such as the lack of suitable alternatives for one or both parties.

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[297] Macaulay, "Non-Contractual Relations", *supra* note 88, at 15.

[298] See Boris F. Blumberg, "Cooperation Contracts between Embedded Firms" (2001) 22 Organization Studies 825 (study of 92 technology cooperation contracts involving 5 Dutch multinationals);.Ronald S. Batenburg, Werner Raub & Chris Snidjers, *Contacts and Contracts: Dyadic Embeddedness and the Contractual Behavior of Firms*, *The Governance of Relations in Markets and Organizations* (Oxford: JAI/Elsevier, 2003) (study of IT transactions between Dutch firms); B. Lyons, "Contracts and Specific Investments: An Empirical Test of Transaction Cost Theory" (1994) 3 Journal of Economics and Management Strategy 257(survey of 91 small subcontractors operating in the UK engineering industry).

[299] Poppo & Zenger, *supra* note 265.

[300] Nicholas S. Argyres, Janet Bercovitz &Kyle J. Mayer, "Complementarity and Evoluion of Contractual Provisions: An Empirical Study of IT Services Contracts" (2007) 18 Organization Science 3.

However, similar contradictory results have been found in studies resorting to measurement and observation of "trust" independently from the duration of the relationship. On the one hand, Malhotra & Murnighan[301] have found experimental evidence that the use of binding contracts not only impedes the development of trust but also diminishes existing trust. Similarly, Wuyts and Geyskens found that the use of contract with "close partners" increases opportunistic behaviour."[302] On the other hand, the managers interviewed by Mayer & Argyres[303] indicated that, by clarifying partners' expectations toward each other, more detailed contracts actually enhanced, rather than diminished, the trust between their own firm and their contractual partners over time. Woolthuis, Hillebrand & Nooteboom[304] describe an opposite case in which a party's choice to use a very general contract, despite the presence of specific investments, was justified by its desire to keep options open for alternative partners, suggesting that the absence of a fully specified contract can reveal a high propensity towards opportunism rather than a trusting orientation.

B. Embedded ties in developing countries

By documenting the existence of business relationships that do not correspond to the economic model of market exchange, embeddedness research has drawn attention to the role that social relationships play in the initiation and management

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[301] Deepak Malhotra & J. Keith Murnighan, "The Effects of Contracts on Interpersonal Trust" (2002) 47 Administrative Science Quarterly 534.

[302] They attribute this phenomenon to the fact that "detailed contracts may signal distrust, which conflicts with the trust conventions that typify close relationships between a firm and its partner, thus encouraging rather than discouraging opportunistic behaviour": S Wuyts & I Geyskens, "The Formation of Buyer-Supplier Relationships: Detailed Contract Drafting and Close Partner Soelecction" (2005) 69(4) Journal of Marketing 103, at 113.

[303] KJ Mayer & NS Argyres, "Learning to Contract: Evidence from the Personal Computer Industry" (2004) 15 Organization Science 394.

[304] Woolthuis, Hillebrand & Nooteboom, *supra* note 296, at 829: "this case shows that the absence of a fully specified contract, in spite of specific investments, may be explained not by mutual trust as one might expect, but quite to the contrary, by the fact that a party's high propensity towards opportunism leads him 'to leave the back door open' or by the fact that routinized behaviour reduces a party's alertness."

of business transactions. Under this approach, the classical distinction between commercial and non commercial forms of exchange has been superseded by a distinction between "arm's length/legal" and "embedded/trust-based" transactions. Borrowing Zelizer's terminology,[305] the result can be said to be the replacement of a "nothing but" economics approach by a "hostile worlds" perspective, in which embedded exchanges are built in opposition to the market model and exclude the use of legal enforcement mechanisms.

In the development context, the view that embedded exchanges constitute an efficient, alternative to market/contract-based transactions has led to the suggestion that "clusters" of firms can provide a solid basis for economic growth and constitute "a useful model for industrialization and employment generation in Third World contexts."[306] However, some have called this hypothesis into question by pointing to the need to consider the constraining aspects of embedded forms of exchange along with their functionality.[307] For example, it has been noted that reliance on a small number of privileged ties may reduce the flow of new information to which a firm has access, with the possible consequences of cutting it off from other opportunities, insulating it from market demands, and stifling innovation.[308] Similarly, Mizruchi and Brewster Stearns indicate that bank managers' tendency to respond to uncertainty by "cling[ing] to those they trust, with whom they are closely tied" [309] for advice cuts them from broader sources of feedback, therefore making deals less attractive to customers and making it more

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[305] See Viviana A. Zelizer, *The Purchase of Intimacy* (Princeton, N.J.: Princeton University Press, 2005).

[306] Kate Meagher, "Social Capital, Social Liabiltiies and Political Capital: Social Networks and Informal Manufacturing in Nigeria" (2006) 105 African Affairs 553, at 473.

[307] See Joel M. Podolny & Karen L. Page, "Network Forms of Organization" (1998) 24 Annual Review of Sociology 57, who attributes the concern with functionality to the initial objective of embeddedness research "to critique and challenge economic views of organization, as is made quite explicit in the writings of Granovetter (1985) and Powell (1990)." (at 73).

[308] Uzzi, "Paradox of Embeddedness", *supra* note 289, at 58-59.

[309] Mark S. Mizruchi & Linda Brewster Stearns, "Getting Deals Done: The Use of Social Networks in Bank Decision Making" (2001) 66 American Sociological Review 647, at 667.

difficult for the banker to be successful in closing them. It has also been noted that the personal feelings or social norms inhering in embedded relationships may conflict with the economic imperatives faced by firms. Uzzi notes that "[f]eelings of obligation and friendship may be so great between transactors that […] stronger firms in the network may dedicate resources to weaker members at a rate that outpaces their capacity to rejuvenate their own resources".[310] In case of conflict, negative emotions of spite and revenge may also be released, leading to feuds diverting the firm from the demands of the market.[311] Thus, even though social relations can have positive effects on trust and performance, this is true only up to a certain threshold of "overembeddedness" after which the disadvantages of embeddedness exceed its benefits.[312]

The notion of overembeddedness has found a fertile ground in the study of the networks of developing countries, whose "overembeddedness" has often been held to account for their limited impact on the economy. Many have blamed these neworks for their inability to deal with the problem of "uncontrolled solidarity"[313] and their tendency to let "the social aspects of exchange supersede the economic imperatives".[314] The "exacerbated" sentiments of solidarity found in these networks have been identified as a factor that can turn promising firms into "welfare hotels"[315] or "relief organizations".[316] For Granovetter, for example, the

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[310] Uzzi, "Paradox of Embeddedness", *supra* note 289, at 59.

[311] *Ibid*.

[312] See Uzzi, "Network Effect", *supra* note 285; Arne Dulsrud & Kjell Gronhaug, "Is Frienship Consistent With Competitive Market Exchange? A Microsociological Analsis of the Fish Export-Import Business" (2007) 50 Acta Sociologica 7.

[313] Granovetter, "Firms and Entrepreneurs", *supra* note 179, at 137.

[314] Uzzi, "Paradox of Embeddedness", *supra* note 289, at 59.

[315] Alejandro Portes & Julia Sensenbrenner, "Embeddedness and Immigration: Notes on the Social Determinants of Economic Action" (1993) 98 The American Journal of Sociology 1320, at 1339.

[316] Uzzi, "Paradox of Embeddedness", *supra* note 289, at 59. For a critical review of arguments about the tendency of Africans to form the "wrong kind of networks", see Kate Meagher, "Manufacturing Disorder: Liberalization, Informal Enterprise and Economic "Ungovernance" in African Small Firm Clusters" (2007) 38 Development and Change 473, at 475ss. See also Kate

relatively small size and cohesive social structure[317] of expatriate minority groups limit the number of people who can make claims on the members of these groups and are instrumental in their economic success. It has also been noted that firms may escape from the influence of dysfunctional redistributive community values by building smaller networks based where those values do not operate. For example, Portes and Sensenbrenner note that conversion to Protestantism allowed Otavalo's owners of garment and leather artisan shops to remove themselves form the social obligations attached to membership in the Catholic Church.[318]

The idea that firms operating in developing countries need to cut some constraining ties to become competitive seems problematic in many respects. One important point concerns its ultimate reliance on the assumption that "strong ties" constitute the main source of trust in developing countries. It is assumed that, in the absence of efficient legal enforcement mechanisms, firms who want to limit their risks restrict themselves to doing business with members of their social circles, and refrain from dealing with "outsiders". Consequently, business networks in developing countries are tought to originate from, or be identical to, the clan-based, ethnic or religious communities to which businesspeople belong. This seems to constitute a rather simplistic view of the nature and functioning of business networks in developing countries. In fact, we still know little about the composition of developing countries' networks and the variables at play in their formation.[319] Some documented cases show that firms can, and do, escape the demands of uncontrolled solidarity by building business relationships with

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Meagher, "Social Capital or Analytical Liabilities? Social Networks and African Informal Economies" (2005) 5 Global Networks 217, at 221 [Meagher, "African Informal Economies"].

[317] Granovetter, "Firms and Entrepreneurs", *supra* note 179.

[318] Portes & Sensenbrenner, *supra* note 315, at 1339.

[319] As mentioned in the previous chapter, evidence rather suggests that ethnicity or family do not play a great role in the composition of African business networks: see *supra,* note 166. In addition, it has been demonstrated that statistical discrimination may generate patterns of ethnic concentration similar to those deriving from networks of "strong ties": see Marcel Fafchamps, "Ethnicity and Networks in African Trade" (2003) 2(1) The B.B. Journal of Economic Analysis and Policy, article 14, online: <http://www.bepress.com/bejeap/contributions/vol2/iss1/art14>.

outsiders with whom they can adopt more competitive practices.[320] Similarly, Yngvesson has noted that the fixation of the boundary separating "close" and "far" people is a matter of political economic strategy as much as the result of the social structure in place.[321] This suggests that at least some firms are in a position to build business networks distinct from the "communities" to which they belong, without having their membership called into question. Moreover, intra-community patterns of contracting might not always result from a series of choices to deal with trustworthy partners, but from other factors. In particular, the impact of the impossibility for firms operating in developing countries to prove themselves trustworthy to outsiders needs to be explored more fully.

Finally, the emphasis put on strong ties originating in "communities" has prevented research on developing countries' networks to integrate important insights about the role of power differentials in the formation and persistence of networks and embedded ties. The notion that firms may manipulate network ties strategically in order to limit their dependence by developing privileged ties with the sources of this dependence is well accepted in economic sociology.[322] Conversely, Gordon has noted that continuing relationships may deepen the power imbalances present at their start "into persistent domination on one side and dependence on the other."[323] The conceptualization of business networks as based on identity markers seems to have prevented the application of these ideas in the case of developing countries. An adequate consideration of the impact of power differentials within business communities would open the door to a more detailed analysis of the factors affecting firms' propensity to make or resist intra-

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[320] See *e.g.* Granovetter, "Firms and Entrepreneurs", *supra* note 179, at 147-48; see also Emmanuel Seyni Ndione, *L'économie urbaine en Afrique: le don et le recours* (Paris: Karthala, 1994) (noting that Dakar woodworkers avoid social pressure by hiring "social orphans" rather than members of their networks; in such cases, the "trust" of the employer originates in the powerlessness of his employee).

[321] Yngvesson, *supra* note 274, at 631.

[322] See *e.g.* Wayne E. Baker, "Market Networks and Corporate Behavior" (1990) 96 American Journal of Sociology 589; Podolny & Page, *supra* note 307.

[323] Gordon, *supra* note 93, at 570.

community claims and capacity to establish successful relationships with outsiders. It would also allow for an alternative explanation for firms' reliance on "trust" rather than contracts in cases of asymmetric dependence.[324]

C. The future of embeddedness approaches

According to the embeddedness approach, social ties are the source of "real trust". By providing initial expectations of trustworthiness, social relations act as "an essential *priming mechanism* that promotes initial offers of trust and reciprocity that, if accepted and returned, solidify through reciprocal investments and self-enforcement",[325] making contracts unnecessary. Embeddedness research is still in its infancy, and additional data will be required before the validity of this hypothesis can be more clearly assessed. Before going further on the embeddedness road, however, it is worthwhile to identify some of the difficulties that may account for the mixed empirical evidence provided so far and that future research should carefully address.

The most important difficulties in the study of "embedded relations" derive from the vagueness surrounding the basic concepts of "cooperation" and "trust", which can be held to partly account for the "inconsistent and inconclusive" [326] evidence found about the larger relationship between social ties and cooperation, as well as between cooperation and trust. A major issue in this respect concerns the determination of what constitutes cooperative behaviour, how such behaviour is evidenced, and how it can be assessed with current research tools.

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[324] The hypothesis is that firms do not dispense from contracts not because they can rely on trust, but rather seek to develop trust because using contracts would be inefficient in their situation: see *e.g.* Woolthuis, Hillebrand & Nooteboom, *supra* note 296 (noting that contracts are useless in cases of asymmetric dependence); Lyons, *supra* note 298 (noting that small firms, although more vulnerable, are less likely to have contracts).

[325] Uzzi, "Financial Capital", *supra* note 286, at 484.

[326] Kathleen L. Valley, Margaret A. Neale & Elizabeth A. Mannix, "Friends, Lovers, Colleagues, Strangers: The Effects of Relationships on the Process and Outcome of Dyadic Negotiations" in R. J. Lewicki, B. H. Sheppard & R. Bies, eds., *Research on Negotiation in Organizations*, vol. 5, (Hillsdale, NJ: JAI Press, 1995) 65, at 66.

The domination of quantitative approaches in current research means that "cooperation" is generally not "observed" in itself but inferred from other, more easily observable variables that do not necessarily constitute good indicators of the presence of a trust-based cooperative frame of mind. For example, low litigation rates, which are often held to mean that business people solve problems cooperatively, do not necessarily mean that most transactions are unproblematic, or most problems cooperatively resolved.[327] Similarly, the absence of sanctions may also result from a party's decision to "lump" a claim in order to preserve a business relationship and/or a reputation as a "cooperative" partner.[328] Moreover, even the absence of open conflict or reported problems in a specific relationship does not necessarily indicate that covert opportunistic behaviour has not taken place under a cooperative guise, for example by asking for flexibility or special treatment in excess of one's real needs.[329] The various meanings that can be attached to the same variables point to the need for clearer conceptualizations of "cooperation" and "trust" that can only be derived from sustained observation and detailed descriptions of behaviour and the motives behind specific decisions.

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[327] A good example is provided by Rooks and Snidjers' study of 1252 IT transactions among Dutch SMEs, which showed that only 28% of were completed without problems, and that sanctions were imposed in 40% of the cases. This represents 52% of the cases in which active deliberation took place between the parties, indicating that attempts at cooperative problem-solving failed more than half the time: see Gerrit Rooks & Chris Snidjers, "The Purchase of Information Technology Products by Dutch SMEs: Problem Resolution" (2001) 37(4) The Journal of Supply Chain Management 34.

[328] Larson, for example, notes that, where the failure of a relationship with a partner with a good reputation can entail reputational damages, parties will be tempted to give up the potential benefits of litigation and maintain the relationship, unless the presence of opportunism can be clearly established to third parties: Larson, supra note 282, at 84.

[329] Conversely, cooperation does not necessarily entail the total absence of conflict, or even the presence of trust. For example, Kaas' study of the German food market has shown that the risk-sharing relationships "based more on informal, economic links than on formal, legal bonds" observed between producers and retailers did not preclude the presence of constant conflicts and complaints about dubious business practices, and were able to develop as a result of the peculiarities of the market, even in the absence of initial or resulting "trust" between the parties: KO Kaas, "Symbiotic Relationships Between Producers and Retailers in the Germany Food Market" (1993) 149 Journal of Institutional and Theoretical Economics 741, at 743.

The lack of empirical evidence supporting the posited relationships between social ties and cooperation might also be related to the tendency of economic sociologists to focus almost exclusively on the structure of the network of ties in which transactions take place, to the detriment of an examination of the content of those ties.[330] A dichotomous approach to ties (as "embedded" or "market") has led to their categorization in terms of their capacity to generate initial, general expectations of trustworthiness, whose content has remained underspecified. In the case of developing countries, this dichotomy has translated in an opposition between the logic of community-based strong ties and the logic of market exchange, with little attention being paid to the actual expectations attached to the so-called "strong ties" and the processes by which individuals actually form such ties and negotiate between the different logics to which they are exposed. [331]

One consequence of this disinterest in the normative content of ties has been the difficulty to account fully for the role played by such ties in trust-building, as well as the transfer of expectations from one tie to another. For instance, resorting to a general notion of "expectations of trustworthiness" makes it difficult to determine whether a specific behaviour is consistent or not with the expectations of the parties. Even where they have known each other in a certain capacity for a certain period of time, this kind of knowledge might be of limited relevance in determining the behaviour expected from them in their new capacity.[332] They may also disagree on whether having a common friend makes them friends or not, or

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[330] See Laurel Smith-Doerr & Walter W. Powell, "Networks and Economic Life" in Neil J. Smelser & Richard Swedberg, eds., *The Handbook of Economic Sociology*, 2nd, (Princeton: Princeton University Press, 2005) 379, at 394. As noted by Valley, Neale and Mannix (*supra* note 326, at 66): "Attempts to show that close relationships either help or hinder negotiations, in some absolute sense, are destined to be overly simplistic."

[331] As noted by Meagher, the "cultural turn" in economy has had a particularly negative impact on the study of African networks, which has been characterized by "essentialism and cultural determinism", rather than attention to social and historical processes: see Meagher, "African Informal Economies", *supra* note316, at 222.

[332] For example, one might wonder to what extent a friend's past behaviour is a good indicator of his future behaviour as a colleague, roommate, or business partner. Unsurprisingly, daily life abounds with instances in which implicit expectations were not met.

have differing views on what "being friends" or "having a common friend" entails in terms of mutual obligations.[333] Since it is often hard to determine with any precision what is expected from "trustworthy" partners in specific situations and, consequently, what will be interpreted as cooperative or opportunistic behaviour, initial classifications as trustworthy may provide a basis on which exchange can be initiated, but cannot guarantee that cooperation will indeed develop in the relationship.

Finally, embeddedness research seems to suffer from its relative disinterest in the process by which trust actually solidifies, or fails to solidify, once a relationship is primed. This disinterest, probably generated or amplified by the adoption of a functional orientation focusing on outcomes and efficiency to the detriment of the specific conditions and factors leading to such outcomes and by the dominance of quantitative analyses over ethnographic descriptions,[334] has left trust-building processes under-investigated. One is basically left to rely on the idea that trust is some kind of "self-fulfilling prophecy"[335] in which the expectations of an actor substantially determine the outcomes, thereby justifying the "trust" put in the other in the first place.

It is suggested that a proper understanding of the role of social relationships in business transactions would require a definition of "embeddedness" that makes room for the recognition that "embedded" relationships differ in kind. More precisely, it seems necessary to fully recognize the heterogeneity of the social ties

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[333] In addition, the parties' behaviour and expectations will likely depend in part on their perceptions of how the intermediary expects them to behave toward their new partner.

[334] It is suggested that this might be due to the fact that most researchers choose to combine insights from transaction cost economics and economic sociology in their research frameworks.

[335] See Henry Adobor, "Trust as Sensemaking: The Microdynamics of Trust in Interfirm Alliances" (2005) 58 Journal of Business Research 330, at 330: this is because parties with positive expectations tend to interpret the behaviour of their counterparts in a positive light and react toward them in ways that are generally consistent with those expectations; this trusting behaviour in turn tends to be reciprocated by the other party, initial trust thus breeding trust.

that form "communities".[336] This would involve replacing the focus on large networks based on personal characteristics by a closer examination of the various overlapping networks of ties of diverse nature and intensity inside those networks. This closer examination of different types of "embedded relations" would also allow for the identification of the specific expectations attached to specific kinds of ties and, consequently, to operational definitions of "trustworthiness" and "cooperation" that would be adapted to the specific context of particular relationships. Finally, it seems also necessary for embeddedness research to take a closer look at the different steps of the process through, and conditions under which cooperation emerges or fails to emerge in relationships, as well as the impact of different kinds of ties on the trust-building process.

What is in fact proposed here is to move away from a mechanical conception of trust acts as an intervening variable linking "embeddedness" and cooperation, to an inductive one based on observation of the various ways in which is invoked by individuals as a basis for their action. This involves a close examination not only of the diverse expectations attached to specific kinds of relationships, but also of the processes through which these expectations are adjusted as relationships evolve. In other words, understanding the role of trust in cooperation first requires us to clarify the reasons why people trust, and how the presence of trust transplates in practice in particular situations.

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[336] For a critique of the "homogeneity assumption" and a proposed typology of ties, see JM Hite, "Patterns of multidimensionality among embedded netwrol ties: A typology afo Relational EMbeddedness in Emerging Entrepreneurial Firms" (2003) 1 Strategic Organization 9.

Chapter 5. Law beyond sanctions: avenues for research

The reliance of policymakers on New Institutional Economics as a basis for the elaboration of the law and development agenda has had a profound impact on its understanding of the role of law in contracting. The use of an economic conception of human decision-making as a "game" in which parties seek to maximize their benefits has led law and development proponents to conceptualize law primarily as a provider of "incentives" to cooperate. In consequence, the "efficiency" of these incentives has been considered both the primary factor accounting for the use or non use of legal mechanisms, and the criterion according to which "formal" and "informal" alternatives are to be evaluated.

Such a functionalist conception of law as a set of State-backed sanctions carries significant consequences for the conceptualization of the relationships between informal and formal modes or ordering. From a functionalist perspective, formal and informal orders are basically considered as forming a "package" of "enforcement solutions" from which transactors choose, in function of their respective estimated efficiency in each contemplated transaction. The result is the adoption of an "either/or" approach, in which formal and informal institutions work in parallel. The objective of law reform in developing countries is not to eliminate informal modes or ordering, but to turn those "substitutes" into "complements" of the formal legal order. From this perspective, law reform can hardly do any wrong, and, since it could do some good, it should be offered as an "alternative" to transactors in search of more efficient mechanisms.

Past experience with legal reforms has shown that the availability of seemingly more efficient solutions does not necessarily entail their use by the people they aim to serve. In the previous chapters, some perspectives developed outside of the field of economics in order to account for the non-use of law in diverse settings were presented. The cultural approaches presented in Chapter 3 point to the fact that formal law does not exist in a vacuum, but works in close connection with underlying conceptions that form local legal and popular cultures. Their

recognition that "efficiency" is a relative notion and that enforcement considerations are only part of the factors involved in decisions to resort to law in contractual matters provide important insights into the limits of game-theory models in accounting for contractual behaviour, as well as the role that law plays in this matter. However, the emphasis generally put on the internal legal culture of legal profesionnals as well as the lack of interest in the investigation of local business cultures and their relationship to formal law considerably limit the usefulness of cultural approaches in the evaluation of the "fit" between local practices and transplanted legal norms.

The contributions from the field of economic sociology reviewed in Chapter 4 may be held to fill some of the gaps left by cultural approaches in the investigation of social capital. In opposition to the "trust as virtue" approach of social capitalists, economic sociologists see trust as the product a specific structures of relationships that allow for the initiation of exchanges and the incremental building of cooperative relationships. However, the empirical evidence produced so far in this line of research shows that the relationship between trust and law (and contract) is far from being straightforward and needs both further investigation and a clearer conceptualisation of the nature of trust and the processes through which it emerges of fails to emerge in specific situations.

The non-economic approaches presented in the previous chapters clearly point to the need for a better understanding of contractual behaviour before one can assess the potential for law reform to drive economic activity. Their usefulness for this purpose has however been limited by their difficulty to clearly distance themselves from some basic assumptions derived from transaction cost economics.[337] Economic sociology, in particular, has exhibited a tendency to

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[337] The importance taken on by economic thinking in the investigation of business relationships is not surprising when one considers the clear domination of economists with respect to the empirical study of contracts. A review of recent work on contracts has shown most of the empirical studies of contracts undertaken between 1990 and 2006 are found in economics literature: see D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, University of Wisconsin Law School Legal Studies Research Paper Series No. 1037 (2007), at 22.

borrow simultaneously from sociological approaches and TCE to account for the governance of non contractual relationships. As a result, "embeddedness" has often emerged as an umbrella concept covering a set of notions impacting on the availability and effectiveness of sanctions, such as the shadow of the past and the future, lock-in, and social sanctions. [338] One can observe a similar pattern of colonization by economics in the legal community, with "nearly all legal scholars […] assum[ing] without blinking an eye that legal rules will affect the behaviour of those governed by those rules."[339] By sticking to the classical understanding of contract as a bargain between rational and equal parties paying attention to existing rules in negotiating their agreements, legal theorists in the classical tradition have provided reformers with a view of law that integrates well with the NIE paradigm, but lacks empirical support.

It is suggested that the progress of research in this field is conditional on our capacity to fill the gaps left unexplored by this overreliance on an economic logic. Two points are of particular relevance in this respect. First, it seems fundamental to investigate the diverse functions that law and formal contracts may play in business relationships beyond the provision of sanctions in case of breach. This would allow us to identify with precision the characteristics of legal and judicial systems that condition the capacity of law to fulfill these functions efficiently. From a law and development perspective, the adoption of such an approach would have a profound impact on the framing of research questions. Rather than comparing legal systems of developed and developing countries in terms of the content of the legal rules they provide and the "efficiency" of their enforcement

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[338] A similar phenomenon is observable in law and society research, including Macaulay's 1963 seminal study, in which he accounts for the non use of law by pointing to two widely accepted norms − the notion that commitments are to be honoured in almost all situations and that one ought to produce a good product and stand behind it − and the many effective non-legal (bilateral and multilateral) sanctions ensuring their application. From this perspective, the "trust" on which businessmen rely is the product of their calculations that the other party will behave opportunistically despite the existence of those norms and the related sanctions. The question remains, however, of determining how those norms emerged in the first place. See Macaulay, "Non-Contractual Relations", *supra*, note 88.

[339] Korobkin, *supra* note 89, at 1062.

mechanisms, the focus would broaden to encompass various symbolic and psychological factors not captured in the concept of "best practices". In line with the argument that law operates more "as a vague threat" [340] than as an efficient provider of sanctions, the emphasis would be put on the elements that enable law to "shadow" independently of its actual sanctioning capacity.

The second point concerns the need to break away from dichotomous approaches opposing "contract" and "trust", formality and informality, arms' length and embedded ties, and culture and rationality, and to build new models that better account for the multifaceted character of business relations. It is suggested that, rather than treating "transactions" or relations as "blocks" to be categorized according to specific types, any relation should be seen as based on a series of different agreements, to which specific norms and expectations are attached.[341] Seeing relationships as sites of contention between different but interrelated logics would allow the focus of the investigation to move from the emergence and development of certain "types" of relationships taken as units of analysis, to the interrelationships between the different elements comprising such relationships and the various ways in which these elements come into play and complement, contradict, or exclude each other.

Such shifts would have important consequences at the methodological level. They would first involve moving from the lab for the field, and abandoning game-theory models in favour of more complex accounts of human decision-making processes. They would also require narrowing the focus of inquiry on the individuals who make the decisions to be investigated. Rather than the providers of sanctions, values or trust that they are generally held to be, "communities" would become subjective constructs, and would be introduced in the analysis only

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[340] Macaulay, "Real and Paper Deal", *supra* note 98, at 61.

[341] For an application of this idea, see Collins, *supra* note 98, at 128-32 (describing business relationships as characterized by the coexistence of three distinct and partly incompatible frames of reference − contract, deal, and business − evoked at different points of the relationship).

to the extent that they actually play a role in the individual decisions made by their "members".

A primary condition for the success of such an endeavour is to adopt a conception of human decisions not as driven by incentives, but as based on one's desire to behave in conformity with the rules applicable to particular situations.[342] From this perspective, individual decisions result from the identification of the "frame", "role", "mental model",[343] "cognitive script",[344] or schemata[345] evoked by particular situations and their matching with the corresponding rules of appropriate behaviour. The question then becomes one of determining which role will be taken on by the individual, and which set of rules will therefore apply.

Considering law as a specific "frame of reference" rather than a sanctioning device presents many advantages. First, it opens the door to a more thorough examination of the relationships between law and the other frames forming the repertoire of roles available to parties to business relationships. For example, "legal signals" sent by partners, such as the use of written contractual documents, specific clauses, legal terminology, or legal arguments, have different meanings depending on the kind of frame which dominates the relationship. A party's desire to use a binding contract to govern an agreement may be interpreted as a signal that the transaction constitutes a market exchange governed by the rules of self-interest to the exclusion of other norms, or as evidence of one's commitment,

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[342] A good description of this process is provided in James G. March, *A Primer on Decision-Making: How Decisions Happen* (New York: The Free Press, 1994), at 58: "Rule following is grounded in a logic of appropriateness. Decision makers are imagined to ask (explicitly or implicitly) three questions: […] What kind of situation is this? […]What kind of person am I? […] What does a person such as I, or an organization such as this, do in a situation such as this? The process is not random, arbitrary, or trivial. It is systematic reasoning, and often quite complicated."

[343] Max H. Bazerman et al., "Negotiation" (2000) 51 Annual Review of Psychology 279, at 287.

[344] J. J. Halpern, "The Effect of Friendship on Decisions: Field Studies of Real Estate Transactions" (1996) 49 Human Relations 1519, at 1520.

[345] Paul DiMaggio, "Culture and Cognition" (1997) 23 Annual Review of Sociology 263, at 269.

desire to avoid misunderstandings, or intention safeguard the relationships against unforeseen contingencies.[346]

Secondly, thinking in terms of frames allows for a more nuanced understanding of the role played by social ties on cooperation. Rather than the passive depositories of "trust" they are held to be in embeddedness research, ties can be seen as cues evoking particular types of roles, [347] without however constraining the choices made by individuals as to which role to enact in a specific interaction.[348] They can then be categorized on the basis on the kind of script they trigger, rather than on the presence of specific variables such as "trust" or "long-term orientation".

Thirdly, a framing perspective allows us to account for the shifting and multidimensional character of culture. Whereas cultural approaches tend to see cooperation as resulting from the presence of specific traits (or the endorsement of specific roles), the notion of frames implies that cooperative behaviour may depend on a shared understanding of the role (or roles) that should govern the relationship, the behavioural implications of those roles, as well as the "metarules"[349] governing role switching. By providing transactors with shared background understandings of their respective roles, cultural similarity allows certain points of their agreement to remain implicit, and increases the probability

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[346] Woolthuis, Hillebrand & Nooteboom, *supra* note 296, at 835.

[347] See *e.g.* James D. Montgomery, "Toward a Role-Theoretic Conception of Embeddedness" (1998) 104 American Journal of Sociology 92, at 112 (holding that mutual acquaintances make the friend role more applicable at the start of an exchange relationship); Jennifer J. Halpern, "The Effet of Friendship on Personal Business Transacctions" (1994) 38 Journal of Conflict Resolution 647, at 661 (holding that "[p]ricing decisions in personal business transactions may reflect noneconomic, nonrational, scripted responses to the anticipated bargaining partner.")

[348] Other factors than ties are obviously at play, and may mitigate the impact of ties or produce similar results: For example, in their comparison of negotiations between friends and strangers, McGinn and Keros found that the differences between the two groups varied depending on the medium used for their interactions: strangers being more likely to cooperate where they had to engage in face-to-face negotiation, and friends more likely to haggle over prices in email negotiations. Kathleen McGinn & Angela T. Keros, "Improvisation and the Logic of Exchange in Socially Embedded Transactions" (2002) 47 Administrative Science Quarterly 442, at 457.

[349] Montgomery, *supra* note 347, at 99.

that the signals sent by one party will be properly interpreted by the other.[350] "Cultural style" may thus act as a substitute for pre-existing ties.[351] From this perspective, "[o]thers with similar characteristics may be sought out for exchanges under the premise that many background understandings will be held in common, smoothing or eliminating the negotiation over the terms of exchange and making it more likely that the outcome of the exchange will be satisfactory to both parties."[352]

What is proposed here is that our understandings of the role of "trust" (however defined) and "contract" in business relations in both developed and developing countries would greatly benefit from a deeper knowledge of the subjective and complex processes involved in business decision-making. More particularly, it requires a better understanding of the processes by which business disputes emerge, evolve and are settled or resolved by firms operating in developing countries, including answering questions such as: what are the alternative dispute resolution mechanisms used by firms to solve their disputes, and where do they originate from? What factors account for the decisions made by firms during the disputing process (including the decision to litigate or not)? What are the factors at play in firms' contracting decisions, and the relative importance of enforcement considerations in such decisions? Does "trust" matter, and how is it defined?

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[350] For example, insistence on putting an agreement in writing or, to the contrary, relying on handshakes and words of honour, may be interpreted differently in different countries and different sectors of activity: see M. C. Suchman, "The Contract as a Social Artifact" (2003) 37 Law and Society Review 91, at 113. Culture-based misunderstandings seem particularly relevant to consider with respect to international trade: Fafchamps, for example, suggests that "there may be reasons other than rent seeking and erroneous policies for why Africa trades so little with the rest of the world, namely that foreign firms find it difficult to deal with African firms and find them generally unreliable. In particular, attempts by African entrepreneurs to renegotiate delivery and payment terms *ex post* - a relatively common practice in local transactions according to the data presented here - are likely to be misinterpreted as opportunistic." (Fafchamps, *Market Institutions*, *supra* note 164, at 110).

[351] Paul DiMaggio, "Culture and Economy" in Neil Smesler & Richard Swedberg, eds., *The Handbook of Economic Sociology* (Princeton: Princeton University Press, 1994) 27, at 39.

[352] Lynne G. Zucker, "Production of Trust: Institutional Sources of Economic Structure, 1840-1920" in Barry M. Staw & L. L. Cummings, eds., *Research in Organizational Behaviour*, vol. 8, (Greenwich: JAI Press, 1986) 53, at 61.

What impact do pre-existing ties have on those decisions? These are among the questions that guided the design and conduct of the empirical study which will be described in the second part of this dissertation.

PART II: ENFORCING CONTRACTS IN DAKAR - AN EMPIRICAL STUDY

The field study undertaken in the course of the present dissertation was primarily aimed at filling some of the current gaps of our understandings of the role of law in business matters in developing countries, and particularly with respect to Sub-Saharan African countries, for which very little data is available.[353] The study was conducted between January and March 2006 in Senegal. It involved the conduct of in-depth interviews with a small sample of small- and medium-sized enterprises operating in diverse sectors of activity in the city of Dakar. The main objective of the interviews was to identify the types of contract enforcement problems faced by these enterprises, the sources of those problems, the methods used to solve them, and the reasons accounting for the use or non-use of courts for this purpose.

The next chapter of the dissertation provides information about the design and characteristics of this empirical study. In chapter 6, the research setting is introduced, before a presentation of the data gathered among the participants. An analysis of the diverse types of business relationships observed and the role played by law in these relationships follows.

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[353] The most notable exception is the work done in relation to the World Bank Regional Program for Enterprise Development, whose research team built the most important database available on African businesses. For details of the results of this project, see Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa* (Cambridge, MA: The MIT Press, 2004)164.

Chapter 6. The study

The design of the study was influenced by four major considerations. First, in view of the limited data available on African businesses, it was to be exploratory in nature. The main objective could not be to "test" hypotheses or the impact of pre-selected variables, but to set the stage for the identification of relevant variables and the elaboration of hypotheses to be tested in future research.

Secondly, it was thought that the study could better contribute to the advancement of research by focusing on processes rather than results. The role of cultural, institutional, or other factors in disputing behaviour would be investigated by looking at their impact not only on the final decision to litigate a claim or not, but also on the previous stages of the dispute resolution process. In addition, attention would be paid to the interplay between diverse variables in the course of the processes through which decisions are made, rather than on the role of one factor taken in isolation. Therefore, the study would clearly distinguish itself from most existing studies on disputing and legal behaviour, which are generally concerned with the existence of correlations between variables, rather than with showing how these variables interact among themselves and impact on behaviour.

Thirdly, one basic assumption underlying the study was that it is impossible to fully understand human behaviour without understanding the meaning that individuals give to their actions. This required examining decision-making processes from the perspective of the people involved in them, and with an emphasis on the role of their feelings, values, beliefs, perceptions and opinions on the behaviour of decision-makers. From this perspective, "objective" measures of efficiency mattered only to the extent that they had an impact on the subjective perceptions of decision-makers in this respect.

Finally, pragmatic considerations also affected the design of the study. In view of the time and financial resources that could be devoted to the project, the possibility of locating the research in more than one site or making more than one stay in the field could not be contemplated. In contrast, the realization of a small-

scale, intensive research project was not only possible, but was thought to constitute a small but highly relevant building block to a better understanding of disputing behaviour in developing countries. The conduct of of small number of in-depth interviews would allow for the gathering of rich data that could serve as a basis from which to discuss the plausibility of existing theories and lead to the development of hypotheses that could be refined and tested in the course of broader research projects.

The objective of the study was to gain detailed and accurate (though invariably incomplete) descriptions of the law-related behaviour of firms operating in a developing country, with a view to understanding which factors influence dispute processing in a given context. In contrast to approaches focusing on the impact of different institutional contexts on the operation of businesses, the project represents an attempt to evidence commonalities and differences in firms' reactions facing similar institutional environment. In the following sections, the sampling, data collection and data analysis techniques used will be described, before exposing some limitations of the study.

A. Setting, population, and sampling

1. The research setting

The study aimed at getting accounts that were both different enough to study variations among them, but not so different as to eschew relevant comparison. Comparability was first ensured by restricting the study to a specific research setting. Five main considerations played a role in the choice of the research site. First, sites that were politically unstable were turned down in order to ensure the feasibility of the project as well as for reasons of personal safety. Secondly, the quality of the data collected depended on the capacity of the researcher to build trusting relationships with the participants. In order to increase the level of rapport between the researcher and respondents (as well as minimize translation costs), choice was restricted to places where one of the languages mastered by the

researcher (i.e. French or English) was spoken and understood by a good proportion of the business community. Thirdly, in view of increasing the richness and credibility of the findings, the accounts gathered needed to represent a broad range of businesses, while being sufficiently similar to allow for the drawing of comparisons between them. There thus was a need for the sample to exhibit a rich mix of processes, peoples and interactions of interest among an otherwise comparable set of businesses. For this purpose, the constitution of an adequate sample required that the study be conducted in a heterogeneous business community.

Fourthly, the local legal and judicial systems needed to satisfy some theoretical criteria. "Cultural" barriers could only be examined to the extent that the formal law in operation on the site constituted a form of legal transplant from a Western country. In addition, the impact of courts could only be examined to the extent that they were likely to play a role in at least some cases. The presence of a reasonably efficient justice system was thus seen as essential in order for local firms to see litigation as a real option, and thus allow for an exploration of their reasons for discarding this option. Finally, the fact that, compared to Asia and Latin America, the researchers interested in business matters has so far exhibited little interest in the African continent[354] made the choice of an African setting all the more attractive.

The site of Dakar, the capital of Senegal, satisfied those criteria. On the political and economic side, Senegal is a stable democracy with a positive international image and a relatively good reputation among foreign investors. It is also an important West African economic centre that hosts a plethora of formal and

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[354] There are very few studies on African business practices, among which: Claire Moore Dickerson, "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 Columbia Journal of Transnational Law 17, Abner Cohen, *Custom and Politics in Urban Africa* (Berkeley: University of California Press, 1969), Paul Kennedy, *African Capitalism: The Struggle for Ascendency* (Cambridge: Cambridge University Press, 1988). See also the recent study on Kenya small business networks conducted by Elin Cohen, *Improving the Business Climate Under the Hot Sun: A Study of Business Relations, Government Programs and Collective Actions in Western Kenya* (Doctor of Law Thesis, Stanford School of Law) [forthcoming in 2010].

informal firms of different characteristics, making it easier to form a diversified sample. In addition, French is taught in all the public schools of Senegal and is thus spoken by a good proportion of the population, even though wolof remains the language used by most people in everyday life. Finally, Senegal is one of the Member States of the OHADA initiative,[355] a major regional effort to modernize commercial law in Africa. More information on Dakar and the OHADA is provided below.

2. The research population

Another way to increase comparability was to limit the research to a small- and medium-sized enterprises (SMEs). The main objective of this choice was to restrict the sample to firms with comparable levels of financial resources. Large enterprises, which benefit from privileged access to legal resources, were thus excluded from the research population.[356] Micro-enterprises, which represent the great majority of businesses in developing countries, were also excluded, because of the limited scope of their operations and the small size of their typical economic transactions. It was hypothesized that court use would probably not constitute a viable option for such enterprises in any circumstances.

Even though many different measures can be used to determine the size of a business, employment is often the only, or most, reliable figure that can be obtained in developing countries; consequently, it has been favoured by most international survey teams.[357] However, no universally-accepted definition of what constitutes an SME in terms of number of employees exists. In line with studies undertaken in Africa, it was decided that the research population would

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[355] The French acronym OHADA is preferred to its little-used English equivalent, OHBLA (for Organisation for the Harmonisation of Business Law in Africa).

[356] In addition, large firms form a very small minority of the firms operating in Dakar, and are often partly or wholly-owned by foreign and public investors rather than private local businesspeople.

[357] See World Bank, *Productivity and Investment Climate Survey (PICS): Implementation Manual* (2003), at 18.

include enterprises comprising between 5 and 150 permanent employees.[358] Using the number of employees as an indicator of size proved problematic in two cases. In the first one, a small local firm proved to be a subsidiary company of a large firm based in France, and thus add access to more resources than purely local firms. A second case concerned a firm which was part of an intricate network of family businesses with vague and porous boundaries between them. In both cases, however, these factors not seem sufficient to consider these firms as "large" ones and exclude them from the sample.

Finally, an additional question concerned the Senegalese informal economy (locally called the "*secteur informel*"), whose existence is interpreted by law and development proponents as evidence of the inadequacy of formal law. Examining this assumption entailed that the research population should comprise both sectors.

3. The research sample

Because of the exploratory and qualitative nature of the study, the objective was not to create a sample that "represented" a larger population. Rather, the goal was to gather accounts that were sufficiently different to be held to represent an important proportion of the range of cases that could be observed, and similar enough to lend themselves to comparison.[359] The size of the sample was determined on the basis of two main considerations. First, the sample needed to

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[358] See *e.g.* World Bank, *Sénégal: une évaluation du climat des investissements* (World Bank, 2005) (defining small firms as having between 10 and 49 employees, and medium firms as counting between 50 and 99 employees); Arne Bigsten et al., "Contract Flexibility and Dispute Resolution in African Manufacturing" (2000) 36(4) Journal of Development Studies 1 (excluding as "microenterprises" firms counting less than 5 employees); Benn Eifert, Alan Gelb & Vijaya Ramachandran, *Business Environment and Comparative Advantage in Africa: Evidence from the Investment Climate Data*, Center for Global Development No. 56 (2005), at 37 (defining small firms as having between 11 and 50 employees and medium firms as having between 51 and 249 employees).

[359] See Margarete Sandelowski, "Sample Size in Qualitative Research" (1995) 18 Research in Nursing and Health 179, at 180: "qualitative analysis is generically about maximizing understanding of the one in all of its diversity".

be large enough to reach theoretical saturation, but small enough so that its size would not interfere with the case-oriented nature of the study. Secondly, the limited time period (three months) during which the data gathering process was to take place and the difficulty of making contacts with respondents before entering the field and collecting data from Canada, put practical restrictions on the number of interviews that could be conducted.

It was estimated that, in ideal conditions, a maximum of 40 in-depth interviews could be realised during the researcher's stay in the field, and that the actual number of interviews would probably be between 20 and 30. The research project thus had to be precise enough to allow theoretical saturation to be reached with 20 to 40 cases. This was believed to be feasible, to the extent that the interviews could concentrate exclusively on the enforcement of inter-firm commercial contracts to the exclusion of other aspects of business activity on which legal factors could have an impact. [360] In total, 30 representatives of SMEs were interviewed. In addition to this main sample of SMEs, preliminary interviews with Senegalese businesspeople living in Canada as well as some contacts with potential informants were made prior to entry in the field. A series of 11 informal interviews were conducted following entry with two business lawyers, the heads of two business associations, representatives of two organizations working with SMEs, representatives of the Dakar arbitration and mediation centre, the director of a financial institution regularly dealing with SMEs, an employee of a debt collection agency, and two academics from departments of management and economics. The interviews were set up during the course of the study, as respondents were identified and available.

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[360] This is one of the reasons for which the impact of regulation and government actions on business operations was not expressly included in the interview guide. An additional reason concerned the anticipated reluctance of respondents to talk freely about this issue, which is closely related to the extent to which they comply with existing regulation or manage to circumvent administrative obstacles. The relationships between the respondents and State institutions were thus covered only to the extent that the State acted in the capacity of "client" or "supplier" toward the respondent.

Purposeful attempts were made to maximize variation with respect to three sets of variables. First, phenomenal variation[361] was important in order to explore the importance of variables related to the type of transaction between the parties and the industry in which they operate on the evolution of their disputes. Such variation was ensured by including in the sample firms from the industrial, commercial and service sectors, and representing a good variety of industries within each of these sectors. Twelve participants were involved in the import, installation and servicing (where applicable) of goods as diverse as IT equipment, auto parts, shoes, textiles, second-hand garment, stationary, food, heavy equipment, biomedical products, and water filtration systems. Three were providers of goods and/or services in the construction industry. Four offered specialised training or consulting services. Industrial firms were almost equally split between "traditional" manufacturers (furniture, clothing, doors and windows, plastic mats) and firms involved in more high-tech industries (bottled water, chemicals, plastic elements, concrete paving stones…).

Secondly, limited demographic variation was sought after, in order to explore the role of "cultural" traits on disputing behaviour. The diversity of the Dakar business community was reflected by including in the sample people from diverse ethnic origins, including a small number of people born outside of Senegal.[362] Among the respondents born in Senegal, one was of Lebanese origin. No attempt was made to screen respondents with respect to other demographic characteristics such as gender, religious affiliation, age, and level of education.[363]

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[361] On the dimensions along which variation may be sought, see Sandelowski, *supra* note 359, at 181-182.

[362] One respondent was a Canadian who had lived in Dakar for about 10 years; three were of French origin and had spent between 3 and 35 years in West Africa. Unsuccessful attempts were also made to include entrepreneurs of Chinese origin in the sample.

[363] The respondents' profiles on all those dimensions were quite varied, except with respect to gender: only one respondent was a woman. It must be noted that no specific question was asked regarding the respondents' religious beliefs, ethnic origin, or level of education; however, some relevant information was either given in the course of the conversation or could be deducted from other indications such as the display of religious signs or the person's or firm's name.

Thirdly, as mentioned before, it was thought important to research the situation of both formal and informal firms. However, maintaining a balance between those two groups proved to be problematic in practice. This was partly because gaining access to respondents was much easier for "formal" firms − which are more likely to be listed in official publications and known to potential contacts made from Canada − than for informal firms. It was thus expected that, in view of the limited time that could be devoted to the constitution of the sample, firms belonging to the "formal" sector of the economy would dominate. In addition, the purposive inclusion of "informal firms" required identifying potential respondents with one sector or the other. Yet, although the Senegalese economy is often described as comprising a formal and an informal sector, the boundaries between those sectors proved to be quite unclear in practice, and far more porous than what this opposition suggests.[364] Using formality and informality as sampling criteria thus seemed in great part impracticable. In consequence, firms were not asked to identify themselves with one sector or another, although some of them voluntarily referred to their status.[365]

The constitution of an adequate sample was subject to many practical constraints. A first one concerned the difficulty of identifying with any certainty the firms forming the research population. No reliable listing of Dakar firms was available at the time of the study. The document closest to such a listing was the repertory published by the Chamber of Commerce, which contained the names of the Chamber's members as well as some information on their sectors of activity, their owners and, in some cases, their size. The information, which was provided by the firms themselves, was generally very minimal and often outdated. In addition,

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[364] The status of a specific firm may vary depending on how "informality" is defined. In consequence, as the World Bank acknowledges, "informality" is not a precise category but a matter of degree: see World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (New York: World Bank and Oxford University Press, 2004) at 61-62.

[365] For example, some respondents mentioned competition from informal firms as a problem they faced. Others referred to the process which led to their moving from the informal to the formal sector, or mentioned their connection to organizations or networks associated with the informal sector.

the Chamber's membership represents only a portion of the firms operating in Dakar.

More important still was the question of entry in the field. It soon became clear during field work that, even if an official listing had been available to the researcher, it would have been of little help in securing appointments with potential informants. The best, and often only way, to convince potential respondents to agree to an interview was to make contact through a local intermediary or introduce oneself as referred by a common acquaintace.[366] In view of the little time spent on site, this put severe limitations on the latitude of the researcher to "pick" respondents. In consequence, sampling first began with accessible sites, and built on the connections made with the initial respondents. The limitations associated with convenience and snowball sampling were limited by multiplying the number of "entry doors" used by the researcher. Firms were contacted from Dakar through the intermediary of three business associations with different orientations, two organizations offering services to SMEs, and personal contacts of the researcher. Those who agreed to take part in the study were asked to provide the names of people who might be interested to do the same. The sampling strategy also indirectly allowed for the inclusion of firms associated to the informal sector, since one of the entry door used was a business organization which presents itself as the official representative of Senegal informal businesses.

B. Data collection and analysis

The decision to gather data through the conduct of in-depth interviews responded to three main imperatives. First, it enabled the researcher to gather large amounts of data in a relatively short period of time. Secondly, it was thought that the

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[366] Positive response rates were very high where a third party was involved in contacting respondents, irrespective of the nature and strength of the relationship between the potential respondent and the person referring the researcher or making the appointment on her behalf. It is acknowledged that a longer stay in the field, during which word about the researcher and research could have spread within the business community, might have made entry easier with a larger range of respondents and improved the quality of data.

informal format of an interview, even where it was taped, made the collection process less intimidating and intrusive for firms than a formal survey, thus making access to respondents easier.[367] Finally, and more importantly, in-depth interviews were warranted in view of the exploratory nature of the research and the fact that relevant variables were to be inferred from observation in the course of the study.

The main goal of the interviews was to gather information on participants' past experiences with the legal system as well as detailed accounts of disputes that could have been brought to court but were not. The possibility that a certain number of respondents may mention they had never encountered any potentially legal problem was addressed by focusing not only on dispute resolution but on dispute prevention as well. The objective in the interviews was to help uncover the respondents' perspectives on the themes covered in the interview, as they themselves framed them. This implied establishing "closeness between the researcher and the people studied, rather than an impersonal and distanced relationship",[368] and respecting how respondents chose to structure their responses. The interview guide was thus conceived as a flexible list of themes to be discussed, rather than a set of questions to be answered in a precise order. Finally, since the interviews involved businesspeople and were to be made during business hours, limiting the length of the interviews to about one hour made it easier to convince respondents to take part in the study. One major challenge in drafting the interview guide was to be able to elicit all or most of the information needed in a short period of time, while giving respondents some control of the

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[367] For example, some respondents expressed the concern about the use of data, and particularly the possibility that it could be transmitted to State authorities. Using a survey would likely have increased their perception that they were asked to disclose sensitive information to an unknown party. In contrast, the conversational style and loose format of the interviews enabled the researcher to build a better rapport and establish trust more easily.

[368] Matt Henn, Mark Weinstein, &Nick Foard, *A Short Introduction to Social Research* (London: Sage, 2006), at 150.

interviewing process,[369] including by selecting the length and precision of their answers to specific questions.

With these constraints in mind, an initial interview guide was drafted that covered four main objectives:

- understanding the contracting practices of the respondents with reference to the constraints they face and their specific needs;
- evidencing the existence of local contracting practices or attitudes likely to influence disputing behaviour;
- assessing the respondents' knowledge of, and opinions about, legal and judicial institutions, including the normative content of the laws, the functioning of local courts and available arbitration mechanisms, and the execution of the judicial decisions rendered;
- uncovering potential issues related to the legitimacy of the OHADA reform and State law in general.

The initial interview guide comprised five main sections: respondent information, firm information, business relationships, dispute resolution, opinion of the judicial/legal system. It was thereafter modified incrementally in the course of the study. More specifically, the section on respondent information, which was designed to build rapport and give clues about the proper interpretation of data, proved to elicit too little relevant information for the time it took to administer, and was thus removed. The sections on dispute resolution and legal attitudes were merged. The accounts were made more precise and complete by the inclusion of a check-list of potential dispute resolution mechanisms as a way to bring salience to elements which the respondents might not have mentioned otherwise. The checklist was thereafter regularly updated in order to include the additional

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[369] "What is central to in-depth interviews, regardless of how the emerging data is perceived, is that they provide qualitative depth by allowing interviewees to talk about the subject in terms of their own frames of reference. In so doing, the method enables the interviewer to maximize her or his understanding of the respondent's point of view." *Ibid*. at 161.

mechanisms uncovered in the interviews. Some questions were reframed, including by adopting a vocabulary more in tune with local usage. For example, words such as "conflict" (*conflit*) and "problem" (*problème*) used with respect to business partners were often met with resistance by respondents, and were replaced with terms of wider use such as "difficulties" (*difficultés*). Finally, following an interview in which local social norms emerged as an important determinant of behaviour, a question was added to deal explicitly with this issue which, in view of its taken-for-granted character, could easily fail to come spontaneously to the minds of respondents if not brought explicitly during the interview. A copy of the final version of the interview guide is provided in Appendix II.

The purpose of the research was first explained to the interviewees on the first contact[370] and reasserted at the first meeting in person. Interviewees were asked to sign a consent form before the beginning of the formal interview. Some respondents expressed some concerns about signing the consent form before having an exact knowledge of the kind of information they would be asked to provide. In such cases, the consent form was signed after the end of the interview. All interviews were recorded using a digital recorder, except for the eight respondents who objected to this practice. Interview notes were taken in all cases. Twenty-seven interviews were conducted in French; three were conducted in French and wolof with the help of an interpreter.

The interviews lasted between 45 minutes and two hours and were all fully transcribed by the interviewer. Subjects were assigned a number to be used in all documentation, including interview transcriptions. The interview tapes and all the documents containing personal information about the interviewees were kept in the researcher's office, to be eventually destroyed. No other person was allowed access to any personal information given in the course of the project, apart from

[370] Most first contacts were made on the phone, but some were made in person at social events or following an introduction by an intermediary.

the French-wolof interpreter involved in three interviews, who was made aware of the importance of preserving confidentiality.

As the incremental modification of the interview guide indicates, data collection and analysis partly went hand in hand. The initial understandings of the researcher on the research topic were modified as more data were collected. During the collection stage, analysis aimed at identifying the salient themes and recurring ideas in the accounts, as well as the main commonalities and differences between the perspectives of the respondents. Interview transcripts were thereafter fully analysed using Weft QDA, a data analysis shareware. A first step consisted in reading all the transcripts again, in order to identify the main themes for coding purposes. The initial themes were based on the topics covered in the interview guide and focused on the business of the respondents (activities, partners), their contractual problems (frequency and types), their problem-solving behaviour, and their opinions of the justice system. A matrix aiming at describing each respondent along these themes was drafted. A second stage of analysis focused on the motives of respondents in the internal coherence of their accounts. A closer look was taken at each account in order to identify the factors influencing the decisions of the respondents. A few patterns of belief linking sub-sets of respondents together were identified. Finally, the accounts were read again in order to ensure that the conclusions drafted actually conformed to data.

C. Limitations and biases

The most important limitation of the chosen methodology relates to its qualitative nature and the non representative character of the research sample. The data gathered do not purport to be generalizable to the research population at large or other populations or settings. Their value lies in their capacity to contribute to the development of a general theory on the role of law in contractual relationships

that could be applied to other cases.[371] It is thus believed that the study provides insights that can contribute to a better understanding of contract enforcement not only in other African and non-African developing countries, but also in developed economies.

Three main kinds of biases may affect the quality of the research findings. The first one concerns the impact of the researcher on the information disclosed by the respondents. People who agree to take part in a study craft the responses they give according to their perceptions of the situation and the researcher, and often in a way congruent with the protection and advancement of their own interests. There are some indications that the Canadian identity of the researcher might have inclined some respondents to agree to an interview in the hope to make contacts in the Canadian market or get funding from Canadian sources. In consequence, some respondents might have been concerned with presenting a "professional" image of their firms, to the potential detriment of the accuracy of the data they provided. Similarly, the way in which respondents were contacted, i.e. through an intermediary, is likely to have tainted their responses. Even though the use of snowball sampling proved an important tool − not only in gaining access to respondents, but also in establishing initial trust − there is a possibility that respondents were led to give responses amenable not only to the researcher but to the referring party as well.

The impact of such factors on data was minimized by both the length of the interview and its informal and interactive character, which allowed the researcher to clarify the respondents' accounts and ask specific questions to address contradictions and discrepancies. It is believed that most interviews in fact reflect

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[371] See Joseph A. Maxwell, "Designing a Qualitative Study" in Leonard Bickman & Debra J. Rog, eds., *Handbook of Applied Social Research Methods* (Thousand Oaks: Sage, 1998) 69, at 95: "The generalizability of qualitative studies is usually based not on explicit sampling of some defined population to which the results can be extended, but on the development of a theory that can be extended to other cases".

an accurate, although incomplete, portrait of the respondents' views.[372] In addition, being a foreigner proved to be an advantage, as it pushed respondents to give more detailed accounts of their situation than they would have to someone whose local knowledge could be taken for granted. Respondents were generally forgiving of the researcher's relative ignorance about their situation, and some of them indeed seemed to enjoy acting as "cultural mediators" introducing the researcher to local conditions and ways of doing business.

The second source of bias concerns the quality of the data. Although only a few of the potential respondents approached ultimately refused to take part in the study, a good proportion of those who agreed to participate seemed somewhat uncomfortable to share potentially sensitive information with a stranger. Some respondents agreed to sign the consent form only after the end of the interview as a way of keeping ultimate control of released information. About 25% of the respondents refused to be taped. One respondent chose to give answers concerning State authorities "off the record". One way to deal with this issue was to avoid sensitive issues, such as the degree to which respondents complied with applicable laws or engaged in corrupt practices, and more generally the problems in which they were at fault, and focus on cases in which they were victims of contractual violation by their suppliers and clients. This proved insufficient, however, to ensure that all data would have similar levels of quality and, consequently, would carry a similar weight in the conclusions. The researcher's capacity to establish rapport with the respondents and gain their trust varied among respondents. For example, the respondents' educational background and knowledge of "standard" research procedures had a major impact on their willingness to trust the researcher from the outset of the interview and share

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[372] This remark must, however, be qualified with respect to the interviews conducted in wolof, during which communication between the researcher and respondents was more difficult; the use of an interpreter also affected the pace and "flow" of the interviews, making them closer to a set of questions and answers than a conversation, and often preventing clarification and movement from one topic to another.

sensitive information.[373] It was also considerably more difficult to evoke long narratives from wolof-speaking respondents and those with a limited mastery of the French language.[374] This problem was compounded by the fact that, because of the difficulty of planning meetings in advance in Dakar, the interviews were not conducted according to any pre-established order, but in function of the availability of the contacted respondents. As a result, the interviews conducted in wolof happened to take place at the beginning of fieldwork, at a time where the researcher had a more limited knowledge of local culture and conditions and the interview guide was less refined than it would later become. It is believed that the data extracted from these interviews would have been richer if they had taken place at a later period. It must also be said that the accounts provided by articulate, well-informed respondents were generally of superior quality (in terms of both the quantity of information provided and its levels of detail) than those coming from less articulate ones, and thus weigh more heavily in the analysis. The non representative character of the sample is also compounded by the sampling techniques used, which in all likelihood entailed the overrepresentation of the views of social elites in the sample.

The third source of bias is specific to the use of semi-structured interviews, and concerns the tendency of interviewees to interpret and describe past events as more coherent than they really are. Such artificial coherence may be created when respondents attempt to build accounts in line with their own images of themselves or conforming to their conceptions of the expectations of the researcher. It may also derive from the attitude of the researcher, whose search for internal consistency and explanatory patterns may impact on the interview and analysis

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[373] For instance, some respondents unfamiliar with the notions of informed consent and protection of confidentiality were very reluctant to sign the consent form before the end of the interview, i.e. after they had come to trust the researcher about how data would be used.

[374] Cross-cultural communication issues also arose with respect to French-speaking respondents, for whom certain questions proved unexpectedly offensive. More particularly, and as mentioned above, the interview guide was rapidly modified to eliminate words suggestive of opposition, such as *conflit, différend, problème* and *violation.*

processes. One strategy devised to deal with this problem was to attempt to bring potential inconsistencies to light by "double-checking" the respondents' assertions (e.g. by asking the same question in more than one way and using the check-list mentioned above). It is believed that, despite their relative inconsistency, the accounts are more likely to reflect reality than the perfectly coherent ones that could otherwise have been given. However, it is also clear that the presence of internal inconsistencies in any account complicates the interpretation of data and makes it hard to assess the accuracy of self-reports of behaviour. In consequence, there is no guarantee that the meaning ultimately ascribed to the accounts constitutes an accurate reflection of the actual behaviour displayed by the respondents.

Chapter 7. Doing business in Dakar

An accurate understanding of the behaviour exhibited by Dakar SMEs with respect to business disputes requires having a proper grasp of their situation, including the constraints they face when making decisions. For this purpose, the business environment in which Dakar SMEs operate will first be described through a brief account of the evolution of Dakar's business community and legal system. The data gathered in Dakar will then be presented, beginning with a presentation of Dakar's business environment as it was described by the respondents themselves. A general description of the evolution of typical business disputes will then be given, before providing a more detailed analysis of the diverse types of business relationships observed and the role played by law in each of them. In each section, excerpts from the interview transcripts or notes will be provided in order to illustrate the points made.

A. The research setting

1. The business environment

Dakar, the capital of Senegal, is situated on the Cap Vert peninsula, on Senegal's Atlantic coast. Dakar is Africa's westernmost city as well as a major regional port. It is one of the most important cities of West Africa, with a population of over 2 million people, about one fourth of the country's total population. Senegal's population comprises a number of ethnic groups of which the wolof group is the most important, with about 40% of the total population. Although French is the official language of Senegal, wolof is spoken by over 80% of the population and is the unofficial *lingua franca* of the nation. Over 90% of Senegalese are Muslim.

Initially a French military post, Dakar developed as a major port in the second half of the 19th century. The French colonial authorities made large infrastructure expenditures to build and improve the port facilities and complete the railway line

between the city and the capital of Saint-Louis. Dakar thereafter became the leading urban centre of the colony, and an important base for the conquest of the western Sudan. In 1902, Dakar replaced Saint-Louis as the capital of the Afirique Occidentale Française (AOF). The completion of the Dakar-Bamako railroad line, in the first quarter of the 20th century, contributed to the consolidation of Dakar's dominant position in the French African Empire.

Under the colonial regime, Dakar was one of the "Four Communes" of colonial Senegal whose inhabitants (the "*originaires*") were extended rights of citizenship by the French colonial authorities. The communes had a particularly strong French presence, and their inhabitants were well connected to the French political and commercial establishment. Until the beginning of the 20th century, the French colonial policy was favourable to the emergence of a commercial Senegalese bourgeoisie. In 1900, almost 800 Senegalese traders were registered with colonial authorities.[375] Between 1900 and 1920, pacification and the establishment of French rule over new territories allowed the French trading posts to open inland offices and to compete with local traders. Under attack and with little access to direct import and credit, many Senegalese became employees of the colonial firms. The local business class' role of intermediaries between the French companies and the local population was taken on by newly arrived Lebanese immigrants.[376]

At independence, the Senegalese economy was largely dominated by French and Lebanese firms. Like most developing countries at this time, the country adopted a development policy based on import-substitution industrialization and heavy government involvement in economic activity. Some French firms were nationalized, and many State enterprises were created. The control of industrial

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[375] Samir Amin, *Impérialisme et sous-développement en Afrique* (Paris: 1976), at 151.

[376] In 1935-36, Senegalese traders represented half of the licensed traders of Dakar, but only 15% of those operating in the countryside: Laurence Marfaing & Mariam Sow, *Les opérateurs économiques au Sénégal. Entre le formel et l'informel (1930-1996)* (Paris: Karthala, 1999), at 82-83.

enterprises passed to Senegalese businessmen with political connections to President Senghor's Parti Socialiste. A new "bureaucratic" bourgeoisie emerged, to the detriment of the established business class,[377] whose presence was essentially limited to industries with low barriers to entry (trade, construction, and transportation).[378] In parallel, the 1970s and 1980s saw the rise of a new category of Senegalese entrepreneurs in the commercial sector. Senegalese peasants operating in the declining peanut sector sought to evade the official peanut marketing board, leading to the expansion of contraband trading networks and the rise of new, powerful business groups. Many members of the Murid Islamic order, in particular, managed to accumulate large fortunes by trading in contraband goods.[379] They also provided financial support to large numbers of young Senegalese trying to make a living in the city by reselling fraudulently imported goods on urban markets. Escaping the payment of taxes, fees, and social security charges, the new "informal businesses" became more competitive than their formal, mostly French and Lebanese, counterparts, who gradually withdrew from the import and distribution trade as well as many segments of light industry.[380] This "informalization" of Senegalese commerce provided not only jobs to rural immigrants, but also cheap consumer goods that made it easier to cope with inflation, which may account for the little governmental efforts made to fight contraband networks at the time.

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[377] *Ibid*., at 102.

[378] Amin, *supra* note 375, at 160.

[379] See Laurence Marfaing & Mariam Sow, "Les commerçants sénégalais et le commerce des années 1930 à nos jours: entre le formel et l'informel. Structures parallèles/informelles: du dualisme à l'interdépendance" in Leonhard Harding, Laurence Marfaing & Mariam Sow, eds., *Les opérateurs économiques et l'État au Sénégal* (Hamburg: LIT, 1998) 27 : "il est possible de dire que l'essentiel de l'apprentissage au commerce international au cours de cette période se résume à apprendre à contourner les lois" (at 34).

[380] Ibrahima Thioub, Momar-Coumba Diop &Catherine Boone, "Economic Liberalization in Senegal: Shifting Politics of Indigenous Business Interests" (1998) 41 African Studies Review 63, at 70.

From the mid-1980s, a series of market-oriented reforms took place under the aegis of the IMF and the World Bank. Trade was liberalized as the New Industrial Policy ("*Nouvelle Politique Industrielle*") provided for the suppression of quotas and licenses to import as well as the lowering of tariffs. In 1994, the regional currency (franc CFA), which was until then at par with the French currency, was devalued by 50% as a way to increase the levels of export and reduce budget deficits. The prices of imported goods increased dramatically, leading to a decrease of the spending power among the local population as well as increased poverty, contraband activity, and social unrest, with Dakar becoming the site of a series of violent demonstrations. Small- and medium-sized enterprises, in particular, had a difficult time facing the increase in the price of imports and the contraction of local demand for their goods. The combination of an increased recourse to consumer credit and the imposition of more stringent terms of payment from suppliers led to increased need for liquidities and higher levels of debt in this fraction of the business community.

In the aftermath of the devaluation, a number of state-owned industries and public utilities were privatized, often to the benefit of French firms (France Télécom, Bouygues (water), Dagris (cotton), Advens (peanut)…). Businessmen formerly privileged by their connections to the State saw their position compromised. In parallel, the Senegalese government was subjected to increasing pressure to widen the tax base by subjecting the informal sector to taxation. "Informal" traders fought for a share of the advantages arising from deregulation, while vigorously opposing all attempts to catch them in the fiscal net. In 1990, they created their own association, the UNACOIS, which clearly positioned itself as the champion of the "informal sector" and the defender of small businesses and "national" interests against the "foreign capital" dominating the "modern" sector.[381]

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[381] More recently, the UNACOIS has taken position against the arrival in Dakar of immigrant Chinese importers, selling directly to consumers and Dakar's petty traders, qualifying their presence of "unfair competition". The UNACOIS fight against the Chinese well illustrates the fact that the association is controlled by the wealthy traders who dominate the commercial sector,

Despite deregulation and the rise of a new business class, Senegalese businessmen still remain heavily concentrated in trade and some portions of the light industry, while foreign, mostly French, capital[382] is predominant in the manufacturing sector. It is estimated that over 250 French firms are in operation in Senegal, half of them as subsidiaries of France-based companies. Those firms often play a dominant role in many spheres of activity such as energy (SAR), telecommunications (Sonatel), construction (Spie, Jean Lefebvre, Razel, Fougerolles), transportation (groupe Bolloré, Air France), tourism (Sofitel, Senegal Tours, Club Med…), the food industry (Grands Moulins de Dakar, Compagnie Sucrière Sénégalaise, SOBOA, SOCAS..), cement production (Sococim), and banking (Crédit Lyonnais, BNP, SGBS, CBAO).

Dakar's recent history has been strongly influenced by the persisting political troubles in Côte d'Ivoire. Many firms and organizations previously based in Abidjan have relocated to Dakar in order to find the political stability that Côte d'Ivoire is no longer able to provide, turning Dakar into the economic capital of Francophone West Africa. One major impact of this change has been an explosion of real estate prices in the area.

2. The legal environment

French law was first imported to Senegal during the colonial period. French legislation was introduced in the colony on a piecemeal basis, and with the adaptations deemed to be required by local circumstances. The imported laws included the Civil Code and the Commercial Code. A dual legal regime was put in place: while French citizens were governed by colonial law, customary law

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whose interests do not always coincide with those of local producers or consumers: see See Habibou Bangré "Sénégal: pour ou contre les commercants chinois?" *Afrik.com* (13 August 2004), online: < www.afrik.com/article7549.html>; Alassane Gueye, "Le secteur informel à la périphérie de la presse sénégalaise" in Martin Taureg & Frank Wittman, eds., *Prospérité ou précarité? L'avenir du secteur informel face à la mondialisation, Séminaire au Pencum Goethe, Dakar, 2002* (Dakar: Goethe Institut Inter Nationes, 2003) 28.

[382] France represents 75% of foreign direct investment in Senegal : Alain Frossard, *Exporter au Sénégal* (Paris: Editions du CFCE, 2002), at 104.

remained applicable to relationships between non-citizens.[383] At independence, the existing laws remained in force and were nationalized. Almost all the branches of the law were reformed, in line with the French model.[384] A new Code of Obligations was adopted, on which the influence of customary law proved negligible.[385]

At the beginning of the 1990s, Senegal entered a new round of reforms by becoming a founding member State of the OHADA initiative, a major regional organization was created with the aim to "harmonize" business law in Africa.[386] In line with the current "private sector-based" development agenda, the main rationale for the OHADA reform resides in the assumption that the legal environment plays a major role of the disinterest of foreign investors in Africa and the difficulties of local firms to grow and become profitable. The OHADA initiative emphasizes the need not only to "modernize" but also to "harmonize" laws within the region. This is consistent with the policy of the Coopération française regarding Africa, which sees legal harmonization as a necessary preliminary step to the economic integration of the region.[387]

In the eyes of policymakers, legal integration presents two major advantages over national legal reform. First, it is thought that an integrated legal framework facilitates the work of firms interested in operating at a regional rather than

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[383] On the colonial law applicable in Senegal, see generally Louis Rolland & Pierre Lampué, *Précis de législation coloniale (Colonies, Algérie, Protectorats, Pays sous mandat)* (Paris: Dalloz, 1931).

[384] See *e.g.* René David & Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains,* 9th ed. (Paris: Dalloz, 1988), at 658; W. Paatii Ofosu-Amaah, *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa* (Washington, DC: World Bank, 2000), at 13.

[385] Jeswald W. Salacuse, *An Introduction to Law in French-Speaking Africa* (Charlottesville, VA: The Michie Company, 1969), at 232.

[386] More detailson the history and content of the OHADA reform is provided in Appendix I.

[387] See Kéba M'Baye, "L'histoire et les objectifs de l'OHADA" *Petites affiches, La loi*, no.205 (13 October 2004) 4, at 4.

national level,[388] thus making the whole region more attractive to foreign investors. Secondly, the pooling of national resources allows the Member States to create a better legal and judicial system than they would have built on their own.[389] Having a single law and one organization in charge of its publication in an official journal greatly simplifies the dissemination process, and allows for the creation of more important markets for legal textbooks and legal education programs. Legal and judicial professionals also become able to exchange ideas and experiences.[390] In other words, the "regionalization" of reform efforts is said to contribute to making reforms easier, cheaper, and, arguably, more effective.

Along with the adoption of "uniform acts", the OHADA reform program provides for the creation of new dispute resolution mechanisms. A common court is now in charge of hearing appeals from the diverse national first instance jurisdictions, thus ensuring some consistency in the application of the new law. In addition, a strong emphasis is put on the creation of arbitration mechanisms. The adoption of the Uniform Act on arbitration inaugurated the CCJA as a regional arbitration centre. However, the CCJA's role in this respect remains underdeveloped.[391] The annual report of the Court for 2002 indicates that only five cases were submitted to the court for arbitration between 1999 and 2002.[392]

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[388] See *e.g.* the interview of Kéba M'Baye in François Katendi & Jean-Baptiste Placca, "Savoir accepter la pauvreté : Interview de Kéba M'Baye", *L'Autre Afrique* 11 (19 décembre 2001 – 8 janvier 2002) 8, at 12 : "Il faut que l'entrepreneur à Washington, qui a l'intention d'aller faire des affaires à Libreville, puisse savoir le droit qui lui sera appliqué. Et si, à Libreville, ça ne va pas, ou qu'il a l'intention d'étendre ses activités au Congo, le même droit doit lui être appliqué. C'est cela qui est extraordinaire : un droit applicable partout."

[389] Martin Kirsch, "Historique de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)" (1998) 108 Recueil Penant 129, at 131.

[390] See Xavier Forneris, "Harmonising Commercial Law in Africa: the OHADA" (2001) 46 Juris Périodique 77, at 5: "The emergence of a stronger legal profession, one that is better equipped to work at international level, is one potential benefit of OHADA reform that is rarely mentioned"; from this perspective, one advantage of the reform is to shake the quasi-monopoly of Western legal firms in the regional legal market.

[391] Dickerson, *supra* note 354, at 56.

[392] Seydou Ba, "RRapport d'activités de la Cour commune de justice et d'arbitrage de l'OHADA (CCJA) - Année 2002" *Journal Officiel de l'OHADA* :13 (31 July 2003) 28, at 30.

Although there is an important and growing body of literature on OHADA, very little work has been done so far on the impact of the reform on end-users. The authors interested in OHADA mostly adopt traditional doctrinal approaches focusing on analyses of the new laws and institutions and their interpretation by national courts and the new Common Court. As to empirical research, one study examined the impact of the reform as perceived by legal professionals.[393] However, there is still very little data on the impact of the reform on the firms doing business in the region. The few studies conducted on this matter focus on French firms or local large firms, and involve small samples.[394] Finally, the lack of judicial statistics at the level of national courts makes any assertion concerning the effect of the OHADA reform on litigation rates impossible to verify. As to the statistics available at the level of the CCJA, they show that the vast majority of the cases heard by the Common Court come from only two countries, Cameroon and Côte d'Ivoire; moreover, 75% of these cases concern the application of the *Acte uniforme sur le recouvrement et les voies d'exécution*.[395]

In parallel with the implementation of the OHADA reform, the end of the 1990s saw the introduction of arbitration in Senegalese law. A new arbitration centre was created by the Dakar Chamber of Commerce. Conceived as a way to palliate

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[393] Dickerson, *supra* note 354; this article is partly based on interviews conducted in Cameroon, Senegal and Côte d'Ivoire with 33 different persons, including lawyers, judges, law professor, law students, and economics officers at US consulates or embassies. Only four businesspeople were interviewed for this study.

[394] Two such studies were identified. The first was realized by the Cercle Afrique of Ubifrance, and involved a survey of 44 firms, including French firms doing business with Africa and a number of African firms; see Institut Français d'Experts Juridiques Internationaux, Synthèse des résultats du questionnaire OHADA, available at http://asso.proxiland.fr/_default/dlfile.asp?db=&i=2335 (last visited December 8, 2008). The other one involved 15 large firms based in Ouagadougou, Burkina Faso. See http://www.institut-idef.org/Enquetes-sur-la-reception-de-l.html (last visited December 8, 2008).

[395] Félix Onana Etoundi, "Les principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats" (2005) Uniform Law Review/Revue de droit uniforme 683, at 709, fn 79.

the insufficiencies of the judicial system,[396] the centre combines arbitration and mediation functions. At the time of field work, the caseload of the Centre amounted to less than 10 cases a year, all of them subject to arbitration rather than mediation.[397]

B. Dakar's business environment : the respondents' assessment

The data gathered in Dakar show that the local business environment is characterized by a high incidence of contractual breach. Almost all respondents acknowledged that contractual violations are frequent, and many identified them as one of the most important issues they have to deal with as managers. Lack of contractual discipline was said to force managers to constantly juggle their different commitments in order to find the liquidities they need.

In light of the importance of these problems, it is not surprising that respondents generally affirm that they take all the necessary steps to get their contracts enforced. However, an overwhelming majority of them also said they would consider court use only as a very last resort and in exceptional cases only. Indeed, very few of them had ever resorted to court in cases of contractual breach.

At first sight, such an attitude seems to confirm the negative perceptions of the local judicial system that dominate in the legal literature. Yet, a closer look at the reasons accounting for the reluctance of respondents to litigate their claims indicates the little impact that negative perceptions of the court system seem to

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[396] See *e.g.* Jacques Alibert, "Le centre d'arbitrage, de médiation et de conciliation de la Chambre de commerce de la Région de Dakar" *Marchés tropicaux et méditerranéens* 54:2786 (21 May 1999) 1035, at 1037: "La création du Centre dakarois relève également d'une certaine méfiance quant au fonctionnement des institutions judiciaires du pays, aux lenteurs des procédures, à l'insuffisante impartialité des juges: d'où un souci de simplification, et un appel évident à la valeur morale et professionnelle de ces arbitres et conciliateurs, ces hommes et ces femmes à qui les parties font confiance en raison de leur personne, et non de l'institution."

[397] Conversations with Mrs. Fatou Gueye Faye and Mr. Chérif Mbodj, Centre d'arbitrage, de médiation et de conciliation de la Chambre de Commerce, d'Industrie et d'Agirculture de Dakar, 16 and 28 February 2006.

play in this respect. Respondents almost never cited legal costs, legal complexity, corruption, and judicial competence as a major consideration in their decisions. They tended to see the justice system in a rather positive light. Most of them thought that it worked reasonably well, and many said they would consider using it if they needed to.

This suggests that, in order to account for the unpopularity of the solutions provided by Dakar courts to the problems faced by Dakar SMEs, it is necessary to go beyond an examination of the functioning of the judicial system. Neither the frequency of contractual breach in Dakar nor the reactions of local economic actors to this reality can be properly understood without taking proper account of the local environment in which SMEs operate. Three main elements deserve further consideration. First, the local context has an important impact on how firms account for instances of contractual breach. Secondly, it severely limits their capacity to prevent breach from their partners. Finally, it makes the preservation of harmonious business relationships an important factor in business success.

1. Dealing with uncertainty

Firms operating in Dakar have to deal with a number of factors that may have an impact on their activities, and over which they have no or very little control. Among the factors mentioned by respondents are the local climatic conditions, including periodic droughts as well as the existence of a rainy season extending from June to October ("*l'hivernage*"). Since agriculture is a major source of revenue in rural areas, drought and other factors affecting production have a direct impact on demand for certain kinds of goods as well as the capacity of clients in rural areas to settle past debts.[398] The *hivernage* also constitutes a source of problems, as access to certain regions or neighbourhoods become difficult or

[398] A wholesaler involved in the distribution of cloth mentioned that the frequency of late payments by retailers was closely related to variations in agricultural output (#6).

impossible, making suppliers unable to deliver goods and forcing firms to take exceptional measures to prevent supply shortages.[399]

The impact of the *hivernage* on transportation is rendered more important by the inadequacy of the transportation infrastructures servicing the region. Partly because it has grown rapidly, Dakar suffers from important traffic congestion problems that the simultaneous construction of a number of new roads and highways aims at solving. In the short term, however, important road works currently make access to the town's business centre as well as transportation from one neighbourhood to another very difficult. In the course of the research project, unpredictable variations in the time required to go from one place to another generated represented significant obstacles to making appointments with respondents and holding such appointments in a timely manner. Many respondents also deplored the unreliability of the State-owned electricity supplier, SENELEC. During the research project, daily, unannounced power cuts affected the whole country, including Dakar's business and industrial districts, forcing firms to interrupt their operations during the cuts or, for those who could afford it, to invest in alternative sources of supply.[400]

Even though Senegal is a generally politically stable country, the respondents also mentioned that they suffer from the political instability affecting the African continent. The eruption of a "civil war" in Côte d'Ivoire, which until the end of the 1990s was considered among the best investment locations in West Africa,

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[399] "En période d'hivernage quand il y a beaucoup d'eau, comme ce qui s'est passé l'année dernière, où les routes étaient coupées, les carrières étaient inondées, les camions n'avait pas accès aux carrières de sable et aux carrières de pierres (…) Et nous en fait on gère ça très bien, parce que quand on arrive au mois de juin, juillet et qu'il commence à pleuvoir, nous faisons un stock exceptionnel de matière première" (#26).

[400] "La difficulté majeure que nous rencontrons actuellement c'est l'irrégularité de l'électricité, qui nous cause beaucoup de problèmes, on ne peut pas respecter les délais de livraison à cause de ça, et le client ne nous le pardonne pas. Parce que vous devez livrer aujourd'hui, vous pouvez avoir facilement un retard d'une semaine, et là le client a du mal à le comprendre, bien qu'il est installé au Sénégal, il est au courant de ça, mais il vous reproche quelques fois de ne pas avoir de groupe électrogène [...] Et les groupes électrogènes, pour faire fonctionner des machines industrielles, il faut pas un petit groupe, c'est un investissement majeur." (#29).

only reinforced the impression that stability is never guaranteed in Africa. Political problems at the regional level not only affect firms doing business across borders but also impact on their business partners. One respondent mentioned that a client of his doing business with Ivoirian firms was unable to pay for his services following the "troubles" in Côte d'Ivoire.[401] More generally, the reputation of Africa as an unstable continent was cited as a contributing factor to what many respondents perceived as the reluctance of foreign firms to take any kind of risks or even enter into business relationships with African firms.[402]

Another source of uncertainty is that most individuals and firms are in a precarious financial situation. Widespread poverty means that many final users of basic goods are vulnerable to even relatively small shocks. Firms face tight financial constraints as well. Recent history has also demonstrated that "structurally adjusted" State institutions[403] and large local firms (many of whom were previously owned or supported by the State) are no longer immune from financial problems likely to have direct and indirect impacts on smaller firms.[404]

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[401] "Il nous est arrivé avec un client d'attendre son paiement 4 mois après, et c'était une petite somme. (…) Ce qui s'est passé, ça a commencé la période où la Côte d'Ivoire commencait à avoir des problèmes, ses bateaux étaient partis vendre du sel là-bas, l'Administration avait des problèmes, des choses qui étaient pas faites, il s'est retrouvé coincé, son sel il l'a vendu mais il a pas eu ses règlements (…) il nous a appelé pour nous dire 'je peux pas vous payer, parce que j'ai des problèmes', et nous nous savons que cette somme qu'il nous doit c'est rien du tout par rapport à son chiffre d'affaires, mais c'est une réalité qui est là." (#20)

[402] "[les fournisseurs europeens] c'est difficile, ils disent tout le temps en Afrique c'est pas sûr. C'est pas le problème de la personne, ca peut péter du jour au lendemain. Moi j'ai des fournisseurs qui ont eu des problèmes à Abidjan, beaucoup de problèmes, qui ont envoyé leur marchandises, après il y a eu des problèmes, il sait pas comment faire, parce que tu peux pas réclamer l'argent à quelqu'un qui est en guerre." (#4).

[403]"L'Administration sénégalaise, actuellement, ils ont lancé des appels d'offres, je sais pas si je vais répondre, parce que la trésorerie est très tendue, là on attend des factures de 2001, alors qu'avec l'ancien pouvoir en fin d'année on était payés." (#30).

[404] A recent example concerns the Industries Chimiques du Sénégal ("ICS"), a major enterprise on the verge of bankruptcy whose future was the subject of much speculations at the time of field work. Although no respondent counted the ICS as a direct client, many expressed concern about the possible consequence of the loss of thousands of well-paid jobs on Dakar's and Senegal's economies and their own firm's operations. As one respondent said, "les ICS traînent 2000 emplois, et la société menace de licencier ces emplois; 2000 emplois pour un pays comme le Sénégal avec 10 millions d'habitants, vous voyez un peu ce que ça fait. Avec les 2000 employés

A significant proportion of the problems identified by respondents was connected to the functioning of State institutions. A few respondents mentioned the corruption of State representatives as an issue, mostly in relation to import/export matters or the application of social security regulation. In general, however, respondents were far more likely to blame State institutions for being unreliable rather than corrupt. For example, one respondent mentioned having gone bankrupt following the cancellation without indemnity of a State contract with respect to which he had made significant investments.[405] More generally, a majority of respondents mentioned that the State's propensity to delay payments to its suppliers constituted a major problem.[406] Payment problems were generally attributed to "management problems" and the bureaucratic mode of functioning of State institutions.[407]

Respondents often identified dealing with financial difficulties and their impact on production as an important aspect of their daily work and the most pressing issue they have to face.[408] Many mentioned that their financial problems are related to their limited access to both short-term and long-term financing in the form of bank loans, bank overdrafts, or supplier credits, and were generally quick to blame banks for their unwillingness to simplify the lives of SMEs.[409] The fact

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des ICS j'ai forcément 10 clients là-bas, donc si la société ferme je peux perdre tout de suite 10 bons clients, qui sont sûrs." (#29)

[405] #10.

[406] "Il y a une différence de travail avec l'État et travail avec les privés parce que les privés une semaine après tu es payé, vous faites la comparaison avec 3 mois..." (#6); "les hôpitaux ne paient pas, tu peux passer un an, deux ans sans être payé." (#12); "le plus mauvais payeur c'est l'État. Ah oui, il faut dire hein, parce que des fois il te prend le truc et pendant un an tu rentres pas dans tes fonds". (#19); "[Avec l'État] si seulement on pouvait appeler ça du retard! (...) un retard d'un an, c'est pas rare." (#25).

[407] "l'Administration a ses contraintes, donc, l'argent qui doit sortir passera par 100 bureaux... C'est problématique." (#10).

[408] "[L'État] nous pompe beaucoup de trésorerie, parce qu'il paie dans des délais déraisonnables, mais pendant ce temps là il faut pouvoir financer l'activité, donc ça pose des problèmes dans les rapports avec les banques, les garanties qu'ils demandent, etc., négociation avec les fournisseurs, etc. etc., donc c'est ça les problèmes au quotidien." (#25).

[409] "Les banques sont très très très frileuses au niveau local, ils ne font pas confiance du tout aux petites et moyennes entreprises. (...) elles ne prennent pas de risques." (#17); "pour travailler il

that firms often do not have the financial cushion they would need to face contingencies easily emerges as one of the main factors accounting for the high incidence of contractual breach in Dakar. Having insufficient working capital may make firms unable to acquire the goods they need in a timely manner, thus slowing down production.[410] In addition, firms often deal with late payment from their clients by passing the problem to their own suppliers. Performance problems thus tend to ripple through the whole economic chain, forming a vicious circle of non compliance.

2. Preventing breach

As indicated in the interviews, Dakar SMEs see non-compliance as having negative consequences on their business, and consider risk management an important part of their job. They are generally aware of the need to limit the risks they run by reducing the probability of contractual breach and/or the potential consequences of such a breach.

In theory, there exist non legal ways to eliminate contractual risk. One of them consists in refusing to enter into the contract or making the deal a spot-market transaction with full inspection of the goods. Another one involves dealing only with reliable partners. However, these solutions are of limited relevance in the Dakar context, for three major reasons. First, the small size of the local market and firms' limited access to external markets in which they can get the supplies they need or sell their products severely limit the pool from which they can

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faut avoir de la trésorerie, et la banque, les banques aussi au Sénégal dès que tu fais un découvert c'est quasiment dans les 25%, c'est des histoires, tant que tu as de l'argent là bas tu paies rien mais dès que tu as un petit découvert tu dois aller négocier pour le découvert, ils prévoient 25% et tu négocies jusqu'à 12, 14%, c'est vraiment difficile quoi."(#18).

[410] "Les délais de règlement (...) ralentissent beaucoup l'éxécution des travaux, parce que les PME ont pas souvent de fonds de roulement cohérent." (#10); "Nous, on n'a pas une grosses surface financière, ca nous pose problème, parce que si vous avez un client ici qui vous doit, ici qui vous doit, alors qu'aujourd'hui vous devez vous apprêter à tout recevoir et qu'une nouvelle commande tombe et que votre argent est dans la nature, ca pose problème." (#20); "Les banques nous servent que pour garder de l'argent! (rires) On gagne de l'argent on le dépose à la banque, point. Il leur arrive quelques fois de nous faire des facilités bancaires, mais..." (#29).

choose their partners. Secondly, intense competition from both smaller and larger firms often forces SMEs to take more risks than they would like in order to "win the deal".

a) Selecting suppliers

As to their relationships with their suppliers, a major problem encountered by firms is the limited size of the local supplier pool. Local production being inexistent for an important number of goods, the great majority of respondents operating in the commercial and industrial sectors indicated that an important part of their supplies had to be imported from Europe, Asia or North America, either directly or through locally-based intermediaries. Respondents who dealt directly with foreign-based suppliers on a regular basis indicated that this mode of operation allowed them to pay less for the supplies they needed, but also entailed some additional hassle and delay,[411] and could pose problems in cases of defect. Some respondents mentioned that the small size of their orders compared to other clients made contractual compliance from foreigner partners problematic.[412] Many respondents also complained about the difficulty to build business relationships with foreign firms, as well as their reluctance to grant credit and insistence on using costly instruments such as letters of credit to secure payment.[413]

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[411] "Quand on importe, ça nous coute moins cher, on va acheter en Espagne, quelques fois en Italie, mais si c'est des délais réduits on achète ici, on a un fournisseur qui nous livre en 24 heures, mais c'est un peu plus cher." (#12) ; "il y a d'autres fournisseurs (locaux) qui font venir mais à des coûts plus importants; mais quand on n'a pas le choix (...), on peut faire appel à des fournisseurs locaux, acheter le produit sur place et évacuer assez rapidement une commande qui traîne" (#17); "Y a certaines entreprises ici qui importent directement pour éviter de passer par des fournisseurs locaux, mais ca exige du temps, de gérer les douanes …" (#24).

[412] "on a des problèmes de retard de livraison des fois, souvent, [...] le fournisseur français qui a une commande de 5 conteneurs sur le Sénégal, mais de l'autre côté il a le Brésil ou la Chine qui lui commande 20 conteneurs, vous avez beau être gentil, et tout, vous avez beau avoir les meilleurs rapports, ils priorisent les plus gros marchés, ça c'est normal." (#25).

[413] "Les Européens vous font confiance et nous ils nous font pas confiance. Et si je vais en Chine, au Japon, ils nous demandent de payer par crédit documentaire irrévocable et confirmé. Crédit documentaire irrévocable et confirmé par une banque! Ça veut dire quoi, ça veut dire que vous êtes des voleurs, vous êtes des assassins, vous êtes tout!" (#18).

At the local level, competition between suppliers is restricted by a number of factors. Firms looking for large quantities of a certain product generally have to buy it from one of the very few large firms in position to supply them.[414] Another problem often mentioned by respondents is the fact that, even where many firms technically "compete" for the same clients, variations in the composition of their inventories mean that a specific product is rarely available at more than one place at the same time.[415] Clients are thus forced to shop around to find the supplier who can fulfill their needs, relegating price considerations to the background. Many respondents also complained about the scarcity of reliable local suppliers, especially where quality is an issue. In such cases, they often have to agree to pay the higher prices charged by well-established firms until they can locate alternative suppliers offering products of equivalent quality (including in terms of after-sales service).[416]

When firms can acquire certain type of goods from many different sources, price is often said to drive their decision.[417] However, the precarious financial situation of firms means that, although they want to obtain the best price they can, they also

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[414] "[On achète chez] les plus grands. Parce qu'ils sont prêts à répondre, pour la quantité. [...] Ces grosses maisons-là, elles ont des stocks assez importants, elles ont la possibilité de faire venir même par avion s'il faut, les grosses quantités..." (#12); "nos fournisseurs c'est toujours des grandes entreprises, parce qu'il y en a pas beaucoup (...) pour les flacons, par exemple, y en a un seul qui compte, les autres c'est des gens qui vous prennent des flacons ici et là..." (#16).

[415] "[Le critère] c'est plutôt qui a le produit". (#15) ; "C'est très dur de constituer un stock, (...), ce qui fait que la clientèle navigue entre les possibilités du moment de chacun, quoi." (#13); "Pour chaque commande, on va là où on peut avoir le tissu (...) par exemple, si je cherche une couleur en particulier pour les tenues d'un client, bien je fais le tour pour trouver." (#29).

[416] "Y a des gens qui sont dans l'informatique, des petites société qui vont aux États-Unis ou au Canada, qui importent des conteneurs d'ordinateurs [...] ce qui fait qu'ils peuvent vendre à des prix beaucoup moins chers. [Mais] ces gens-là quand ils amènent du matériel vous avez pas la garantie derrière." (#20); "quand c'est pressé, le réflexe c'est de prendre le grand fournisseur de la place, on est assurés de la qualité, et voilà, bon, le prix sera de toute facon plus cher." (#24).

[417] "Nous on consomme beaucoup de filtres, ça s'épuise très vite. Aujourd'hui on l'achète à X, demain à Y, une autre fois à Z... [...] quand tout le monde a le même produit en même temps on prend le moins cher." (#28).

pay particular attention to the financial conditions imposed by suppliers.[418]The creation of long-term business relationships with a supplier is often seen as key to obtaining credit[419] as well as achieving other economic efficiencies, such as economizing on search and negotiation costs.[420] This is not negligible in cases where the supplier pool consists in a plethora of small firms offering products or services of varying prices and quality. However, even where such long-term relationships are established, they are rarely exclusive and do not prevent firms from shopping around for new partners and better prices, and attempting to renegotiate contractual terms.[421]

b) Screening clients

The main risk associated with dealing with clients is the risk of non- or late payment. One respondent mentioned that he dealt with this risk by entering into spot market transactions alone. Less drastic solutions involve refusing to extend credit to certain categories of clients considered too risky. The most common examples concerned State institutions, which are in the unique position of being able to impose their conditions on private firms while being notoriously slow

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[418] "La facilité de paiement compte aussi: quelqu'un qui te dit tu paies à 90 jours, tu as le temps de te faire payer de ton côté". (#18); "Le but d'un gestionnaire, c'est de réduire ses délais de recouvrement et de jouer sur ses délais fournisseurs et ses créances clients. [Donc on cherche les] fournisseurs qui veulent vraiment avoir des marchés et qui sont prêts à accorder du crédit." (#24).

[419] "Au début, on n'a pas confiance en vous donc il faut faire du chemin pour convaincre les fournisseurs de vous donner du crédit. " (#29) ;" Au début d'une relation, vous payez comptant, c'est normal, parce qu'il y a tellement de mésaventures que chacun ne prend pas de risques, donc, le crédit, c'est au fil du temps, quoi." (#20).

[420] "Au Sénégal c'est beaucoup de négociation avec les fournisseurs. D'où l'intérêt d'avoir un fournisseur régulier, parce qu'on sait après qu'il connaît nos prix, on est beaucoup moins à chaque fois dans les négociations permanents. Y a des prix qui se stabilisent." (#24).

[421] "Avec certaines personnes on a une certaine relation, y a des affinités, donc j'ai tendance à travailler plus avec ces gens-là tout en contrôlant les prix, en regardant ce qui se passe ailleurs aussi. Parce que c'est pas parce qu'on a des affinités, que tu me livres plus vite, que tu peux te permettre de me faire des prix qui sont pas corrects, je connais les prix sur le marché alors..." (#28) ; "Comme on a établi une bonne relation, une relation durable, on travaille tout le temps avec eux, même si les prix changent on arrive à négocier avec eux, à trouver une entente. (…) Si y a des nouveaux fournisseurs qui arrivent on prend contact avec eux, on négocie les prix, et on travaille autant avec les nouveaux fournisseurs qu'avec les anciens fournisseurs. (...) Le prix c'est la base de tout." (#22).

payers.[422] Other cases concerned friends and family members, who often feel entitled to borrow money or obtain goods on credit with no stringent obligation to repay, leading one respondent to conclude that "dealing with relatives always gets you into trouble".[423] The drawback of these two strategies is that they may prevent firms from attracting enough customers to stay in business. In view of the importance of credit in the life of firms and individuals alike, refusing to extend credit may turn away clients whose business might nonetheless be profitable in the long run.

Many respondents seemed somewhat torn between their need to keep their customers and attract new ones, and the need to stay afloat financially to ensure their survival. A strategy used by many respondents to increase their competitiveness without increasing their financial risks consist in differentiating one's products from competing offers by emphasizing their superior quality and/or exclusive character,[424] or other features such as the provision of after-sale services.[425] This also seemed to be the preferred way to deal with the "unfair" competition of firms operating (totally or partially) in the informal sector, whose status enables them to produce at lower costs than formal SMEs. Alternative strategies to attract clients included resorting to networks of relationships or

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[422] "Nous, nous avons choisi de ne pas travailler avec l'État. c'est parce que leurs délais de paiement sont extrêmement longs, et souvent ça traine, donc si vous avez pas une certaine surface financière, rester 3-4, parfois 6 mois sans être payé, si c'est des grosses sommes, c'est pas intéressant." (#20); "Il faut avoir les reins solides pour travailler avec l'État. Et là justement on a une stratégie de, de vraiment savoir dans quoi on va aller avec l'État, dans les projets de l'État, parce que vous savez, le problème, le nerf de la guerre c'est la trésorerie. [...] Vous avez beau dire que vous avez des clients qui vous paieront à coup sûr, mais s'ils vous paient avec un an de retard..." (#25).

[423] #27.

[424] "[Pour faire affaire sur ce marché], il suffit d'avoir un peu d'argent, d'aller à Paris acheter et de revendre en Afrique, mais ça c'est trop facile, c'est pas ma conception [...] Nous, on participe à la conception des produits, tous les produits distribués dans les boutiques S. sont exclusifs à S."(#4).

[425] "Avec nous les gens savent que s'il y a un problème ils peuvent se référer à la personne qui est là. Le service après vente est important."(#17) ; "Nous on dit aux clients si vous avez un problème vous nous ramenez l'imprimante, on vous la change. [...] En fait, on joue sur notre crédibilité. Parce que nous savons que dans les pays africains, les gens, si vous leur offrez un service, ils sont fidèles généralement." (#20).

giving "gifts" to establish contact with potential clients and influence them in one's favour.[426] Most of the time, however, SMEs trying to break into or survive in competitive markets have to match or beat the price and other financial conditions offered by existing firms.[427]

Price and credit often work in combination when devising the "best offer" to make. For example, one respondent, a shoe retailer, managed to attract customers toward his higher-end, more expensive products by devising a mechanism by which credit extended to a client was secured by the client's employer. [428] However, agreeing to extend credit in order to attract a client may create a dangerous precedent when reliability over the long term cannot be ascertained. One respondent indicated that he sometimes solved such dilemmas by initially offering lower, "end of season" prices to clients he wants to attract, and switching to credit sales at higher prices as the relationship develops.[429]

Market position seems to be an important determinant of business practices. Where competition comes from firms with financial resources that enable them to offer hard-to-match credit facilities,[430] SMEs often have to take greater risks than

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[426] "Gagner un appel d'offres, c'est difficile. Alors [que] si vous réussissez à avoir des entrées, ça c'est sénégalais, c'est-à-dire si quelqu'un [dans l'entreprise] peut vous appuyer pour que vous vendiez du matériel, ça ça marche." (#8); "il nous arrive parfois de donner des dessous de table pour décrocher des marchés, mais ça ça existe partout! (rires) [...] Ou encore, avec des connaissances, des amitiés, on peut dire à un ami de... de demander à un directeur qui est son ami de me passer commande." (#29).

[427] "Quand on a ouvert ici, on est que deux, mais depuis 10 ans, tout le monde fait ça. (...) Avant on fait presque pas de crédit, c'est rare qu'on fait du crédit avant, et maintenant on est obligés de faire un petit crédit pour vendre." (#19).

[428] "Par exemple, à la banque, on a une trentaine de personnes qui veulent s'approvisionner chez nous, on leur permet d'avoir des produits sans payer cash (...) chaque fin du mois quand elles reçoivent leur salaire, y a une retenue. (...) Dans les structures où il y a beaucoup de femmes, ça les intéresse toujours, car comme on a un produit un peu plus cher, c'est pas facile de payer d'un coup. " (#4).

[429] #27.

[430] "Comme on est les plus petits, nouveaux sur le marché, [les autres] ont une bonne longueur d'avance, et ils ont des moyens financiers que nous on n'avons pas, donc ils ont les moyens de financer le client. (...) Ce client-là, il a un pouvoir de négociation sur toi qui est plus élevé." (#28); "Qu'est-ce qui va faire que tel client va venir travailler avec moi? Il va vouloir des avantages. A prix égal, à produit équivalent, l'avantage, c'est le crédit que tu es prêt à donner" (#21).

they would like in order to win the deal. In addition, the capacity of clients to meet their obligations often correlates with their market power. Low-risk, reliable clients are few and generally have the capacity to strike better deals and impose stringent financial conditions that make life difficult for less powerful market players. In comparison, less powerful clients may be easier to get and agree to pay higher prices, but are more vulnerable to contingencies and less likely to pay on time when extended credit.[431]

The interviews also suggest that local social norms have a certain impact on firms' credit-granting practices. Respondents generally describe as pervasive the belief that one has to lend money, including by selling on credit, to relatives and friends. It was also mentioned that one's obligation to sell on credit, irrespective of the buyer's capacity to repay, can also extend beyond one's own circle to encompass persons "recommended" by others.

Respondents were generally aware that this constituted an obstacle to their firm's profitability. However, they also mentioned that resisting such claims may be impossible[432] or require recourse to specific tactics, such as this one: "If someone asks for, let's say, 100 000 francs, I don't lend him 100, I lend him 20; 20 is nothing for me, so I lend him 20, and I know I'll never see this person again, he'll do everything to avoid me: I got rid of him!"[433]

Although most respondents found keeping a balance between short-term imperatives (i.e. cash flow management) and longer-term goals (i.e. increasing

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[431] A related point concerns the ability of more powerful market players to derive a financial advantage of their position by delaying payment of the amounts they owe to firms with little recourse against them: see section C.2 below.

[432] "Pour les particuliers, c'est des cas exceptionnels, mais ca arrive parfois qu'on fasse du crédit, parce qu'on est au Sénégal, on a une coutume, des fois on te recommande avec quelqu'un, tu peux pas refuser, parce que c'est le pays quoi! On a cette coutume. Des fois on est obligés de donner à quelqu'un quoi, tu es obligé même si tu crois qu'il te paiera pas, tu es obligé de lui donner." (#19)

[433] "Moi je prête pas beaucoup, je donne. Et quand je donne je teste d'ailleurs… Y en a qui viennent vous voir, ils disent 'prête-moi 100', moi je prête pas 100, je prête 20, 20 c'est rien pour moi, je prête, le gars je le vois plus hein, dès qu'il me voit (*moving hands as if someone was fleeing*), c'est bon, je me suis débarassé de lui. Y a des techniques pour bien vivre ici!" (#8)

revenues) particularly challenging, the interviews also reveal one important difference between firms in this respect. Whereas start-up and very small firms saw attracting new clients as fundamental, "larger" and better-established enterprises seemed more sensitive to financial management issues, and more likely to "rationalize" their credit and debt collection functions by creating specialized departments and procedures. Having dealt with financial problems in the past also seems to lead managers to adopt more conservative credit-granting practices.[434]

c) Managing risk: the role of "trust"

The environment in which Dakar SMEs operates severely limits the efficiency of "screening" and "spot transaction" methods for preventing contractual breach. Rather than avoiding risk, firms have to devise ways to deal with it as well as they can. A major challenge for SMEs consists in correctly assessing beforehand the level of risk associated with potential transactions[435] in order to determine whether it is worth taking or not.

The level of risk attached to a particular transaction depends on two disctinct factors: the probability that the agreement will be breached, and the consequences attached to the breach in question. The potential impact of a breach may be lessened through diverse means, such as dealing with more than one supplier,

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[434] "Il y a beaucoup d'entreprises qui s'effondrent parce que le chef d'entreprise n'est pas assez prévoyant sur ce problème de liquidités... (...) je suis très sensibilisé à ça (...) Avant, c'était plus souple, c'est pour ça que l'entreprise a connu beaucoup de difficultés, il a fallu redresser pas mal de choses. Là on commence à souffler." (#25); "Les clients, en principe, c'est tout le monde, mais il faut choisir les clients solvables et ça c'est pas évident ici. (...) Moi j'ai eu des difficultés très grandes à cause des clients. Parce que moi je paie cash, et j'ai pas de trésorerie. (...) Donc je suis obligé de durcir ma politique commerciale, je ne fais plus crédit, ou bien j'exige une traite, etc. Je me rends compte que c'est ça que les fournisseurs qui sont là ils utilisent, hein!" (#8).

[435] "on a compris que quand on prend des risques il faut que ce soit des risques calculés aussi, parce qu'il faudrait pas que lorsque ça casse, ça fasse mal. Quand c'est des petits montants, etc. ça va quoi, mais on est méfiants." (#26).

fixing limits to the amount of credit that can be granted to a single client[436] or asking for a down payment covering one's costs before completing an order.[437] However, the main strategy used by respondents to reduce contractual risk consists in fixing the amount at risk in a transaction in function of the "trustworthiness" of the partner involved. Respondents generally said that they enter into transactions representing a significant level of risk only with people they "trust".[438] However, because of the uncertain environment in which they operate, Dakar economic actors tend to see perfect contractual compliance as rarely achievable. Trust therefore has less to do with the probability that one fulfill his contractual duties as planned than with his willingness to do his best to minimize the impact of a potential breach on their partner as much as possible in light of the circumstances.

The interviews indicate that trustworthiness comprises two elements in Dakar: the (primarily financial) capacity to satisfy one's obligations, and the willingness to do so. Assessing trustworthiness first requires distinguishing *bona fide* firms from crooks looking for an opportunity to take one's money and run. "First

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[436] "chacun de nos clients a un plafond avec nous, OK? Chacun de nos grossistes a un plafond, ce qui fait qu'ils ont ce plafond, au-delà, toute marchandise qu'ils renouvellent ils vont la payer." (#21); "En général, ça dépend des fournisseurs mais c'est plafonné, par exemple, on peut dire, on a droit d'acheter jusqu'à 200 000 euros de crédit direct. Si on dépasse ce plafond là le reste on doit le payer d'une autre facon, en général c'est par lettre de crédit documentaire à terme." (#25).

[437] "Avec les particuliers, nous imposons un système de paiement tu donnes 50% à l'avance, qui couvre les matières premières et la main d'oeuvre, donc 1,5 million, tu demandes 750 000, ca couvre déjà les matières et la main d'oeuvre, les 750 000 qui restent s'il ne te paie c'est l'argent de l'entreprise, mais ca serait moins grave, parce que c'est ton bénéfice. " (#12); "Le problème, nous on a des pièces qui ont été livrées là et qui ont attendu 1 an ou 2 ans avant d'être posées. Parce que moi j'ai respecté mes délais mais le chantier a eu du retard. C'est là que c'est important pour nous de prévoir, on demande généralement un acompte à la commande de 30-35% au client et généralement je demande aussi un acompte sur approvisionnement, quand le matériel arrive, je demande 35% pour pouvoir passer ma commande, et après je demande 40% de mon prix une fois que mon matériel arrive sur site, pour parer à ce genre de problème. Parce que si mon matériel reste sur le site et que je ne peux pas l'installer on a un problème de financement. " (#30).

[438] "Non, quand on a pas confiance on ne signe pas. En général quand on sent qu'il peut y avoir des difficultés, [...] on sent que les conditions n'y sont pas, on n'avance pas. [...] La relation de confiance est fondamentale." (#9).

impressions"[439] can be supplemented with information gleaned from diverse sources.[440] In the absence of formal credit rating or other reliable information mechanisms, business and social networks act as the most important repository of more or less reliable information on business reputation and are routinely to identify and get in touch with potential partners.[441]

Despite the size of Dakar and its status within the West African region, respondents often mentioned that the town is still small enough for people to get to know almost all the major players in their line of business. In addition, the various networks of relationships that can be found in the city often overlap and create numerous types of links between apparently unrelated actors. Respondents generally agreed that in Dakar, "everybody pretty much knows everybody".[442] This allows information to flow easily from one circle to another. Friends, relatives, colleagues, or business relations can be put to use to gather specific information on a firm's situation.[443] However, such information gathering appears to be exceptional rather than systematic.

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[439] "Lorsqu'on a pratiqué le client on peut cerner sa psychologie, on sait a priori à qui on a affaire, avec l'expérience on ne peut pas toujours être là à se faire bluffer par un client à gauche et à droite. Chaque client, on sait à qui on a affaire, qui est sérieux, qui est rigoureux, dans ce qu'il dit, dans ce qu'il fait, etc. Donc c'est pas compliqué." (#17).

[440] "On y va au feeling, mais aussi avec des informations, une enquête qu'on fait, en allant voir le client où il est situé, où est son magasin, qu'est-ce qu'il y a dedans, qui sont ses fournisseurs..." (#21); "Vous savez quand quelqu'un a son magasin, un grossiste a son magasin, il a pignon sur rue, il va pas s'envoler avec ton produit." (#28); "On fait pas d'enquête sur nos clients, mais on essaie de savoir qui c'est... Quand tu vas dans les bureaux des gens, tu vois bien". (#30).

[441] "Je passe souvent par des amis de la communauté d'expatriés ici, qui sont là depuis plus longtemps, souvent on discute, pour tel truc, tu bosses avec qui et autre, ils nous conseillent. [...] On prend rarement un inconnu, c'est très rare que je travaille avec quelqu'un qui s'est présenté à moi, à moins que j'en aie déjà entendu parler." (#24).

[442] "Bon, dans chaque profession, dans tous les pays d'Afrique les professions sont des petits milieux, quand même, donc après dans ces petits milieux tout le monde connait un peu tout le monde. " (#13).

[443] "J'ai le moyen de faire des enquêtes sur des entreprises, pour voir leur santé financière, mais c'est purement confidentiel, c'est par des amis, le canal des amis, que j'ai ces informations-là. [...] Je peux aussi, y a des entreprises où je passe par le biais du personnel pour avoir des renseignements, le personnel peut ne pas être content, il y a des arriérés de salaires, ou autres, mais c'est confidentiel." (#29); "Si quelqu'un veut ouvrir un compte, et on le connaît pas bien, il donne des références bancaires, mais la banque n'est pas tenue de donner des informations, et là il nous

In addition, information about past contractual violations does not seem particularly sought after or considered when making decisions. The interviews suggest that past conduct toward other people is seen as constituting a reliable indicator of future conduct only where it clearly reveals a serious lack of ethics or a state of impending bankruptcy. Otherwise, direct business dealings remain the best way to assess the trustworthiness of a particular partner. Trust then builds incrementally as the relationship develops and the parties get to know each other.[444] The permanent severing of business relationships with partners in breach was rarely cited as an appropriate way to limit contractual risk. In view of the few options available to firms when time comes to select business partners, refusing to deal with someone on the basis of past contractual breach alone is a luxury that many of them cannot afford.[445] In case of default by previously trusted partners, firms generally choose to revert to "cash and carry" or "secured" transactions until debts are paid and "trust" is rebuilt.

3. Preserving relationships

Due to the small size of the local market and limited access to external markets in which they can get the supplies they need or sell their products, Dakar SMEs tend to be relatively dependent on their suppliers and clients. Moreover, in Dakar, the order of things can change fast and in unexpected directions. A firm in a difficult position today might become one's best partner in the near future. In such a

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faut des circuits informels, parce que tout le monde connaît au moins quelqu'un à la banque avec qui vous avez des relations […] Et, comme je vous ai dit, au Sénégal tout le monde se connaît, donc sur le comité de crédit, y a forcément quelqu'un qui connaît un peu l'histoire de cette personne-là dans les affaires. " (#25).

[444] "Nous on avait beaucoup de petits produits qui coûtaient rien du tout, 20 000, 40 000 CFA, je me permettais de faire du crédit sur ses produits-là. En fait, c'était une façon de regarder le comportement du client. Y en a qui vous devaient 50 000 et ils venaient payer, mais d'autres non. Si celui qui vous doit 50 000 ou 100 000 il paie pas il faut pas aller plus loin avec ce client, il paiera pas...." (#8); "Quand on vous connaît pas très bien, où qu'on a pas des relations d'affaires suivies sur une longue période, avant de sortir d'ici il faut payer. C'est aussi simple que ça." (#26).

[445] "Parfois, on a envie de dire, celui-là, je travaillerai plus avec lui, mais comme tu dis des fois le marché est limité... Parfois il faut savoir passer l'éponge sur un petit contentieux qu'on a eu, c'est pas pour ça que les relations sont closes pour l'avenir quoi." (#30).

context, severing business ties is not a decision that can be made lightly. In such a context the "shadow of the future" is almost always present, business "transactions" are better understood not as discrete events, but as episodes punctuating longer business "relationships".

For many respondents, the desire to preserve future relationships with their partners played an important role in the choice of disputing strategies. Data indicate that the contractual flexibility exhibited by respondents partly derives from their belief that suppliers and clients would take their business elsewhere if they pressed too much for enforcement. Adopting a flexible, rather than confrontational, attitude was often described as essential in order to allow the parties to remain on good terms and do business together again in the future. [446]

It remains unclear whether this belief is backed by experience, since no respondent mentioned having actually lost a partner because of their confrontational attitude or inflexibility. To the contrary, and as acknowledged by some respondents, [447] firms and individuals do not always have the option to switch to a more accommodating partner without incurring additional costs. In addition, a viable strategy for defaulting clients who actually have many options is to diversify their sources of supply, a measure which enables them to resist claims. In such cases, as one respondent in a very competitive sector said, "the more credit you give, the more clients you lose."[448]

Many respondents also expressed some concern about the impact of their disputing behaviour on their business reputation, and thus on their relationships

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[446] Seeing clients come back after a dispute may lead one to reconsider one's view of the matter ; for one respondent, past experience working for foreign firm with a reputation for being though on collection matters seemed to have been determinant: "Je suis pas arrivé [en cour], mais si je devais arriver là-bas, j'y vais sans problème, parce que quand j'étais dans l'autre groupe, l'autre société, je l'ai fait et ça n'a pas gâché nos relations." (#18).

[447] This was explicitly acknowledged by some respondents: "quand quelqu'un manque de papier, même s'il m'aime pas, il va venir chez moi. Et si le voisin il en a et il est moins cher que moi, c'est pas parce que j'ai pris cette décision [de laisser tomber] qu'ils vont aller chez lui, c'est parce qu'il est moins cher. " (#13).

[448] #2.

with other partners. They feared that going to court or pursuing claims too aggressively rather than compromising could give them a reputation for being "too tough" and strict in business matters and drive away existing or potential partners.[449]

One important characteristic of Dakar's market is that, although business networks constitute the main conduits of information on firms, they also overlap with a variety of social networks based diverse types of ties. The porous boundaries between the different kinds of networks, as well as the fact that business partners often share membership in one or more non-business networks, allow information to flow easily from one circle to another. In the absence of clearly defined boundaries between the professional and personal spheres of life, the "reputation" of a SME and the personal reputation of the people who own and manage it are partly indistinguishable. Unsurprisingly, a large number of respondents expressed concern about the potential impact of a decision to litigate a claim on their personal reputation and relationships. A closer look at two important aspects of the local culture will shed some light on the impact of local social norms on business disputing.

a) The "culture of compromise"

The notion that local social norms could prevent some firms from litigating their business claims emerged in some of the interviews at the beginning of field work.[450] In the respondents' accounts, Dakarois are described as people who

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[449] "Si tu es rigoureux, rigoureux, rigoureux, très très rigoureux, c'est sûr que les gens vont t'indexer en disant, peut-être qu'il va pas nous aider, nous appuyer, etc. etc. " (#18); "Aller en cour, ça aurait un effet, parce que les gens vont dire, ces gens-là, si on traite avec eux, il faut pas lésiner sinon ils vont nous amener en justice. Donc c'est cette réputation qui peut venir, et c'est pas toujours le meilleur." (#20).

[450] In order for hypotheses to emerge from interviews, rather than be tested in them, the role of cultural factors was not addressed specifically in the interview guide. The idea that local social norms could prevent firms from litigating their business claims was not covered in the initial questionnaire. It emerged at the beginning of field work, when one respondent referred to a general reluctance of Senegalese to resort to judicial institutions. The questionnaire was thereafter

enjoy negotiation and are keen on seeing themselves as conflict-avoiding people for whom any matter can, and should, be resolved amicably. Respondents describe the local culture as a "*culture de compromis*",[451] in which conflict calls for dialogue[452] until an agreement is reached. In contrast, litigation has the effect of turning a relationship based on negotiation for mutual gain into a matter of right and wrong and is often seen as a personal attack on the defendant's probity. The confusion between the penal and civil functions of tribunals clearly observable in the accounts of a number of respondents probably contributes to feed this perception.[453] In consequence, litigation is said to entail the destruction of all personal and professional relationships between the parties and is generally seen in a negative light, as disruptive of collective order.

The impact of the local culture of compromise on disputing behaviour does not seem insignificant, but remains hard to assess. On the one hand, the application of the obligation of compromise seems to depend on the type of relationships

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modified to verify whether the statements made by this respondent indeed reflected a generalized perception.

[451] See *e.g.* interview #9.

[452] In case of problem, "on fait l'Africain, on dialogue." (#26).

[453] "Moi j'ai vu une personne récemment, l'année dernière, qui est en Chine, il a mis plus de 150 millions en l'air, on lui a donné que des pacotilles... Imaginez si cette personne là avait emprunté à la banque, il serait allé en prison, je parle même pas de perdre de l'argent, il va aller en prison, et sa famille va être ... voilà le problème. " (#4); "Le tribunal c'est un dernier recours, moi je trouve que ça peut être dérangeant... (...) Vous ne savez plus ou ça va mener. Le juge peut décider dans sa conscience, que l'autre c'est un escroc, dès qu'il pense ça, peine lourde, le jour ou vous entendrez la peine lourde, je vous condamne à payer et en plus deux ans de prison, vous êtes mal." (#8).

Even though the existence of such confusion among lay people is hardly surprising, it might be compounded in the Dakar context by historical factors and a tendency to oppose the local "culture of compromise" and the "culture of sanction" inherited from the colonial power. Another, possibly more important, contributing factor may be the adoption of a statute that sought to curb the proportion of NSF cheques given in payment to debtors by turning the issuing of such cheques into a criminal offence. Under this statute, the police can, at the request of a creditor having received a cheque without cover, put the debtor under arrest and keep him in detention for up to 48 hours, after which the case has to be transferred to penal tribunals. Debtors who come up with the money during the 48 hours period are released without charges being pressed. From the respondents' accounts, it seems common practice for the Dakar police to become involved in civil disputes about unpaid bills or loans not covered by the new law. Whether this law gave rise to this practice or merely made it more visible by providing it with a seemingly legal basis remains unclear.

between the parties, and more particularly on the structure of the common networks to which they belong.[454] In addition, general agreement on elements of the "local culture" does not prevent the existence of possible discrepancies between what Dakarois say about their preferences and what they actually do. Some respondents were quick to point to newspaper reports of litigated cases as evidence that the place had indeed turned into a haven for lawyers, or to describe litigation as a standard and well-accepted practice in business matters.[455]

Social norms appear to have an impact on managers' decisions partly through internalization. A few respondents expressed a clear preference for preserving harmonious relationships, even when it means giving up on a rightful claim,[456] and a majority of respondents also were of the view that "un mauvais arrangement vaut mieux qu'un bon procès." Social pressure also seems to play a major role in the enforcement of social norms. Some respondents expressed the fear of being stigmatized if they ever brought a case to court.[457]

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[454] "Y a deux façons de connaissance. Y a des connaissances d'entourage que vous êtes connaissances depuis des générations quoi, et y a des connaissances que tu connais à peine 1 mois, 2 mois, 1 an quoi. Mais des gens tu habites le même quartier pendant des années, tes parents se connaissent, quoi..." (#19).

[455] "Nous on a l'habitude, hein, c'est une pratique normale, quelqu'un qui vous doit de l'argent qui vous paie pas vous l'amenez en justice. […] quand vous allez au tribunal vous allez voir des cas de quelqu'un qui ont pris une cacahuète ou quelque chose de... vous allez des cas, vous allez dire c'est pas la peine!" (#16) ; "J'ai jamais ressenti que, s'il y a vraiment un problème... Les procédures judiciaires ca se fait beaucoup ici, j'ai rien senti là-dessus." (#24).

[456] "Ces valeurs-là je m'y reconnais. Je crois que l'homme sans les autres c'est rien. Moi je me sens bien, peut-être c'est une faiblesse, quand j'ai des bons rapports avec les gens, j'aime bien rigoler, je vis comme ca, c'est mon bonheur, alors si je suis mal, j'ai un conflit avec quelqu'un, même si on va pas au tribunal c'est pas bien pour moi, j'aime pas" (#8); "De nature je suis une personne très conciliante, dans les relations j'essaie de pas exagérer, de faire preuve de tolérance, de compréhension, parce qu'on est tous différents les uns des autres. Il m'arrive à l'occasion dans ma vie personnelle je suis chaque fois lésé mais que je préfère renoncer à quelque chose que d'entamer des poursuites judiciaires." (#15); "C'est quelque chose qui est très loin de ma pensée, vraiment je fais beaucoup de recours avant d'aller chez les tribunaux, de négociation, parfois même jusqu'à laisser tomber, comme on dit un mauvais arrangement vaut plus qu'un bon procès. Il faut éviter les procès." (#29).

[457] "Ici quand tu amènes quelqu'un au tribunal c'est pas comme en Europe où les affaires c'est les affaires, si tu amènes quelqu'un au tribunal, tous tes parents ils te regardent sous un autre angle. Ils vont te traiter comme quelqu'un qui... Ils ne vont pas dire que ce sont tes droits, ils vont dire il est méchant, il l'a amené à la police, il l'a amené au tribunal, t'as vu comment ils vont te voir." (#12).

b) "Le relationnel"

The role played by local norms favouring negotiation and compromise in business decisions cannot be properly understood without considering the specific ways in which social pressure is exerted in Dakar. The most striking finding made during field work arguably concerns the existence of a local practice, often referred to as "mediation" or "intermediation", which consists in asking third parties to intervene in bilateral processes of business negotiation.

The main form of intervention for a third party consists in serving as an informal link between two parties unable to reach an agreement. The type of informal "mediation" in which these third parties engage is quite different from the standard definition of the term. Dakar "mediators" are not neutral third parties.[458] Although one aspect of their roles is to facilitate communication and negotiation between the parties, their essential task is to "convince" the other party to behave in a certain manner. In business matters, a well-chosen mediator may help convince someone to pay a debt, grant further delay, or settle a claim for less than he would have otherwise.[459] A good proportion of respondents indicated that they resort to their own "*relationnel*" in business matters, mostly in order to meet with potential clients and suppliers, but also to enforce their contracts. In many examples, relations were used to make contact with specific persons in big bureaucracies, in the hope that the creation of a personalized relationship within

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[458] "C'est pas une question de médiation, c'est une question de faire entendre raison à la personne, qu'il vaut mieux payer quoi." (#13).

[459] "Un ouvrier qui fait mal son boulot, qui me fait perdre de l'argent, je peux être amené à bloquer ses paiements jusqu'à ce qu'il mette le nombre d'ouvriers nécessaires. Le faisant il peut aller voir une relation à moi pour que je débloque la situation. On agit en réseau interconnecté, et, il peut aussi bien agir sur moi que l'inverse." (#10); "Par exemple, moi je vous connais, vous connaissez une personne, je vais vers vous, je dis vous connaissez telle personne, il me doit de l'argent, si j'ai tout fait, je peux pas, mais toi comme tu as des relations avec eux, demandez s'il me peut m'aider, me payer mon argent." (#18); "Au Sénégal c'est un tissu qui a beaucoup de relations, et quand tu touches par un point d'une manière ou d'une autre, tu toucheras toujours une sensibilité avec qui tu as un rapport quelque part. Donc tu as toujours beaucoup de mal à, à toucher un point. Parce que le gars va toujours réfléchir, ce gars-là est venu me voir, comment je peux faire, d'une manière ou d'une autre il va toujours connaître quelqu'un qui te connaît, et cette personne viendra te voir..." (#30).

the firm would speed up payments and put the respondent in a better position to get orders.

According to the respondents, it is generally relatively easy to find a mediator willing to intercede in one's favour. Due to the small size of Dakar and the density of local networks, any two persons' circles of relations almost always overlap, making it relatively easy for one to find someone who knows the other party well enough to agree to intervene and exert some kind of pressure on him.[460] Mediators seem to have influence not because they refer to new moral arguments not previously invoked by the parties themselves, but because the weight of an argument depends on the identity of the person who utters it. For example, "moral" arguments may contain implicit threats when voiced by people in a position to exert reputational or other sanctions.[461] On the other hand, the refusal of a party to compromise and grant the favour asked for by the mediator may have an impact on the relationship between them as well as one's reputation.[462] The best mediators are therefore persons to whose opinion the other party is particularly "sensitive" for a variety of reasons, including the depth of their relationship with the defaulting party and their personal status.[463] Interestingly,

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[460] "Comme au Sénégal tout le monde se connait, hein, d'une manière générale, tout le monde se connaît, donc il nous arrive de faire intervenir des relations. (...) C'est un petit pays hein... Ça peut être un membre de la famille, un promotionnaire... On utilise beaucoup de réseaux informels pour régler des conflits." (#25); "les professions sont des petits milieux, quand même, donc après dans ces petits milieux tout le monde connait un peu tout le monde, y a toujours quelqu'un qui peut avoir plus d'influence sur quelqu'un d'autre." (#13).

[461] For example, a respondent mentioned a case in which clients tried to convince him to drop a case against another client by referring to the potential impact of this decision on his business reputation: "Ils disaient: 'tu comprends, si tu agis comme ça, c'est pas bien, pour nous, ça veut dire que t'es pas un fournisseur sympa, etc." (#13).

[462] "Y a aussi, y a une autre valeur, qui est quand même une valeur d'acceptation de la société, un tel m'a demandé et je lui ai refusé, c'est inadmissible, demain peut-être beaucoup de gens vont se détourner de vous, ne vont plus faire affaire avec vous, parce qu'un tel a dit que il vous a demandé service et vous avez refusé." (#9).

[463] "Souvent les gens cherchent des recours quoi, en se disant telle personne, la personne est peut-être plus sensible à telle personne qu'à moi, et elle peut m'aider à déclencher ou à régler le problème, très souvent ca se fait." (#17); "Si on sait que cette personne-là a beaucoup de respect pour une tierce personne, ou a honte de cette tierce personne, on essaie de faire intervenir la tierce personne, en disant toi tu as une autorité sur cette personne-là, tu la connais, essaie de voir dans

the special authority conferred on some religious, ethnic, or "extended family" figures, and the corresponding obligation to comply with their requests, were specifically mentioned by only a handful of respondents, all but one being of non-Senegalese origins. This may be because either non-Senegalese respondents overestimated the influence of such persons and their role in the mediation process, or Senegalese respondents failed to make explicit mention of this factor because of its taken-for-granted quality. Data are too fragmentary to determine which of these hypotheses is closer to reality.

One means of preventing the intervention of third parties and social norms of solidarity in one's affairs is to avoid doing business with people who are "too close" to be sued, and privilege arm's-length partners. As stated by one respondent: "I tend to avoid dealing with friends, or the friends of my friends, whenever I can. Because if a problem occurs, I won't have any means to put pressure on them. So I try to come up with some reasons, I say that we are not available right now, or that we do not do this kind of work."[464] However, the overlapping of networks, which create invisible links between seemingly unrelated persons, severely limits the efficiency of this strategy.

A revealing example of the overlapping of Dakar networks also well illustrates another way in which relations may intervene in business disputes. Rather, or in addition to, sending mediators, a debtor facing a ruthless creditor may try to settle a dispute by asking someone in his circle of relations to give or lend the amount at stake.[465] The existence of such financial obligations between certain categories of

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quelle mesure on peut rentrer dans nos fonds parce qu'elle a beaucoup de respect pour toi, c'est une personne qui te dira que la vérité, peut-être à nous il va touner autour du pot mais avec toi on sait où on va. Essaie de voir si éventuellement tu peux intervenir." (#21).

[464] #9.

[465] Financial obligations seem to exist in a variety of more or less intimate relationships, including, as this example shows, between supplier and client: "Dans le commerce, le client est plus ou moins un ami, hein, y a des liens, amicaux, vis-à-vis du client, surtout, bon un client qui vient prendre du prêt-à-porter, quelques fois on n'a pas besoin de se voir, mais un client qui pendant 5 ans vient commander chez vous, tout ce qu'il porte, tout ce que sa femme porte, tout ce que ses enfants portent vient de chez vous, du coup, [si] moi j'entends que le client a été arrêté à la police

people means that the money received in payment of a debt does not necessarily come from the debtor's pocket, and points to some unexpected potential consequences of aggressive claiming and litigation. In the case described by one respondent, the constraints she applied on a debtor spread to the debtor's circle of relations, to eventually reach one of the respondent's friends, who agreed to pay in place of the debtor. As the respondent admitted, it is her unawareness of the provenance of the money that allowed her to ultimately get paid: "I am glad I did not learn that the money came from my friend until after I got my money back. Had I known this before, I probably would have behaved differently."[466]

C. The emergence and transformation of disputes

Dakar's legal sphere is characterized by the presence of a high number of problems that could be addressed by legal means but fail to reach the forum designed to solve them. In order to better understand why this is the case, it is necessary to take a closer look at the disputing process as a whole, and examine how disputants manage or fail to solve their problems without the intervention of courts.

In a seminal article, Felstiner, Abel and Sarat[467] proposed that injurious experiences get (or fail to get) transformed into disputes following a three-stage process. The *naming* stage involves perceiving the experience as injurious. The

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à cause de 50 000 moi je peux aller rembourser pour lui, parce qu'on a des liens d'amitié. Quelqu'un qui commande chez vous depuis 5 ans, quelqu'un avec qui vous avez fait un chiffre d'affaires durant ces 5 ans, de 2-3 millions, arrêté à cause de 50 000 F, vous pouvez intervenir." (#29) In this specific case, "friendship" is not based on personal relations beyond the business context of the relationship, and is hardly distinguishable from the financial interest in the preservation of the relation.

[466] "C'est bien après que le monsieur en question m'a dit, écoute est-ce que tu savais que dans le cas de X, c'est ce qui est arrivé, j'ai dit non (…) Mais c'est clair que si au départ il m'avait dit écoute, c'est moi qui suis obligé de casquer, je me serais peut-être comportée autrement, vu peut-être les relations que j'ai avec cette personne, mais heureusement pour moi, j'ai dit heureusement que je ne l'ai pas su avant, au moins je suis rentrée dans mes fonds" (#17).

[467] William L. F. Felstiner, Richard L. Abel &Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-1981) 15 Law and Society Review 631.

next step (*blaming*) consists in the transformation of the experience into a grievance against an individual or social entity. The *claiming* stage corresponds to the voicing of the grievance to the party held responsible. Rejection of the claim leads to the emergence of a dispute *per se*. The next sections will be devoted to a description of the particularities of the naming, blaming and claiming stages in Dakar.

1. Naming: "injuries" or "facts of life"?

Reacting to a particular situation first involves perceiving it and identifying it as something calling for some form of response. One unexpected problem encountered during the first days of field work was to identify the instances of contractual breach most commonly encountered by respondents in the course of their work. Questions about the "problems" they faced with their business partners or the frequency of business disputes often failed to generate satisfactory answers, respondents generally mentioning they did not face any such issues. However, rephrasing questions in other terms, for example by referring to the "difficulties" faced by firms or specific instances of breach[468] generated quite different results, most firms acknowledging that such events are in fact quite common.

This failure of the respondents to qualify injurious experiences as "problematic" could be attributed to a loose attitude toward contractual commitment. However, data do not seem to support this hypothesis. Most respondents were aware that events such as late or non-payment, order cancellation, and late or defective deliveries constitute contract violations that can be addressed through legal means, and deplore the frequency with which such contractual violations occur. Their reluctance to describe such events as constituting "problems" or as evidence of the existence of a "conflict" with a business partner appears related to their

[468] *e.g.* "do all of your clients pay on time or not?", "do you usually get your orders on time?".

prevalence, which makes them closer to a "fact of life" with which one has to deal than an exceptional event. In addition, the respondents' propensity to see the unreliability of their partners as a corollary of the general business environment in which they operate also seems to have an impact on how they qualify specific instances of breach. "Naming" is contingent not on the occurrence or perception of an event, but on how it is interpreted: only those events for which someone is to blame will constitute actual injuries, rather than common inconveniences one has to learn to expect and deal with. From this perspective, naming and blaming do not constitute distinct stages but take place simultaneously, as parties gradually come to ascribe a definite sense to a series of events comprising, but not limited to, the actual breach of contract.

2. Blaming: the fuzzy contours of responsibility

Having themselves to deal with a series of unpredictable contingencies on a regular basis, respondents generally considered contractual compliance to be an ideal out of reach of their partners as well as themselves. In consequence, they have come to treat contractual breach as a mostly inevitable event and not to expect strict compliance with contractual terms. For them, contractual terms seemed closer to an ideal than a list of precise obligations to be fulfilled at all costs.

In such a context, most respondents were reluctant to blame their partners for every single failure to comply. Their qualification of, and reactions to, specific instances of breach seemed to depend on their perception of the factors leading to the breach. Four main types of default can be identified from the respondents' accounts.

The first one consists in excusable default resulting from uncontrollable external events or, in the case of small firms or individuals, financial or other difficulties related to the limited level of their resources. In such cases, parties are held to be temporarily or, if bad luck persists, permanently unable to comply, despite their

willingness to do so. Even though such parties are generally not blamed for their incapacity, [469] their obligation subsists and they are expected to fulfill it as soon as the circumstances make it possible.

Second are breaches attributed to bureaucratic hurdles or "management problems" (*problèmes de gestion*) that prevent firms from fulfilling their obligations in an appropriate and/or timely manner. Degrees of tolerance for such kind of "problems" varied among respondents: while some saw them as the unavoidable consequences of growth and bureaucratization,[470] others were quicker to point to inefficient modes of organization.[471]

A third category of breach comprises the cases where the defaulting party seeks to derive financial advantage by not complying immediately in order to "play with the credit" granted (*jouer sur le crédit*) granted by their partners with little possibility of retaliation [472] Some respondents mentioned that firms with superior bargaining power sometimes resort to such strategy, where. The use of such business tactics, although seen as reprehensible, is generally not held to be dishonest or constitute fraud. Lebanese firms were more likely to be blamed for resorting to such strategies.[473]

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[469] "Des retards de paiement on en a, parce que même, dans les deux sens, il peut se poser des problèmes qu'on peut essayer quand même de comprendre..." (#17); "Si un client admet qu'il a des problèmes au niveau de son commerce, on peut comprendre..." (#22).

[470] "Y a certains types de sociétés où les règlements sont assez lents (...) y a un certain nombre de contrôles qui vont être faits, (...) tout ça, ça prend du temps, il faut le comprendre."(#26).

[471] "Dans un cas, mon client a eu un problème: son patron est parti en mission, il a laissé un certain nombre de chéquiers, mais ils ont dû user de pas mal de trucs, et il peut même plus émettre de chèque... Avant-hier il a dû envoyer son chèquier par Air France pour que son patron lui resigne des chèques... Moi je trouve ça aberrant. J'étais abasourdie." (#17) ; "Quand on travaille avec de grandes sociétés, c'est pas parce que la société n'a pas l'argent pour payer, c'est que les gens n'ont pas le réflexe de payer à la date, rarement ils vont vous payer comme ca. C'est des mauvaises habitudes qu'ils ont..." (#20).

[472] "Lui, toujours on court derrière, il nous paie l'entretien, mais toujours avec un retard, s'il fait pareil sur chaque fournisseur, il se fait son crédit comme ça. [...] Et c'est un gars qui est très riche." (#30); "Dans les cliniques, y a de l'argent. Mais ils veulent jouer sur l'argent en disant, moi je paie pas mes fournisseurs." (#18).

[473] Interestingly, respondents of foreign origins were prone to describe the propensity to delay payment as much as possible as a Senegalese trait: "Le Sénégalais vit au dessus de ses moyens,

In the first three categories, compliance is delayed rather than avoided. In contrast, the last category of breach comprises the instances of "*vraie malhonnêteté*", in which individuals or firms have no discernable intention to comply, unless as part as a bigger plan to take advantage of the other party.[474] Such cases are often considered exceptional, one respondent even refusing to consider the existence of opportunistic breach.[475]

The boundary between "faulty" and "involuntary" instances of contractual breach is far from clear in practice. The real reasons why a party failed to comply often remain impossible to identity for outsiders. In addition, resistance to increasing pressure to comply may be interpreted both as a sign that inability is real ("if he had the money he would have paid already") and as evidence of unwillingness to pay. In consequence, the behaviour of a party following breach will often have a strong impact on blaming[476] as well as the qualification of the injury. The interest or absence of interest in pursuing the relationship manifested by the party will often be determinant in this respect. For example, one respondent, a distributor, indicated that his preferred strategy first involved interrupting sales to clients in default for a two-month period. Failure to pay during this period is interpreted as evidence that the client has found a new supplier and thus ended the relationship,

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c'est une nature au Sénégal. Il vit audessus de ses moyens, et beaucoup beaucoup d'entre eux respectent moins les délais de paiement." (#21) ; "A la base, le problème c'est la mauvaise foi des gens, c'est tout, hein, c'est ça, si vous laissez le crédit s'étirer, vous êtes pas payé." (#13); "[Les Libanais], leur habitude, souvent c'est de tirer sur le crédit... (...) Le Sénégalais il fait un peu pareil; à la limite, s'il est vieux, il se dit si je meurs l'argent sera pas payé." (#30); "même les personnes qui ont les moyens de tout payer d'un coup, c'est dans la culture ici, ils se disent, autant garder l'argent à la maison. Pourquoi payer d'un coup si on peut payer en plusieurs fois?" (#24).

[474] This would include cases in which an employee of a firm, unbeknownst to his bosses, delays payment to clients in order to obtain bribes: "La corruption existe ; par exemple, vous avez votre chèque qui est là bas, il est signé par le directeur, l'employé, ce qu'il doit faire, c'est vous téléphoner. Mais quand vous l'appelez, il vous dit c'est en signature chez le directeur, c'est pas encore revenu..." (#20).

[475] #14.

[476] This confirms the insight of Felstiner, Abel and Sarat that attributions are not fixed: see *supra* note 467, at 641.

justifying legal action.[477] Similarly, "good faith" debtors are expected to react to requests for compliance in a way evidencing their willingness to comply eventually, including by being open about one's situation, taking steps to find a solution,[478] keeping lines of communication open,[479] keeping one's word,[480] and paying at least part of the amounts owed from time to time.[481]

3. Claiming: the different variants of "putting pressure"

According to the respondents, claims are made in almost all cases of breach. Many respondents mentioned that they not only make claims, but give up asking for compliance only where it is in fact impossible, where very small amounts of money are at stake, or where the costs to be incurred exceed the amounts that could be recovered.[482] However, reactions to instances of contractual breach also

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[477] #23.

[478] "[Si quelqu'un] paie trop lentement, y a pas de problèmes, s'il vient nous dire que, voilà, s'il nous propose une échéance, on accepte, en général on crache pas dessus (...). Le seul cas où on va en justice c'est vraiment quand la personne ne donne aucune solution, ne fait aucune proposition et n'accepte pas de payer." (#16)

[479] "Si le dirigeant d'une société met un mois, deux mois, sans payer mais qu'on se parle au téléphone, il dit écoutez, je suis désolé mais actuellement nous avons des chantiers bloqués, de l'argent qui doit rentrer, je peux le comprendre parce que je suis sur le marché comme lui, quand il y a des difficultés, je le sais, j'attends. Mais quand le gars commence à dire je ne suis pas là, la secrétaire vous dit qu'il n'est pas là, il n'est jamais là, vous dites y a un problème. Parce que même s'il n'est pas là, il doit vous appeler s'il y a un problème." (#26); "Y en a quelques fois qui ne répondent pas aux lettres, là c'est un manque de respect, ca met toujours le gars en colère. (...) A chaque fois il faut téléphoner, dire, 'écoute, j'ai des problèmes, accorde-moi un délai.'" (#12).

[480] "Dans le cas où le gars nous dit carrément qu'il a des difficultés, il a l'honnêteté de nous dire j'ai des difficultés, on lui dit écoutez, on va vous étaler ça, vous pouvez pas payer d'un coup, on va étaler ça, mais il faut se mettre d'accord pour que les échéanciers soient respectés, parce que nous on va se baser sur ça pour régler certains de nos problèmes. (...) Mais il faut qu'il soit régulier. Il faut pas qu'il dise fin mars, je vous donne 250 000, fin mars on met dans nos prévisions 250 000 de la société X, et on le voit pas! C'est pas bien." (#26)

[481] "Si ça fait longtemps que vous travaillez [ensemble], il comprend qu'il y a un marché donné où il y a eu un problème, il peut te comprendre, avant que ca déborde, vraiment, et de temps en temps il faut aller mettre quelque chose." (#12).

[482] "Généralement nous quand quelqu'un nous doit de l'argent, on va vraiment jusqu'au bout. Maintenant je ne dis pas qu'il ne nous est pas arrivé de laisser un bout d'argent partir... (...) on se dit c'est 15 000, 30 000 c'est rien du tout. Maintenant si c'est au-delà d'une certaine somme, 100 000, 200 000, 300 000, machin, ah non, on va jusqu'au bout." (#26).

evidenced very high levels of flexibility. The standard response to claims of incapacity and requests for further delay to comply is to welcome them with resignation and understanding. Claimants generally give the defaulting party some time to get back on his feet. New payment schedules or other arrangements are routinely agreed upon, without interest being charged. Similarly, defective work rarely leads to claims for performance or damages. No significant differences could be observed between cases of inability due to external shocks and those where inability derived from a supplier's limited financial and other resources (including limited professional and management skills).

To the extent that delay to comply or the making of a compromise offer constitute rejection,[483] most of the claims made in Dakar can be said to lead to disputes. However, the fact that perfect compliance is rarely expected and that parties are given some leeway with respect to the satisfaction of their obligations makes it harder to determine at which point a particular dispute emerges. It could be argued that disputes start where flexibility stops, i.e. at that point where respondents feel justified to stop "trying to understand" and resort to more aggressive modes of claiming.

Despite some degree of variation among respondents in this respect, this generally happens when one starts seeing a breach as due to "unwillingness" to comply rather than inability.[484] This may take some time to happen. Parties generally adopt a bilateral and gradual approach to claiming: requests are made directly and become more insistent and frequent as time goes by. Initial claims are generally

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[483] Felstiner, Abel & Sarat, *supra* note 467, at 636: "Delay that the claimant construes as resistance is just as much a rejection as is a compromise offer (partial rejection) or an outright refusal."

[484] "Si tu sais que quelqu'un a des difficultés, tu ne peux pas faire autrement. Mais si c'est quelqu'un qui a de l'argent mais qui refuse de payer, là c'est autre chose, là c'est la guerre. [...] Parce que le gars il veut pas payer." (#12); "On peut en général mettre en veilleuse, souvent, quand y a une difficulté de paiement. Mais si on sait que le client peut payer on met quand même les moyens de règlement, je dis à mes comptables il faut le faire payer." (#9); "Je trouve que quand on est installés, on est une entreprise installée et on décide de pas payer des gens, j'accepte pas ça. Un petit, bon, un petit, on sait qu'ils savent pas gérer très très bien en général, il peut être de bonne foi et pas y arriver, on fait un effort. Le gros, j'admets pas bien." (#13).

made verbally, often by phone, and more akin to gentle "reminders" than formal requests.[485] Visits to the debtor's workplace or place of residence may be made.[486] Statements of account and reminder letters may be sent, including by fax or email. A good number of respondents also mentioned sending formal notices either on a regular or exceptional basis.

Despite their insistence on the need to make requests frequently and regularly, many respondents expressed some reluctance toward the use of the term "harassment" (*harceler*) to describe their actions, preferring terms such as "insist" (*insister*) or "put pressure" (*mettre de la pression*). In cases of non payment, one preferred way to put pressure is to revert to "cash and carry" or "secured" transactions until debts are paid and "trust" is rebuilt.[487] By preserving the business relationship, such a strategy not only allows sales to take place, but also increases the probability of recovering the amounts owed. However, threatened or actual suspension or termination of business relationships is sometimes used to discipline negligent suppliers, where the business relationship is more valuable to the supplier than to the client.[488] Contracts may also be

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[485] "C'est important la manière d'aborder les clients. Par exemple nous, il nous arrive que le client a pas payé, on l'appelle et on lui dit en blaguant 'hé tu m'as oublié, je fais pas partie de tes plans aujourd'hui'. Et là il dit 'non, on a eu des retards...'. Alors que je pouvais dire autrement." (#20).

[486] "Les coups de téléphone ça marche, mais il faut aller sur place aussi. Faut se déplacer beaucoup pour les encaissements. [Notre gars] est en mobylette constamment, toute la journée il est dehors, chez les banques et les clients." (#30).

[487] "En cas de défaut de paiement sévère, la personne est mise au comptant tout simplement. On ne coupe pas la relation avec elle. On la remet un peu au purgatoire, à des conditions plus strictes, c'est tout. Comptant, traites avalisées, moyens de paiement sécurisés, etc. jusqu'à ce que la confiance revienne, là on peut repartir." (#25); "Ce qu'il m'est arrivé de faire pour régler le problème c'est quand les gens ont pas une trop grosse note, c'est de leur dire que à partir du moment où il y a un problème ils paient au comptant et chaque fois qu'ils paient au comptant ils paient aussi une petite partie de la dette. C'est ce qui me permet de garder un certain volume d'affaires, parce que, bon, leur dire tant que vous aurez pas payé vous pouvez plus être clients chez moi, ca fait pas payer plus vite et pendant ce temps je vends pas." (#13)

[488] The two cases mentioned by respondents concerned their relationships with suppliers from competitive industries: "on essaie de faire comprendre au fournisseur qu'on est décu de lui, que s'il livre pas rapidement la prochaine fois ce sera pas avec lui. Lui faire comprendre qu'il perd, moi je suis ton client, t'en perds un." (#24); "Une fois, on a lâché notre fournisseur, parce qu'il avait un peu déconné, il avait failli au contrat que nous avions, en ne prenant pas les précautions

terminated where a subcontractor's performance proves unsatisfactory and his replacement seems both possible and necessary to guarantee the satisfaction of the principal contract.[489] In contrast, firms who have few alternative options will sever business relationships only in extreme cases, where the possibility of future interaction has been discarded, as in clear cases of dishonesty or lack of respect.[490] In this case, ending the relationships is purely preventive and serves no enforcement purposes. Finally, two exclusive distributors of high-end equipment who were parties to long-term service contracts mentioned sabotage as an exceptional way to get paid for their services, and one respondent indicated that he sometimes puts additional pressure on his partners by threatening to damage their business reputation.[491]

Pressure may also be applied through the intermediary of third parties. Although a few respondents indicated that they preferred to keep discussions at the bilateral level, many mentioned regularly asking people from their *relationnels* to intervene. In contrast, a very small number of respondents mentioned resorting to "strangers". A few indicated that they sometimes hire bailiffs to deliver letters or prepare official reports in order to put additional pressure on debtors. [492]

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nécessaires pour nous donner du sable (...). On a tapé fort, on a dit on arrête avec vous etc., quand il a compris ça, bon, il s'est un peu rattrapé, et puis on a repris. On est très satisfait de lui." (#26)

[489] See #9, 10, and 30.

[490] "Quand un client ne respecte pas beaucoup son fournisseur, là je n'hésite pas à refuser. Comme XYZ, je leur ai dit : je ne participe plus à vos appels d'offres."(#29); "Par exemple là y a quelqu'un c'est sûr que plus jamais on ne fera affaire avec lui parce que, c'est sûr que c'est quelqu'un d'une grande malhonnêteté à l'endroit de notre société, notamment en disant toujours qu'il n'est pas là, il gêne tout le monde, même sa secrétaire est très gênée. Ces gens-là ils nous font perdre du temps, ils nous font perdre de l'argent, c'est pas la peine. C'est sûr qu'on met un terme à tout ça." (#26).

[491] "Souvent ça m'est arrivé de dire, Dakar ce n'est pas aussi grand que New York. Ici c'est un problème de réputation (....) si tu me paies pas, je me gênerai pas dans des séminaires ou quoi que ce soit si des gens viennent me voir de faire de la mauvaise publicité pour toi. Je te le dis franchement, et quand je sortirai c'est ça qui va se passer." (#20). At the time of field work, a certain number of financial situations were resorting to a similar practice consisting in posting "mugshots" of their defaulting clients on their doors. The director of such an institution described this practice as very effective.

[492] "J'ai d'autres cas pour des petites sommes pour lesquels je me suis mis personnellement dessus en envoyant des huissiers, plutôt des clercs de huissiers que j'ai envoyés comme ça,

Only one respondent mentioned resorting regularly to the police in order to get his money back. This particular case seems exceptional in that the respondent admitted being on good personal terms with many police chiefs.[493] Three other instances of police intervention were mentioned by the respondents. Two of them concerned a case of fraud and a NSF cheque, respectively. The third respondent indicated having resorted to the police twice, in order to scare debtors: one of his dobtors paid before the actual intervention of the police, while the other ended up in prison, at which point the respondent withdrew his complaint.[494] Only one respondent indicated having resorted to collection agencies and was not satisfied with the results, and one mentioned considering the possibility of doing it in the future.

Although a good number of respondents were aware of the existence of the Centre d'arbitrage et de médiation of the Chamber of Commerce, none of them had resorted to its services. Only one of them, who had close relationships with an important official of the Chamber, mentioned inserting arbitration clauses in his business contracts. In general, respondents did not seem interested in learning more about this mechanism.

A few respondents mentioned consulting lawyers for information about their rights when facing a dispute. However, lawyers seem very unlikely to be asked to make representations on behalf of their clients. The general trend seems to be for

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informellement, en lui disant va leur faire peur, va récupérer l'argent. [...] Même si c'est informel, c'est quand même un peu plus.... ça leur fait une pression quoi." (#13) ; "[Prendre un huissier], c'est toujours quelque chose de plus. Un voleur invétéré ça lui fera pas peur parce qu'il est habitué, mais quelqu'un qui est sérieux à la base mais un peu mal intentionné, qui est entre les deux, mais ca lui fait un peu peur, machin, peut-être que vous pouvez l'intimider, le remettre à la raison, le faire réfléchir." (#21).

[493] In such contexts, police officers may be more akin to members of the *relationnel* with special powers of persuasion than public officers exercising their duty. Similarly, one of the two other respondents who had resorted to the police indicated that the fact that he knew the police officer personally had an influence on his decision to use his services.

[494] "J'ai déjà amené quelqu'un en prison, j'ai fait la plainte, les gendarmes l'ont mis en prison, et j'ai dit non, je retire ma plainte, parce que je... il est comme moi il est jeune, il a fait du business, il a pris mon matériel, ca n'a pas marché il a sa femme il a ses enfants, il a dormi deux nuits, il a pas payé, donc il a pas." (#8).

lawyers to get involved at the stage where disputes have escalated and the decision to litigate has already been made. From then on, claims are handled exclusively by the lawyers in charge.

4. Litigating: beyond "access"

A third of the respondents mentioned having filed formal legal claims in relation with business disputes. A few more also had been in contact with the judicial system, either as defendants or witnesses in business or other types of cases. In the case of six of the respondents, their experience as claimants were limited to one or two cases. The four other respondents with experience with the civil courts could be described as repeat users, although the number of cases they file amount to only a handful a year.

Experience with the civil courts did not seem to have a major impact on respondents' views of the judicial system. The opinions of past users did not differ significantly from those of respondents without experience with the court system. In general, respondents viewed the Senegalese legal and judicial systems in a rather positive light.[495] As to the legal system, the few complaints voiced essentially concerned the rigidity of Senegalese labour law.[496]

With respect to the judicial system, respondents were generally confident in the quality of the judicial decisions rendered. Concerns about judicial corruption were expressed in only a few instances, mostly by respondents from non-African

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[495] "Je ne suis pas juriste, je ne suis pas trop confronté à la loi, mais je sais que par rapport à l'environnement juridique des entreprises, ca permet aux entreprises de bien se mouvoir, de bien se développer." (#6); "Moi je crois que quand même on a un système judiciaire qui est assez puissant, assez compétent, les gens ici la justice, c'est des gens qui connaissent bien le droit, et à mon sens ils travaillent bien." (#28).

[496] One exception was respondent #3, according to whom the legal and judicial systems served liars and deceptive people better than those in search of the truth. Despite this, however, this respondent admitted resorting to courts about three times a year, but only in cases where the amount at stake exceeded 500 000 F CFA.

origins.[497] Interestingly, corrupt practices were more often identified as having an impact not on the quality of judicial decisions *per se* but on the total duration of the judicial process, and were often blamed on legal officials or professionals rather than judges.[498] Although legal costs did not emerge as a significant problem, a few respondents also took issue with the disproportion between the (otherwise reasonable) costs to be incurred to recover a debt and the amounts involved in the case in small-size transactions, which often form the bulk of their business.[499]

One of the concerns most often voiced by respondents concerned the sums one can actually expect to be able to collect at the end of the process, especially when non-payment is the consequence of financial difficulties.[500] Waiting until the other party is actually able to pay his debt was often described as a better way to get at least part of one's money back. In addition, seizing one partner's assets was sometimes described as the best way to run him out of his business and thus lose a client.[501]

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[497] This is particularly striking when one considers that, in parallel, respondents referred to a certain number of cases of corruption from State representatives or employees of other firms.

[498] "La justice africaine en général, les pays en voie de développement, en général, et la sénégalaise, bien qu'elle soit parmi la moins corrompue, il y a aussi le problème de la corruption. Les gens ont la possibilité par le biais de relations ou au moyen de moyens occultes de retarder la décision." (#9); "Les choses sont, si vous voulez, si elles vont au bout elles sont correctes, mais on essaie quand même de tuer dans l'oeuf, de faire en sorte que ca aille pas au bout, c'est pour ca que ca peut trainer. Le dossier reste coincé quelque part je pense, de temps en temps." (#13).

[499] A related issue concerns the fact that many transactions made with unsophisticated business players (including many informal firms) are left undocumented, making them hard to prove in court.

[500] "Si c'est un client particulier, on prend un huissier, et il va le saisir, des fois c'est pas avantageux parce que tu donnes ca au huissier tu lui paies son frais et il a rien il paie pas, donc ça fait des frais." (#19); "Parce que la justice a pour dire que le gars il paie, s'il n'a pas d'argent il ne peut pas payer." (#16).

[501] "[Un client qui] a un problème, qui peut arriver à tout le monde, [si] vous portez plainte contre lui, vous lui enlevez sa culotte, excusez- moi du terme, mais c'est malsain, il n'a plus rien, vous allez obtenir quoi? Vous allez payer un avocat, machin, des frais, pour ne rien avoir." (#21); "Si tu sais qu'il a quelques mois de turbulences, tu es obligé de lui accorder [un délai], parce que ca ne sert à rien d'amener le huissier, on lui saisit son matériel, ca ne bénéficie pas, c'est pas intéressant." (#12).

Overall, however, the most important concern of firms seems to relate to the time needed to obtain an enforceable decision.[502] Respondents generally did not think that the judicial system could contribute to solving their most pressing problem, i.e., the immediate absence of the supplies or sums of money they were counting on to pursue their activities. In many cases, respondents seemed to prefer getting part of their money or supplies rapidly to the possibility of being compensated at a later point. Refusing delivery was seen as an option only where it had no negative impact on business.[503] Flexible negotiations were the preferred way for the parties to find a mutually acceptable solution to what had become a common problem.[504] In the case of small, vulnerable suppliers, such negotiations can sometimes be assimilated to a form of partial "lumping", firms either paying for defective work at full price, or giving extra money to correct defects. For respondents, this was justified by the fact that such suppliers are hardly in a position to provide monetary or other types of compensation.[505]

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[502] Concerns about the justice system being too slow figure in almost all accounts: "Normalement en matière de commerce la voie judiciaire est censée être très rapide, qu'on m'a dit à l'école, mais je me rends compte que c'est pas si rapide que ça. Parfois on gagne à faire des arrangements avec l'autre acteur." (#7); "Ici au Sénégal, je sais pas comment ça se passe dans les autres pays, mais je sais qu'une affaire, entre la première instance, l'appel et la cassation, ca peut prendre des années et des années, surtout qu'à la cassation la personne peut revenir en appel." (#21). In the absence of reliable and public court records, the time needed to obtain a judicial cannot be ascertained with precision; informal conversations with lawyers in Dakar suggest that the delay needed to obtain a final judicial decision in Dakar compares with the situation that prevails in Quebec.

[503] "Parce qu'ici en fait, dès que tu laisses durer, que la procédure dure, la marchandise peut avoir des problèmes, ou par exemple la période, pendant la période des fêtes, on a vite besoin de nos marchandises, si on a des problèmes, qu'on dit on va devant les tribunaux, on suit la procédure, tu vas avoir des commandes qui seront pas honorées, et après les fêtes tu vas voir tes stocks s'accumuler, personne ne va venir acheter. C'est notre intérêt de trouver vite un terrain d'entente dans certaines conditions, mais si on a aucun intérêt que la marchandise sorte et qu'on est lésés on peut laisser la procédure durer..." (#22).

[504] "Un ouvrier qui me dit demain je veux venir au boulot mais j'ai pas de billets, tu avances de l'argent. Si tu ne le fais pas, si demain il ne vient pas tu ne peux rien dire. Ça c'est des choses que nous gérons." (#10).

[505] "Y en a, tu sais qu'ils ont pas les moyens de refaire [le travail]. [...] Vous prenez un maçon, s'il vous fait le travail pas du tout comme il faut, il peut dire vraiment de bonne foi je veux bien le refaire, mais j'ai pas l'argent pour racheter le ciment. La main d'oeuvre, je peux la fournir gratuitement mais le ciment il faut mettre au moins le prix coûtant". (#24); "Pour un travail qui n'est pas très très bien fait, tu fais faire des travaux de chantier, par exemple, si t'es pas satisfait, tu

Respondents generally agreed that litigation is justified in cases of bad faith and dishonesty. Many said they would not hesitate to go to court in such circumstances. However, they also pointed to the ultimate inability of law to deter "crooks" from trying to rip them off. In addition, the possibility to obtain compensation in such cases tends to be remote, since crooks tend to use false names and addresses, run away, or escape seizures by putting their assets under someone else's name. In consequence, prevention remains the preferred way to protect oneself against fraudulent practices.

D. Contracting in Dakar

The fact that an overwhelming majority of Dakar business disputes are solved through informal mechanisms raises the question of the role that the local legal and judicial system actually plays, or could play, in the ordering of business relationships. An interesting finding in this respect is that the high levels of flexibility exhibited by respondents in the enforcement of their agreements do not entail a total disinterest in the form and content of their business contracts. In fact, the majority of respondents indicated that they do not content themselves with verbal agreements but resort to some other kind of written documentation, including invoices and order forms, in most of their transactions. In addition, a significant proportion of respondents mentioned involving lawyers or other legal professionals in the preparation of their more complex business contracts, or asking them to review the agreements prepared by their partners before signing them.

As to the reasons accounting for such resort to written documentation and lawyers, the possibility to obtain judicial enforcement of the contract or protection

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paies le gars quand même ; parce que les gars ont tellement peu de moyens qu'on veut pas les pénaliser, aussi. En fait c'est ça. (...) quitte à faire refaire le travail, à le rectifier à nos propres frais, mais on dira pas je te paie pas..." (#30) ; "Parfois, il arrive que le travail n'est pas exécuté de la bonne façon, si on peut faire avec, on laisse tomber [...] Mais il peut arriver aussi qu'on casse et qu'on recommence, à nos frais. [...] parce que c'est des gens qui sont payés très justes, si vous leur imposez des coûts de non qualité, ils arrivent pas." (#10).

from opportunistic behaviour did not figure prominently in the respondents' accounts. In only a few cases did respondents specifically expressed concerns with the enforceable or deterrent character of their contracts or chose to incorporate clauses serving these purposes.[506] Similarly, protection from opportunistic behaviour does not seem to constitute the source of firms' concerns with the legality of their contracts. One factor accounting for this situation might be the perceived inability of judicial sanctions to deter breach. In addition, the widespread belief that the overwhelming majority of cases of breach are involuntary suggests that they would occur notwithstanding the presence of judicial sanctions. In this context, the priority when negotiating contracts is to prevent those cases of breach which can be prevented and limit the impact of the other ones on business operations.[507]

The content of the interviews contributes to shedding some light on the functions played by contractual provisions in Dakar. Data indicate that Dakar written contracts are not generally held to state all the obligations undertaken by the parties. They are better understood as partial description of the parties' expectations, additional terms being spelled out verbally or even left implicit. Such unwritten terms may complement the contract, as when detailed, written specifications about the product to be delivered combine with an informal duty

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[506] One respondent (#6) mentioned he required his clients to get their signed contract "legalized" at the police station. This procedure consists, for the police officer, in verifying the identity of the signing party and certifying the validity of the signature appearing on the contract. Another one (#14) indicated that, when dealing with the State, he refused to deliver unless provided with a "bon d'engagement" evidencing that the State authority had the capacity and obligation to pay for the ordered goods or services. In general, respondents mention that the best way to deal with opportunistic breach is to refrain from contracting in situations perceived as risky. One respondent (#24) mentioned including penalty clauses in some high-risk contracts, but described this measure as exceptional.

[507] This may entail taking the possibility of late delivery into account in one's planning ("Quand j'estime mes délais de fabrication pour les pièces je pousse au maximum, on s'arrange pour se couvrir au maximum, pour ne pas avoir de problèmes." (#17)); giving detailed specifications about the work to be done, the product to be delivered, and the schedule to be respected; and delaying full payment until satisfactory delivery, both as an incentive to comply and as a way to limit losses in the case the relationship ends and a new supplier has to be found.

(and right) of the client to monitor the supplier's work and progress.[508] They may also contradict contractual provisions, as, for example, when parties develop new understandings of their mutual obligations as their relationships develops. In consequence, the role played by contractual provisions in business relations cannot be fully understood without taking a closer look at the informal terms actually applied by the parties in the specific context of their business relationships. For the purpose of shedding some light on the variety of relationships in which Dakar SMEs enter, the following section proposes a classification comprising three basic categories. A description of some of the ways in which parties deal with divergences in their respective understandings of their relationship follows.

1. Business relationships in Dakar: the "socio-legal" continuum

Data clearly show that Dakar business relationships do not form a unique category in which law has a pre-determined and uniform role to play. In fact, Dakar businesses and the business relationships they form could be described as constituting a continuum ranging from, at one end, the relationships involving very small/informal businesses deeply embedded in their social context, to, at the other end, the kind of relations created by larger firms adhering more closely to models of business relationships interchangeably described by respondents as "Western", "professional", "objective", or "legal". Many respondents described themselves as placed, either by choice or by obligation, somewhere between the two ends of this continuum.

On the basis of these observations, it is suggested that one useful way to describe Dakar business relationships would be to divide them into three main categories,

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[508] "L'ajustement, c'est en fait, la faute de l'entreprise qui doit, par l'intermédiaire de ses surveillants, surveiller la bonne exécution des travaux par le sous-traitant. Si au niveau de l'entreprise on laisse aller pendant que le gars coule du béton, on ne peut pas imposer ses coûts-là au sous-traitant." (#10); "les fournisseurs, certains, on continue à travailler avec eux, mais sur la qualité on va leur expliquer 20 fois..." (#24).

corresponding to the two ends and the middle part on the continuum. The terms "social contract", "partnership contract" and "legal contract" will thereafter be used to describe each of these ideal types. These categories do not purport to be mutually exclusive and describe the whole range of Dakar contractual relations. They are used primarily because of their potential contribution to building a better understanding of the logics governing these relations as well as the diverse functions played by law in the business transactions taking place in Dakar.

a) "Social" contracts

The business relationships governed by social contracts are established on the basis of business or non business ties between members of a relatively close-knit network. Social contracts are mostly verbal and governed by "trust", and the norms that apply to them are hardly distinguishable from those applying to non business relationships. Contractual flexibility is primarily the expression of the collective values of tolerance, understanding and solidarity governing all intra-network social encounters.

Parties in social contracts are mostly concerned with the preservation of harmonious relationships with their partners, as well as with the members of the larger community to which they belong. The preservation of one's reputation as an honest businessperson and decent human being is primordial. People in such relationships do not establish a clear separation between the "personal" and "business" sides of their activities, and tend to incorporate non business considerations in their business decisions. Parties to social contracts describe themselves as peaceful persons, and are of the view that all problems can be solved amicably if one tries hard enough.

Social contracts are enforced exclusively through non confrontational means, multilateral reputation mechanisms playing a major role. Resort to the parties' *relationnel* is common. Social pressure and potential damages to one's reputation constitute the main reasons for avoiding litigation. The important role of social networks in the enforcement of social contracts entails that law plays a marginal

role in such agreements. Informal understandings of what constitutes an appropriate behaviour generally come to supersede written clauses. The relative positions of the parties of the common networks to which they belong is key to understanding the power dynamics at play in their relationship.

One popular view seems to be that "social contracts" correspond to a particular understanding of the nature of business relationships by certain kinds of business actors, and are characteristic of the informal sector of the economy. However, such affirmation seems overly simplistic. What triggers the use of a social contract is not the party's level of informality but the nature, and concomitant normative content, of their relationship. Informal firms, which are often very small, may be more likely than others to depend on their personal relations to develop their business, making them more likely to develop "social contract" relationships. However, it does not mean that they are unable to develop other kinds of business relationships in specific contexts. For example, respondent #4, a member of a family of informal entrepreneurs who heads two distinct firms in the trade sector, mentioned that the kinds of contracts he used varied depending on which of his two businesses was involved. While one of them, related to the design and import of an exclusive line of clothing, relied on the use of quite sophisticated formal contracts, his more traditional food distribution business was based essentially on social contracts with members of his social networks. Similarly, social contracts may also take place between formal firms sharing some particular kind of ties.

Although some respondents expressed a clear personal commitment to the social contract model, most of those who were actually involved in such contracts also expressed the view that "business is business". Many recognized that the lack of a clear separation between the personal and business spheres of their lives and the use of social pressure to enforce social norms of flexibility, compromise, and solidarity in business matters could constitute important impediments to the

profitability and development of their businesses.[509] In view of the recent collapse and dismantlement of many business empires associated to the "informal model" of business development and the increasing (although partial) formalization of some of the most important players of the informal sector, one might wonder whether the "social contract" model itself will survive, or if other models will gradually come to penetrate its current strongholds, including through increased exposure to alternative modes of functioning or a more acute understanding of the constraints it may place on firms' competitiveness.[510]

b) "Partnership" contracts

In contrast to social contracts, which are deeply embedded in networks of relationships, partnership contracts are primarily bilateral relationships between two parties seeing themselves as "partners" in business. The categorization of a relationship as a partnership depends on the implicit norms perceived to be governing the relationship in question. Partnership relationships may thus emerge between related as well as unrelated parties, to the extent that a certain level of trust has been built, generally in the course of business.

"Partnerships" are defined primarily in contrast to profit-driven market exchanges. They are understood to entail obligations such as risk-sharing, mutual support, trust, and respect. However, they have a clear instrumental function. Parties in partnership contracts are primarily concerned with the survival and development of their business, which often depends on the preservation of cooperative relationships with one's major partners. In view of their fragility and the number of contingencies they face, they put a high prime on the ability to count on the support of their business partners in times of trouble. The contractual

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[509] "C'est ton droit de faire recours à la loi, parce que l'argent c'est pas ton argent. Mais ici on mélange les affaires et la famille, ça cause des problèmes." (#12)

[510] "J'ai été au début très mal à l'aise pour gérer tous ces paramètres là, l'incidence des valeurs familiales, culturelles, machin, mais on paie toujours un prix qui est un prix lourd (…) je crois que ceux d'entre nous en tous cas qui ont survécu aux maladies infantiles de l'entreprise comprennent qu' il y a des limites qu'il faut donner au subjectif si on veut faire prospérer l'entreprise." (#9)

flexibility they exhibit constitutes both a means to preserve valued relationships and a form of insurance in case of trouble. Displays of understanding entitle one to expect the same kind of behaviour from others in times of need.[511]

In case of problems, "partners" deal with them according to their interpretation of the behaviour of the other party. Pressure is applied, including through one's *relationnel*, partly in order to ascertain whether the other party should still be seen as a partner with an interest in the relationship or not. Litigation remains an option for dealing with non-partners, but is generally excluded on the basis of costs-benefits calculations.

"Partnership contracts" often combine written clauses and informal business norms, the latter tending to take precedence over the former as time passes. Written clauses seem to play two major functions. First, by clarifying the expectations of the contracting parties, they prevent disagreements from occurring[512] and protect parties from unwarranted claims,[513] thus contributing to the preservation of the relationship. Secondly, they may be used to signal commitment. Although signing a contract does not guarantee that the other party will satisfy his obligations or even act in good faith,[514] it constitutes an

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[511] "Souvent, [ces clients-là] ont des problèmes de budget. Donc on est obligés de les aider un peu quoi. Mais ils comprennent après en disant , oui, ça, c'est des partenaires, c'est pas des gens qui viennent juste chercher de l'argent, c'est des partenaires. Après, quand on est vraiment bloqués, ils se débrouillent pour nous payer un petit peu quand même, pour nous soulager, qu'on puisse payer aussi nos fournisseurs, pour qu'on puisse continuer à collaborer." (#18); "On est très souples. Parce qu'on sait que c'est pas toujours facile, bon, y a un problème de trésorerie, nous aussi on demande aux autres donc on doit pouvoir essayer de comprendre les autres." (#16).

[512] "La précaution, ce qui en fait fait que les contentieux ne sont pas fréquents c'est le soin que nous mettons à dire, essayons d'avoir un même compréhension de ce qu'il faut faire, si on réussit, quels sont les indicateurs, dans quel délai." (#9)

[513] "Tout contrat correspond à un écrit. Tout. Même si vous m'appelez pour me dire je change de matériel, il faut m'ajouter ça de plus, j'écris, je te donne, tu donnes ton OK, OK. [...] C'est pour éviter que demain on dise 'vous n'avez pas fait ceci, vous n'avez pas fait cela'." (#18).

[514] As previously mentioned, contracts are not considered to provide protection against opportunism; some minimal level of trust is thus necessary to enter into any kind of contract exceeding a certain level of risk: "Il y a des gens ici, s'ils veulent travailler avec moi je dis non (…) Ils ont beau m'envoyer un contrat bien signé et tout, je travaille pas avec eux, parce que c'est des gens qui respectent pas leur parole." (#20).

undisputable indication that one has deliberately agreed to assume an obligation. From the interviews, it seems that one important purpose of written contracts between partners is to provide tools in case of order cancellation. By asking for commitments to be put in writing, parties primarily seek to increase the probability that partners will feel too embarrassed to "change their minds"[515] or invoke "mistakes" in the placement or processing their orders in order to escape from their obligations, or will offer some form of compensation in return.

The use of written documents as signs of commitment seems to vary with the level of trust between the parties to a relationship.[516] Although trusting partners often resort to written contracts, they are often prepared and signed after the parties have started to fulfill their obligations.[517] In contrast, where trust is only partial, requiring one's partners to commit in writing allows one to distinguish real commitments from potentially empty promises.[518]

One important function of written clauses seems to be to provide parties with arguments in case of disagreement. Such arguments are generally uttered in moral terms, emphasizing one's own needs and problems rather than one's rights. By establishing a clear basis upon which future negotiation are to take place, written

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[515] "On sort une fature pro forma et on met les conditions en bas, (et le client) nous met 'lu et approuvé' et il nous le signe. On garde le document. C'est pour éviter que plus tard il vienne pour dire j'avais commandé 500 mètres carrès mais maintenant c'est seulement 100. Ça marche pas!" (#26).

[516] "On fait confiance aux fournisseurs parce que ca fait des années qu'on travaille avec eux ; nous les connaissons déjà, nous leur faisons confiance, ils nous font confiance. (...) il n'y a pas de contrat entre nous. Y a que la confiance et la facture." (#21).;

[517] "Ça dépend également des relations que nous avons avec nos fournisseurs, certains sont nos amis, des gens avec qui on a développé des affinités donc on peut se permettre d'appeler et de passer la commande par téléphone, en attendant qu'on envoie le bon de commande, et ils nous livrent." (#28); "y a des clients où vraiment il nous arrive, le papier vient après, vous voyez, on a un client qui dit je vais vous commander quelque chose, on prépare les papiers, on sait qu'il va commander [...]. Au moment de livrer, on signe les papiers." (#20).

[518] "Y a des clients qui sont fiables si je peux dire, mais y a aussi des clients qui disent 'on va commander chez vous' et on va pas bouger. C'est seulement au moment de recevoir le bon de commande qu'on va entamer les démarches." (#20).

clauses underline the fact that flexibility in their application is a favour calling for immediate or future retribution.

Although they do not erase power differentials, "partnership contracts" seem to somewhat even out inequalities. Because of their emphasis on mutual support and reciprocity, they tend to benefit the weaker party to a relationship. The interviews suggest that stronger parties to such relationships feel an obligation to refrain from taking advantage of their position and support their partners in need.[519]

c) "Legal" contracts

In contrast to social and partnership contracts, legal contracts are agreements that spell out the totality of the obligations of the parties, leaving little or no room for flexible, *ex post* adjustment. The businesses that resort to such contracts are generally in a relatively good competitive and financial position and have already built their customer base. Their advantageous position on the market allows them to give priority to the profitability and development of their businesses over the creation or preservation of business relationships, and to long-term financial considerations over short-term cash flow management concerns.

Legal contracts are not as much negotiated as imposed by the stronger party to a relationship. Their use may be seen as one aspect of a more encompassing process of specialization, bureaucratization and professionalization taking place within the firm. From a management perspective, legal contracts contribute to the rationalization of firms' credit and debt-collection functions, through the standardization of contracting and claiming behaviour. Standard policies and contracts are adopted, and problems are dealt with according to a pre-defined

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[519] "Notre fournisseur, comme nous le connaissons depuis très longtemps, il nous arrive qu'il nous fasse 5 livraisons sans qu'on le paie. Et après un beau jour on l'appelle on lui dit amène tes factures et viens chercher ton argent. [...] Mais nous ne gardons pas son argent beaucoup, parce qu'on sait qu'on va le mettre en difficulté. C'est maximum 5 livraisons et on le paie. Des fois quand il a des difficultés il n'hésite pas, il vient nous dire, est-ce que... bon, on paie, quoi." (#26). Another respondent mentioned that he generally agreed to help his suppliers in difficulty by paying them in advance, but did not hesitate to replace those he found too strict in terms of delays of payment. (#23)

procedure**,** often by people external to the firm or belonging to a department distinct from the "commercial branch". The distinction thereby created between the collection or claiming agents and the people who deal with the client or supplier in the normal course of the business relationships allows the latter to distance themselves from the claims made and maintain harmonious commercial relationships.

Parties in a superior bargaining position may be able to impose the use of a legal contract and determine most of the terms of this contract. Many respondents indicated that State and international institutions as well as a number of domestic and foreign private firms[520] with which they deal impose specific price,[521] payment[522] and delivery terms. The dependence of their contractual partners toward them also means that they can get away with inflexibility and a confrontational attitude. They can also take some liberty with respect to the satisfaction of their own obligations, since dependent parties will often avoid litigation and conflict at any costs.

Legal contracts generally apply to partners who do not have an equal access to legal remedies, and are thus eminently one-sided. However, the interviews also refer to some cases in which written contractual provisions were called upon to protect the weaker party to a relationship. A few respondents mentioned that past instances of disagreements with partners in legal relationships made them aware

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[520] "Avec les gros clients, si on parle des institutions ou du secteur privé, les institutions c'est la plupart du temps par appel d'offres hein, maintenant quand c'est les grosses entreprises du secteur privé c'est le rapport de force qui joue, mais la plupart du temps vous devez accepter leurs conditions. (...) La plupart du temps vous n'avez pas de liberté." (#9); "Le plus souvent c'est un appel d'offres, le client est en bonne position dans ce cas parce qu'il a trois sociétés devant lui, c'est des concurrents. Il peut pousser pour avoir le marché et si c'est le cas l'entreprise n'a plus le choix. Elle est obligée d'obéir quoi!" (#29).

[521] "En 2006, ils ont encore augmenté le ciment, ils sont tributaires du pétrole, mais chaque fois ils nous appellent ou ils nous envoient un fax pour dire attention nous avons été obligés de revoir les prix, ils nous tiennent au courant. Des fois nous aussi on appelle pour dire non, c'est pas normal, machin, mais qu'est-ce que vous voulez, c'est comme ça quoi." (#26).

[522] "Mais pour la Banque mondiale par exemple, ils paient pas au bon de commande ; ils ont des séquences de paiement, même si vous livrez vous êtes obligés de patienter. On a pas le choix, ils fonctionnent avec tout le monde comme ca." (#20)

of the need to put the details of their contracts in writing, to plan for contingencies in their contracts, and to read carefully the contracts proposed by their partners before signing them.[523] This suggests that, even though litigation is rarely an option for firms in weak competitive positions, written contracts may constitute a useful tool in their negotiations with partners more sensitive to "legal" than "relational" arguments.

2. One or many contracts? Dealing with divergent views

The proposed categorization of contractual relations as social, partnership or legal is based on the respondents' descriptions of what they expect from their contractual partners and their own obligations toward them. They constitute subjective understandings of the norms and expectations attached to specific business relationships.[524] Parties to a single business contract may or may not have a common understanding of their relationship. Many types of divergences may exist between parties concerning their conceptions of the normative content of a specific relationship.

Discrepancies may exist at the inter-firm level. A number of respondents referred to problems that could adequately be described as instances of conflict between their visions of their contract and the expectations of the other contracting party. In some of these cases, one of the parties expected his relations to be based on a social contract, while the other viewed it as a partnership or legal contract; in such cases, the major point of disagreement between the parties concerned the

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[523] "Depuis ce qui m'est arrivé là, je dis, avant de passer la commande, je prends la photo, amenez la photo chez le client, je dis c'est ca que vous voulez, oui, vous signez, ou mettre le cachet. Si on livre et il dit que non, j'amène la photo, je dis vous avez signé ça" (#18); "Avant ce que je faisais j'allais là-bas, en Europe, on me donnait un bon de commande, et sans faire attention, je lui donne tout de suite l'argent, sans regarder derrière. Mais derrière y a les clauses, et maintenant par expérience, comme je connais tout ça, quand le fournisseur me donne pour signer, quand je regarde ici tout de suite il change, il sait que je fais attention à ce qu'on a écrit derrière, il sait que je connais les clauses." (#4).

[524] As such, they are close to the notion of "psychological contract" developed by Rousseau with respect to employment relations : see Denise M. Rousseau, *Psychological Contracts in Organizations* (Thousand Oaks: Sage, 1995).

separable character of the "social" and "business" spheres of their lives. Other cases concerned relationships between a partner seeing himself as a "partner" and one who viewed the relationship as a legal one, leading to disagreement about the applicability of the norm of flexibility and mutual help in the relationship. This seems more likely to occur in heavily unequal or inter-community relationships, whose parties do not share a common understanding of the informal norms governing their relationships. Indeed, many of the cases described by respondents concerned dissatisfaction with the "lack of trust" or "insensitivity" of foreign or large firms, and their unwillingness to act as real partners.[525]

Respondents mentioned diverse ways to deal with discrepancies between their own and their partners' understandings of their relationships. One of them consists in sending signals about one's own view of the relationship in the hope that it will impact on the other party's perception. For example, one respondent mentioned that he never asked for a third party's intervention in the fear that doing so would make other people feel entitled to do the same against him. Keeping relations at the bilateral level made him feel more insulated from external influences.[526] Similarly, two respondents indicated that they explicitly deny members from their *relationnel* the right to make claims on them, describing yielding to such pressures as a form of hypocrisy and the practice itself as retrograde. [527]

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[525] "Avec ce fournisseur, je suis agréé avec eux, je suis allé chercher sur le stock, et les gars me disent 'il faut payer'. OK, je fais des chèques, ils me disent "non, il faut payer en espèces". (...) Ça, c'est un manque de confiance. J'étais en colère. J'ai dit c'est pas possible, on définit un partenariat, vous me dites de payer, je paie, et puis en plus vous refusez... Bon voilà, ca s'est terminé en colère, j'ai boudé, depuis lors j'évite de prendre chez eux, je peux pas fonctionner comme ça." (#8).

[526] "Si vous faites la demande quelque part, quelqu'un d'autre peut faire la demande inverse. Mais si les gens savent que votre business vous faites pas des interventions sinon par des voies hiérarchiques ou autres, les gens n'ont pas tendance à vous demander ça. C'est quelque chose que vous créez." (#20).

[527] "Moi je dis souvent: 'c'est hypocrite de dire non à la personne, et de te dire oui à toi. Y a pas de raison que je puisse faire quelque chose parce que c'est toi plutôt que l'autre qui me le demande. Moi je ne fonctionne pas comme ca.'" (#17); "[Les pressions], ca me dérange pas. Au contraire.

Parties may also engage in open negotiation over the normative content of a relationship. A good example was provided by the head of an SME operating in the industrial sector. Following an important order from one of its clients, the SME in question ordered the required supplies from its regular, France-based supplier. The client's order was thereafter cancelled, depriving the SME of the sums it counted on to pay its French supplier. Apprised of the situation, the supplier nevertheless insisted on getting paid before delivery, as agreed in the contract. The following excerpt describes the respondent's reaction:

> J'ai dit au fournisseur, si vous ne voulez pas lâcher les documents pour qu'on récupère la marchandise, qu'on vende, et qu'on vous rembourse, alors reprenez votre produit [...] C'est une question de compréhension, c'est des choses qui arrivent, c'est un cas de force majeure, chacun doit pouvoir jouer le jeu. On n'a pas commencé à travailler hier ou avant-hier, vous savez à qui vous avez affaire [...] La commande existait, elle existe plus, maintenant il faut couper la poire en deux, il faut que la responsabilité soit prise dans les deux sens, je ne peux pas toujours assumer pour vous, vous avez la part belle et à la limite vous êtes couvert parce que moi je vous paie avant de recevoir une matière première que je ne vois pas [...] Et moi, qu'est-ce qui me couvre en retour? Le risque que je prends, vous le prenez pas, alors à un moment donné il faut qu'on se calme un peu et que chacun joue le jeu. (#17)

For the respondent, the behaviour of the French supplier amounted to a violation of the implicit norms of risk-sharing and flexibility that were to govern their relationships and a sign of insensitivity and unwillingness to "play by the rules". The respondent's decision to express her discontentment and state her own expectations led to a peaceful resolution of the dispute: the supplier finally agreed to deliver the supplies on credit.

However, open discussions over the norms that are to govern a relationship carry some risks. There is a danger that the parties will not be able to agree on the normative content of their relations, leading to discontent and potential

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Au contraire même. Faut faire bouger les choses un peu. Si on veut que l'Afrique avance, y a des choses à changer, des mentalités à changer." (#13).

relationship breakdown. In addition, firms opposing norms that are widely accepted by the other players in their industry or in the larger community to which they belong open themselves to the application of reputational sanctions. For example, although many respondents expressed the view that social obligations should not in theory interfere with the functioning of their business, few of them seemed in a position to apply this principle in the course of all of their business relationships.[528]

Firms may avoid such difficulties by trying to limit the negative impact of specific norms in ways that do not signal a personal lack of commitment to those norms. This allows them to get the best of both normative worlds, by reaping the benefits of the norms favoured by their partners without suffering from their disadvantages, while preserving a reputation as a valuable business "partner" and decent human being. The respondents mentioned many strategies that may be used for this purpose. One of them consists in blaming one's lack of compliance with the partner's norm on third parties or circumstances over which one has no control. In its most basic form, this strategy involves presenting one's decision as made under external pressure, for example from bankers, suppliers asking for payment, or clients waiting for their orders. By blaming others for forcing them to be inflexible, while emphasizing their own problems and needs and asking the other party for help, firms can escape from obligations to be flexible and are able to use the norm of solidarity for enforcement purposes.[529]

An alternative strategy consists in voluntarily surrendering control over decisions, by delegating the responsibility for claiming to people from whom rigour and

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[528] For example, a respondent who arrived one hour late for the interview blamed it on the fact that he had to attend a religious ceremony. He later mentioned that, even though social obligations should not, in theory, interfere in business matters, his absence from the ceremony would have been socially unacceptable, even if it took place during his firm's working hours (#14).

[529] "C'est pas une pression pour dire tu paies on sinon... (...) C'est une pression pour lui dire on a besoin de l'argent pour payer nos fournisseurs, une pression morale, quoi." (#22) ; "On va me dire, 'écoutez il faut aider un peu', je dis 'je peux aider jusqu'à la limite de, parce qu'arrive un moment où je ne suis pas maître, l'État exigera de moi, les impôts exigeront de moi, ou le tribunal exigera de moi, ou les bailleurs de fonds exigeront de moi...'." (#9).

intransigence are better accepted. External consultants or even employees of the firm may be called on to make claims, thus allowing "commercial people" to preserve harmonious relationships with their contacts in other firms.[530] For many respondents, such depersonalization of business disputes through "bureaucratization" seemed to represent as much a precondition for growth as a consequence of it. For example, one respondent described bureaucratization and delegation of power as explicit strategies employed by the founder of his firm to establish a clear distinction between his firm and himself and isolate his business from social pressures.[531] Similarly, another respondent mentioned that his plan to transform his family firm into a *société anonyme* would allow him to free himself from certain social constraints and enter a new phase of growth.[532]

Finally, divergences about the normative content of a specific relationship can also exist within organizations. While one respondent indicated that his own employees sometimes often find him too insistent with his partners, another one pointed to the need to prevent his subordinates from putting too much pressure on his clients. Similar conflicts can also occur at the individual level. In this respect, it is worth noting that, although the various strategies devised by businesspeople to limit the application of local social norms may be interpreted as evidence or their limited commitment to those norms, it is not necessarily the case. Even though respondents generally saw the evolution of local business norms in line with the dominant business models as inevitable, [533] their reactions to this state of

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[530] "C'est simple, c'est le comptable qui fait tout son mic-mac, il fait la lettre, contentieux... tu te fais payer, et tu retournes voir le client en tant que fournisseur, tu dis 'écoute, ça c'est le comptable, les comptables, ils aiment rentrer dans leurs fonds. Mais moi, mon objectif, c'est de faire des affaires avec toi.'" (#18).

[531] #11.

[532] "On est obligés de gérer certains paramètres qui sont dépassés, mais qu'on a été obligés de gérer jusqu'à maintenant. Parce que jusqu'à maintenant, c'est une entreprise familiale. Si toutefois ça devient une société anonyme, ca n'appartient plus à une seule personne, c'est un autre domaine. Là c'est le professionnalisme, y a presque pas de sentiments ni rien, bon, c'est une façon de le vivre, c'est les intérêts, c'est 'les affaires c'est les affaires.'" (#12).

[533] "Il y a une différence générationnelle, absolument, les jeunes n'ont pas vécu ce que j'ai vécu, moi j'ai vécu essentiellement ici, quand j'ai quitté le Sénégal j'avais 24 ans. Mon fils, lui, il est

affairs were quite varied, ranging from nostalgia for the good old times to a clear discontent with what they saw as the lack of professionalism of the local business community. In many accounts, the adoption of "objective" or "impersonal" ways of doing business by respondents actually seemed motivated more by the perceived impracticability of norms to which they remain deeply attached than by a true commitment to an alternative set of values.

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parti avant ses 20 ans (...) il est plus Européo-Nord-Américain qu'Africain. Y a beaucoup de choses qu'il va être obligé de négocier avec moi et il aura pas les mêmes valeurs, (...) Aujourd'hui, il y a des conflits de génération, il y a des jeunes gens qui font fi [des normes sociales], les gens de ma génération ne peuvent pas faire fi." (#9)

PART III: IMPLICATIONS AND CONCLUSIONS

The current law and development movement rests on two basic ideas. Inspired by insights from New Institutional Economics, it holds that law (or "legal institutions") is a prerequisite to development. Conversely, it assumes that the legal institutions in place in developing countries are inadequate for development to take place. The numerous "problems" of developing countries, including their presumed lack of commitment to democracy and their failure to "catch up" with their developed counterparts, are blamed on their legal institutions, and law reform is at the core of all development efforts.

Under the leadership of the World Bank, substantial resources are devoted each year to "rule of law" and "investment climate" reforms. Under the benchmarking approach adopted by the Bank, developing countries are urged to compete with each other to attract investors.[534] In view of the little attention brought to the investigation of the actual impact on those reforms on social life, one is left with the impression that law reform constitutes an end in itself, rather than a means to "development". The reframing of the issue of the required "fit" between law and the society in which it applies as a political matter of "participation" and "ownership" means that one's success as a reformer essentially depends on the volume of the reforms actually implemented, with little consideration of their impact on development.

The domination of the "bookish"[535] approach to legal change deplored by Legrand has allowed policymakers to avoid important questions about the actual possibility of effective law reform. As mentioned in Chapter 1, despite the voluminous empirical evidence now available about the relationship between development and legal institutions, the law and development field is still facing an

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[534] The World Bank now even publishes each year a list of the "top 10 reformers" that other developing countries should emulate: see World Bank, "Top 10 Reformers from Doing Business 2010", online: <http://www.doingbusiness.org/features/reformers2010.aspx>.

[535] Legrand, *supra* note 195, at 65.

important "problem of knowledge"[536] about the actual role of law and the potential impact of legal reform efforts. This failure of academics and policymakers to resolve uncertainty about the validity of basic assumptions underlying the law and development approach was the main motivation for undertaking this dissertation. The empirical work conducted in Dakar was designed first and foremost as a humble contribution to bridging the knowledge gap. Its objective was not to provide conclusive evidence that law reform can, or cannot, have desirable consequences in developing countries. By resorting to an inductive, qualitative approach, it rather aimed at examining fundamental, unresolved issues about the role of law in economic activity and the capacity of law reform to modify business behaviour.

This investigation started from the assumption (which was confirmed by data) that legal institutions are seldom used by SMEs operating in Dakar, and from the need to get a better understanding of the reasons accounting for this state of affairs. Contributions from the fields of comperative law, economics, management, anthropology, and sociology were used to identify three main factors that could be blamed for the unpopularity of law: its inefficiency, its incompatibility with local cultures, and its irrelevance in "trust-based" relationships.

One objective of the literature review was to examine the question of legal transplant efficiency from an interdisciplinary perspective making room for a close investigation of the role of informal norms in business behaviour, and the relationship of those norms with formal law. More particularly, diverse factors held to account for the presence, persistence and use of informal contract enforcement mechanisms in developed and developing economies were reviewed, with a view to identifying some avenues to be explored in the empirical work to be conducted in Dakar.

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[536] Carothers, "Problem of Knowledge", *supra* note 67.

The most interesting conclusion derived from the literature review arguably concerns the different treatments that informal mechanisms are given depending on the settings in which they operate. In the case of Western countries, the combination of efficient legal institutions and high levels of "generalized trust" is said to make most transactions possible. Informal mechanisms are generally accounted for by pointing either to the incapacity of efficient courts to enforce particular types of transactions, or to the competitive advantages that firms can gain by developing "embedded ties" with their partners, particularly in industries in which information-sharing and responsiveness to change are essential.

In contrast, the informal institutions found in developing countries are not conceived as valid options with specific advantages, but attributed to the inadequacy of formal legal institutions. They constitute only "second-best" alternatives destined to wither with legal reform. In such a context, the networks found in developing countries are not conceptualised as formed of business ties designed to achieve efficiencies, but as "close-knit (non business) communities" enforcing reputational sanctions. Those "strong ties" which constitute the main source of trust in developing countries are also a liability which limits business activity by erecting "barriers to entry".

The data gathered in Dakar provide important insights into the nature and role of "informal mechanisms", as well as into the strengths and weaknesses of the arguments surveyed in the literature review. In this part of the dissertation, three aspects of the literature will be discussed in light of the data, before presenting some policy and research implications of this research.

Chapter 8. The role of law in business contracts: Lessons from Dakar

Data highlight three points that seem to deserve particular attention with respect to the current state of research on legal transplant and informal legal institutions. They concern the impact of legal sanctions in business behaviour, the cultural underpinnings of business relations, and the emergence and meaning of trust in business contracts.

A. The shadow of the law: a matter of sanctions?

The data gathered in Dakar raises important doubts about the validity of the "legal efficiency" argument. Under this approach, derived from transaction cost economics and game theory, legal institutions are seen in a functional light, as providers of sanctions that guide behaviour.[537] Legal and judicial reform aiming at making courts speedier and cheaper − and legal professionals more competent and less corrupt − is said to make sanctions more salient, thus favouring compliance with the law, and encourages the use of courts in case of breach. By fixing "incentives", law reform allows for the "legal security" needed for business. Under the logic of efficiency, the consequences of the ultimate incapacity of the legal system to provide sanctions in specific cases are said to be twofold: transactions either do not take place, or they are supported by alternative, informal sanctioning mechanisms.

The data revealed a different perspective on the issue of efficiency. Few respondents expressed concerns about judicial corruption and competence or, more generally, the lack of legitimacy of the legal and judicial system. In addition, although many expressed dissatisfaction with the delay needed to

[537] The game-theory models now in vogue may be seen as refinements of older cost-benefit approaches in use in the "access to justice" programs of the 1970s and 80s: see Julie Paquin, *Psychological Dimensions of Access to Justice: An Empirical Study and Typology of Disputing Styles* (Ll.M. Thesis, McGill University Faculty of Law, 1997) [unpublished], ch. 1.

enforce a decision, the delay in question was unreasonable only in view of the immediacy of their need for money or supplies essential to the pursuit of their business operations. In addition, the main factor preventing them from litigating their claims had little to do with the efficiency of the system, since it concerned the impossibility of any system to recover money from insolvent or poor debtors. As to the hypothesis that the existence of informal enforcement mechanisms may account for the little use made of law, data partly supports the notion that local social norms enforced within business or social communities have a sanctioning function in Dakar. However, it is also clear that the primary function of those norms is not to ensure compliance, but to enforce the norm of flexibility on which most firms depend. The informal mechanisms present in Dakar are more efficient in preventing creditors from claiming their due than in enforcing commitments. Dakar firms' disregard for legal remedies thus cannot be accounted for by the lack of legal sanctions available or their relative inefficiency compared to informal mechanisms.

This points to the need to shift the focus of the inquiry from the "sanctions" hypothesized to drive behaviour to the actual factors on which people base their decisions. As the interviews indicate, respondents consider that the business environment prevailing in Dakar, and not the absence of sanctions, accounts for most of the instances of contractual breach as well as the irrelevance of the court system for SMEs. The limited resources at the disposal of SMEs, the concomittant emphasis they put on day-to-day cash management and viability, the small size of their typical transactions, and their dependence toward their partners make litigation unattractive to them, irrespective of the actual costs and delay it would involve. In consequence, they are unlikely to engage in sophisticated evaluations of the legal or judicial system in place. From this perspective, the behaviour of Dakar SMEs has more to do with their structural position in the global economy than with the legal environment in which they operate.

This is not to say, however, that legal factors have no impact on the decisions made during the disputing process. What is suggested is that such impact actually

bears little relationship to the actual "efficiency" of the institutions in place: what matters for disputants is not so much the costs and benefits to be derived from their use as the extent to which they perceive ligitation as an option, however remote, that they could consider using at some point. From this perspective, "legal efficiency" might better be seen as a dichotomous variable (efficient/inefficient) than a continuous one: the degree to which specific legal institutions are "functional" matters little, as long as they constitute a "vague threat" for the disputants they aim to serve. The relevance of legal institutions is thus a subjective matter only partly related to objective measures of efficiency.

B. Assessing the role of culture in business relations

The benchmarking approach of the World Bank, which turns foreign legal institutions into models to imitate, well illustrates the limited room made for "local adaptations" in the law and development agenda. Despite claims about the need to take local conditions into account when devising reforms, the adaptations made are generally little more than marginal adjustments designed to make the laws easier to implement and apply. The widespread assumption that "rational" cost-benefit considerations, rather than cultural factor, determine economic behaviour has also justified the little interest brought in the investigation of the potential role of culture in economic activity. If "business is business" all over the world, then the best business law practices are the best everywhere.

Data partly confirm the notion that culture has little role to play in business activity. Although the respondents hardly looked like the culture-free Prisoner Dilemma's players posited by economists, cultural factors were not the main determinants of their business behaviour. The attitudes they display not only reflect the reality of SMEs all over the world, but are consistent with the well-documented tendency of businesspeople in general to pay only marginal attention to the applicable legal rules and the efficiency of the court system when making business decisions.

Yet, this dissertation should not be interpreted as depriving "culture", however defined, of any role in business and legal matters. Many respondents mentioned the high value attached to negotiation and compromise in Senegal, and dislike for confrontation as part of the "shared, collective beliefs regarding appropriate behaviour in a society",[538] that generally govern social interactions in Dakar, including the "social contracts" described in chapter 7. When internalized, such shared beliefs impact on people's self-identity and their willingness and capacity to depart from what is generally perceived as acceptable behaviour. High levels of norm internalization may make people more likely to prioritize social considerations over the profitability of their businesses,[539] and make it difficult to depart from the model of business relationship prevailing in "social contracts".

Data show that the relationship between "culture" and the behaviour of business actors is not as straightforward as "trait-based" theories of culture propose. As the existence of "partnership contracts" and "legal contracts" indicates, the impact that the values of compromise and solidarity identified as forming part of the Senegalese culture have on behaviour is not uniform among all the members of the business community. Data reveal that such values aim primarily at regulating relations among intimates and family members, and lose their relevance as social distance increases. The respondents also expressed variable degrees of allegiance to these norms, and mentioned a number of strategies that they use to limit impact on their business operations. In addition, many of those who adhered to these norms were also aware of the potential negative consequences of their application in business matters on the profitability of their business, and the resulting need to redefine their business relationships in new terms in order to survive and grow. Social norms thus constitute only one of the variables influencing the process

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[538] In Rousseau's terms, social norms constitute social contracts used to interpret psychological contracts (Rousseau, *supra* note 524), at 13.

[539] It is worth noting that these considerations may be in part compatible, as, for example, in the case of firms embedded in intricate networks of business relationships based on social ties and whose survival depends on the preservation of those ties.

through which decisions about the behaviour to adopt are made. This suggests that so-called "cultural" norms such as the ones observed in Dakar, can hardly be treated as an independent variable and investigated as such.

The subjective perspective on contracts adopted in the present work provides interesting insights into the relationship between culture and business behaviour and how it can be investigated. From data, shared values and beliefs may be seen to play a role at two different levels during this process. First, they influence the expectations of people towards each other and, consequently, their interpretation of each others' behaviour. For example, it is clear that understandings of what constitutes a promise, what promises mean, and the degree to which they are binding vary among individuals and situations, and are influenced by a variety of factors, including one's cultural background.[540] The reluctance of respondents to use terms such as "problems", "breaches" or "conflicts" to designate events that, to the interviewer, constituted clear instances of contractual violation well illustrates this point. In addition, subjective perceptions of what others consider socially acceptable affect the calculation of the reputational costs attached to specific behaviours. These costs in turn impact on people's propensity to set themselves apart from the crowd by behaving in contradiction to the norm. It is worth noting that the identification of a specific behaviour as "inappropriate" according to social norms is a subjective decision depending on one's perceptions of the people involved and their situations. From this perspective, behaviour can hardly be assessed independently from the motives which are thought to justify it. A specific behaviour is thus inappropriate only to the extent that it cannot be framed in terms compatible with local values.[541]

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[540] It must be noted that beliefs described as "cultural" may also be seen as deriving from the environment in which people evolve, these two factors utlimately reinforcing each others. From this perspective, culture is not as much an "obstacle to development" but the product of specific, historical economic circumstances.

[541] As, for example, when claims for payment are presented as basis on one's personal needs for support rather than in terms of rights.

What constitutes an "appropriate behaviour" also depends on the specific context in which the decision is made, including the type of relationship involved. The second function of social beliefs and values is to provide not only categories of relationships, but the criteria for the classification of specific relationships in one category or another. By determining what distinguish friends from strangers, relatives from relations, partners from counterparts, and equals from superiors, social norms allow parties to put an appropriate label on their relationship and adjust their behaviour accordingly.

Business relationships often evolve as the parties get to know each other and develop more intimate ties. The categorization of relationships is thus an on-going process. Data suggest that, in Dakar, the respective positions of the parties in the social structure have a significant impact on their framing of their relationships. An obvious example concerns the difficulty expressed by respondents to apply "business" norms when dealing with friends or relatives, even in a business context. Even in such cases, however, a number of strategies may be used in order to allow a certain frame to prevail over the one that the parties would be expected to apply. For example, the "depersonalization" and bureaucratization strategies mentioned in Chapter 7 may be interpreted as attempts to "reframe" personal relationships as more "impersonal" ones in which social norms do not apply, thus reducing the reputational costs attached to "anti-social" behaviour.[542] Conversely, appealing to sentiments constitute a way for businesses to turn cold business relations into more personal ones, thus increasing the chances that norms of solidarity and support will ultimately prevail. Such strategic appeals to specific metarules to favour the application of a specific frame may have a limited impact, however, in heavily unequal relationships, where the most powerful party is in position to impose the rules it sees the most appropriate to the game at play.

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[542] The best example of this concerns a firm initially created by an entrepreneur operating in the informal sector; although the business is still owned by its founder, it is now managed by "professionals", whose job partly consists in avoiding the owner to be "exposed" to hard-to-resist claims based on social norms (#11).

Seeing cultures as collections of rules and metarules, rather than traits, has important implications for cross-cultural research. One of them concerns the nature of "cross-cultural" conflicts. It is suggested that cultural differences may lead to three different types of disagreement between business partners. First, they may agree on the set of rules to govern their relationship, but have divergent understandings of the content of those rules. Secondly, parties may disagree on how to frame their relationship ("we are friends" vs. "we are business partners"). Finally, parties may agree on the nature of their relationship and the norms governing such relationships ("we are friends who happen to do business together"), but disagree on the metarules applicable in their situation ("a friend should always be treated as a friend" vs. "business is business, even with friends").

A second point concerns the difficulty of tracing boundaries between cultures. Identity markers such as race, ethnicity, or religion traditionally used for this purpose are not always relevant for determining the cases in which specific norms are held to apply or not. For example, the favourable disposition displayed by respondents toward other SMEs or individuals did not extend to large firms, notwithstanding the origins of their owners or employees. This uneven application of the presumption of inability could be held to signal that the norm of flexibility observed is not the expression of a Senegalese "cultural trait" as much as deriving from the market position and level of vulnerability of SMEs. From this perspective, respondents might be culturally closer to foreign firms in similar situations than to the large firms with which they deal on a daily basis.

C. Trust, cooperation, and compliance

"Trust" has emerged as a major topic of interest in many lines of inquiry in recent years. However, despite widespread agreement that trust is important in a number of ways with respect to economic activity and social life in general, no widely accepted definition of the term has emerged yet. While economists consider trust as deriving from the presence of incentives to comply, the tendency in the study

of cooperative relationships has been to distinguish "calculative" forms of cooperation from the more complex forms based on the emergence of "real trust". In contrast to cultural approaches, under which trust is conceptualised as a "virtue" whose origins remain unclear, economic sociologists have attempted to develop an alternative, relation-based view of the emergence of trust. From this perspective, trust is the product of an incremental process during which parties get to know each other, clarify their respective expectations, and gradually increase their levels of vulnerability, allowing them to dispense with contracts. The question then becomes one of determining the conditions required for such process to be initiated. "Pre-existing ties" have been pointed to as important, although not essential, "priming mechanisms" for this purpose. More generally, it can be hypothesized that the initiation of business relationships requires a minimal level of confidence that the other party will behave appropriately.

As mentioned in Chapter 4, the work of economic sociologists on the nature of trust and its relationships with law and contracts exhibits two main characteristics: a difficulty to break from an economic view focusing on the role of sanctions in cooperation, and a quasi-exclusive focus they put on the structure of the networks in which trust is built, to the detriment of the content of the ties forming those networks and the processes through which trust emerges in the course of these relationships. As a result, the trust studied in economic sociology often constitutes little more than an intervening variable linking specific network structures or relationships and levels of cooperation. The confusion surrounding the use of the term "trust", and the concomitant difficulty to "measure" it on the basis of reliable indicators, are also partly to blame for the mixed empirical findings concerning the relationship of trust with contract.

Clarifying the notion of trust and how it emerges entails distinguishing between its behavourial and intentional aspects.[543] The presence of legal or non legal

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[543] See Rousseau et al.'s multidisciplinary definition of trust as "a psychological state comprising the intention to accept vulnerability based upon positive expectations of the *intentions* or

"incentives" may give rise to expectations that the other party will comply in order to avoid the application of sanctions. It does not guarantee, however, that this person will ultimately be able to comply or will refrain from taking advantage of the situation. Beliefs in ability to comply[544] depend on the presence of additional information about the other party. As to beliefs in willingness to cooperate, it is more likely to arise in the course of a relationship involving an emotional aspect.[545]

Data highlight the relevance of the distinctions between, on the one hand, willingness and ability, and, on the other hand, compliance and cooperation, in Dakar. Whereas, in Western economies, "inability" is generally used to refer to incompetence and very exceptional cases of *force majeure*, it has a much wider meaning in Dakar, where few economic actors, notwithstanding their levels of "competence", are immune from "difficulties" preventing them from satisfying their obligations. In this context, "contractual trust" is exceptional. As to "competence trust", the further firms can go to assess ability is to make sure that the other party is a *bona fide* firm and not on the verge of bankruptcy. An additional problem comes from the fact that the most able firms, i.e. those in the best competitive position, are often the ones with the least incentives to satisfy their obligations. In consequence, SMEs often have to choose between "goodwill trust" and "competence trust" when they select their partners.

The frequency of cases of inability makes it particularly important for Dakar firms to be able to distinguish real cases of inability from disguised instances of

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behaviour of another", distinct from the behaviour or decisions leading to or resulting from [emphasis added]: Denise M. Rousseau et al., "Introduction to Special Topic Forum: Not so Different after All: A Cross-Discipline View of Trust" (1998) 23 Academy of Management Review 393, at 395.

[544] According to Sako, "competence trust" (belief in ability to comply) forms one of three types of trust, along with "contractual trust" (belief in compliance) and "goodwill trust" (belief in intention to cooperate): Mari Sako," Does Trust Improve Business Performance?" in Christel Lane & Reinhard Bachmann, eds., *Trust within and between Organizations* (Oxford University Press, 1998), at 89.

[545] Rousseau et al., *supra* note 543, at 398-99.

unwillingness before assigning blame for a particular problem. This is often a lengthy process requiring an assessment of the information obtained by the other party as well as other sources. A cooperative attitude, readiness to share information with the other party, and reports of problems satisfying obligations toward other parties make claims of inability more credible. However, parties facing difficulties are rarely entirely unable, and will generally manage to comply with the obligations they consider the most important for the pursuit of their activities. In such contexts, "inability" to satisfy a particular partner may in fact signal one's unwillingness to give priority to his claims over other ones. From this perspective, both unwillingness and inability are relative notions whose relevance depends on the context in which parties find themselves as well as the subjective perceptions of the individuals involved.

Data also provide interesting insights about the relationship between contractual compliance and cooperation in Dakar. In the context of developed economies, the question of cooperation is generally intimately connected to the notion of compliance. Although Western businesspeople do not always count on absolute, strict compliance from their partners, they nevertheless operate in a context in which they expect the major part of the vast majority of their contracts to be performed.[546] Data indicate that, in Dakar, the contractual compliance taken for granted in developed economies is neither sufficient nor necessary to establish the presence of a cooperative frame of mind. On the one hand, Dakar SMEs tend to interpret contractual obligations as "best efforts" ones, and are ready to contend with breach as long as the violator acts in good faith and make efforts to minimize the negative impact of his behaviour on his partner. On the other hand, they often expect more than strict compliance from their partners, and highly value their capacity to behave as "real partners" and support them in times of need. It must

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[546] In Stewart Macaulay's words, "[w] hat is predictable is that contracts in the United States will be carried out in an acceptable fashion. When Americans make a contract, it is not certain that it will be performed to the letter of its text of performed at all. Yet, it is a good bet that the parties will perform acceptably." (Macaulay, "Real and Paper Deal", *supra,* note 98, at 59).

also be noted that the relationship between compliance and cooperation appears as highly variable among respondents and relationships. Compliance with contractual terms is particularly important in legal contracts. In partnership contracts, strict compliance is only one element of a larger conception of compliance encompassing all the duties devolved upon business "partners". Finally, in social contracts, parties seek to comply with their social obligations. This form of cooperation not only gives little weight to contractual compliance, but often entails relinquishing the rights granted by law.

Data suggest that the relationship between compliance and cooperation is not straightforward: compliance may in fact drive, or even be a prerequisite to future cooperative behaviour, but only to the extent that it is expected from one's partners. A brief comparison between Dakar SMEs and the Wisconsin firms surveyed by Macaulay in 1963 illustrates this point. Although both groups of firms are committed to solving their disputes flexibly, they are, in Wisconsin, supported in their endeavour by their simultaneous commitment, to general norms holding that one has to keep his promises and to stand behind his products.[547] In other words, being flexible in Wisconsin means agreeing to some give-and-take under the understanding that the spirit, if not the letter, of the contract will be enforced. However, the norms favouring compliance, which are congruent with the Wisconsin context, seem unlikely to emerge in the uncertain environment prevailing in Dakar, in which the capacity to compromise is often essential to remaining in business. While flexibility is a luxury that the Wisconsin businessmen interviewed by Macaulay could afford, it is a basic necessity for their Dakar counterparts.[548]

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[547] Macaulay, "Non-Contractual Relations", *supra* note 88, at 13.

[548] This also points to the need to distinguish between the diverse roles played by reputation mechanisms in contract enforcement in function of the basic norms they serve to enforce, i.e., in Wisconsin, promise-keeping/compliance or, in Dakar, compromising/preservation of harmony.

This raises the major issue of the role played by law in the emergence of expectations of compliance. It must be noted that the threatening (or, conversely, empowering) character of law is a subjective variable. Although data indicate that, for most respondents, Dakar courts represent a potential threat, the magnitude of this threat varies greatly among firms, relationships, and situations. The reach of law heavily depends on the levels of dependence between parties to a relationship. The presence of an asymetric relationship allows the less dependent party to dispense with law, while preventing the more dependent one to consider court use as a viable option.

In light of the data gathered in the course of the present work, it is suggested that more consideration should be paid to the impact of observable behaviour in the generation of such expectations. Parties who frequently observe instances of contractual breach are unlikely to hold the belief that their own contracts will be enforced without problems. Reversing this trend would require direct action on the root causes of contractual indiscipline, most of which, as noted above, have little to do with the legal system. This raises important doubts about the capacity of legal reform, and private law reform in particular, to generate faith in compliance in developing countries. On the positive side, however, it may de doubted that such a belief is required for markets to develop. Data show that, although the respondents did not generally believe that their contracts would be enforced, this did not prevent them from expecting most of their partners to behave in a manner which, although distinct from compliance, was nevertheless considered acceptable.

Chapter 9. Policy and research implications

The economic turn taken on by proponents of the second law and development movement has had a major effect on it conceptualisation of the issue of the "fit". In contrast to previous modernisation efforts and their emphasis on the need for cultural change for development, the new movement pays lip service to the cultural roots of institutions. By defining social change in institutional terms, and legal change as a matter of transition from informal to formal institutions, the movement skilfully avoid the thorny cultural issues associated with the use of leagal transplants. By assuming that people choose institutions on the basis of their efficiency, it also suggests that social change through law is not only possible, but largely unproblematic. From this perspective, the failure of reform efforts to produce the intended results necessarily derives from one of three factors: the "inefficiency" of the reforms compared to other alternatives; defects in the implementation process leading to political resistance to the new laws, despite their superiority; and the (temporary) incapacity of the local population to assess the new laws at their right value.

The major contribution of the field work conducted in Dakar is to point to a more fundamental reason accounting for the marginal impact of business law reforms on business practices. It suggests that the the current law and development agenda suffers from an inaccurate conceptualization of the role of law in economic development. It has been noted that, although the benchmarking initiatives of the World Bank have gone a long way to generate significant evidence of the existence of a correlation between legal institutions and business activity, the nature of the relationship between these two factors remains elusive to this day. This also applies to the issue of contract enforcement. Although State contract enforcement mechanisms are considered one of the most basic institutions required for economic development in NIE thinking, their actual relationship with levels of economic activity is far from being clear. The literature review undertaken in chapter 2 shows the notions that State-provided sanctions reduces

the frequency of contractual breach, prevents disputes from escalating in feuds, or encourage people to deal with a wider range of partners are more often taken-for-granted than clearly demonstrated, and lack the strong empirical support required for their unconditional acceptance.

The data gathered in Dakar provide good reasons to doubt that contract enforcement institutions play the causal role attributed to them by law and development experts. The interviews indicate that the ways in which Dakar firms choose their contracting partners have more to do with the small size of the local market and their limited access to larger pools of partners than with their reliance on bilateral or reputation mechanisms. Similarly, the frequency of contractual violations and the high flexibility of most of the contracts entered into in Dakar do not derive from the absence of deterring sanctions as much as from the uncertainty which characterizes the local business environment. The data thus suggest that "legal insecurity" may have little to do with the actual state of legal institutions.

This finding has major policy implications. To the extent that legal institutions are only one, and often not the most important, of the many factors which influence contracting decisions and contractual compliance, achieving the "contractual security" sought after by firms and reformers would require addressing the diverse sources of uncertainty leading to high rates of breach. This would include factors such as the inadequacy of power supply and transport infrastructures, as well as the small size of the local market, which locks many firms into asymmetric relationships. In addition, among the numerous firms operating in Dakar, very few seem in a material and competitive position allowing them to privilege and impose a legal frame in their relationships and benefit from the presence of a more efficient legal system.

This not only raises doubts about the capacity of law to have an impact on business behaviour in Senegal, but also provides reasons to believe that law reform can have a potentially adverse impact in developing economies. Providing

more efficient legal sanctions while ignoring the real sources of contractual insecurity would not only be useless in terms of contract compliance, but would carry the risk of preventing some firms from entering into contracts, thus undermining one of the very objectives sought by legal reform in the first place.[549] It can also be hypothesized that, by providing additional enforcement resources that only a small group of business actors are in position to use, legal reform may force less powerful players to prioritize the claims of these privileged businesses over those of other firms, and reduce the already little room to maneuver that most SMEs have to keep their businesses afloat.

Data also point to a series of measures likely to make a real difference for SMEs operating in Dakar. First, the lack of accurate information on firms present in the market limits the possibility of firms to initiate relationships and properly assess the level of risk associated to a particular transaction. The creation of reliable and well-functioning business registries and credit rating facilities would be a good step in remedying this situation. Secondly, the disadvantages stemming from the limited size of the local market could be limited by increasing access to foreign markets. Measures could be taken to help Dakar firms surmount the hurdles associated with their size and the reputation of unreliability of African firms. One respondent, for example, mentioned that the pooling of small orders by formal associations constituted a powerful way to gain access to foreign suppliers and reduce the costs of supplies. Similarly, the establishment of close collaborative partnerships between Senegalese and foreign firms could be fostered by creating opportunities for communication and increased knowledge of the business conditions prevailing in Dakar. Finally, access to credit remains a major problem for SMEs. Microcredit facilities favoured by international donors are more targeted to independent workers and are clearly insufficient to solve the cash problems of SMEs and fund the investments they need in order to grow. More

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[549] Fafchamps, *Market Institutions*, *supra* note 164, at 34 ("Harsh punishment may deter bad types from making empty promises but it can also discourage bona fide parties who cannot be totally sure they can honour their contract, especially in environment subject to shocks").

work would be needed in order to assess the financing needs of these firms and the reasons why such financing is not available on the Dakar market.

The present work also suggests that the failure of law and development proponents to properly assess the role of law in economic development may be traced back to their misunderstanding of the impact of law in economic activity in general. More particularly, data cast doubts about the acccuracy of game-theory decision-making model on which the current agenda relies. This model suffers from two important limitations. First, the assumption that economic actors make decisions on the basis of the costs and benefits associated with cooperation and defection leads it to give too much weight to sanctions in general, and legal institutions, when accounting for individual behaviour. Secondly, the emphasis put on the opportunistic nature of individuals leads to a conflation of cooperative behaviour with contractual compliance, and opportunism with contractual breach. The result is a dispassionate account of the impact of law on individual behaviour, which makes it possible for "expert views" of "what's best" to take precedence over local subjective perceptions of "what's not working" and "what's needed". The overemphasis put on functionality also allows for the *a priori* characterization of "informal institutions" as functional equivalents of State law, and the development of efficiency-based conceptions of the relationships between formal and informal modes of ordering.

More generally, what is at stake here is the capacity of current dominant economic and legal theories to properly account for the role of law in cooperation, as distinct from strict contractual compliance. Approaches focusing on the role of "trust" in business relationships and the "embeddedness" of economic and social relations have sought to provide additional insights into this issue. However, they have been limited by their tendency to define "law" and "trust" as opposite, mutually exclusive "modes of governance" satisfying different needs. One argument that underlies the present dissertation is that the development of a proper understanding of the impact of the legal system on behaviour requires breaking away from such dichotomies, and acknowledging that all business

transactions and relationships, however "discrete" or "embedded", comprise a legal dimension as well as other aspects. Rather than looking at legal and "non legal" modes of ordering as distinct options from which transactors consciously or unconsciously choose, the emphasis should be put on the diverse ways in which they reinforce, contradict or complement each other, and on the processes by which they are accommodated by individuals.

The field work conducted in Dakar represents one step in this direction. Despite the fragmentary character of the data on which it is based, the present work carries important research implications. First, it clearly reveals the lack of sophistication of approaches pointing to the existence of "informal enforcement mechanisms" developed in close-knit communities to account for the unpopularity of legal remedies in developing countries. The development of more adequate approaches to the issues of transfer failures and, more generally, legal inefficiency, would require the clarification of the respective roles of law, culture, social structure, and bargaining power in the management of business relationships in developing and developed economies. It is argued that this dissertation provides fruitful avenues for further exploration of these questions.

A first avenue consists in abandoning categorisations of relationships on the basis of external variables (e.g. strength of relationship, network structure, personal similarities…) which determine the role played by law in them. Data suggest that the role ascribed to law in specific situations might be better understood by considering the "frames" used by the parties to define their relationship and the problem they face. As mentioned before, data indicate that the business contracts entered into in Dakar are framed in three main ways. In "legal contracts", which are those closer to the promise-based conceptions prevailing in legal theory, legal sanctions are used to ensure compliance as well as signal willingness to strictly enforce contracts. In contrast, recourse to law is almost excluded in social contracts, which resort essentially on social pressure, and give priority to the informal norms governing the relationships over the enforcement of the promises made. Partnership contracts for their part rely primarily on bilateral mechanisms

aiming at cooperative behaviour not limited to, nor necessarily congruent with, strict compliance. Data also indicate that the "frame" that will be applied to a relationship is influenced by a variety of factors, including personal values and preferences and the nature and strength of the ties between the parties and within the network in which the relationship is inscribed, but is not the product of any or all of these factors. Framing is better seen as an active process influenced by strategic considerations, as shown by the diverse strategies mentioned by respondents to favour or limit the application of a certain "frame" to a specific relationship. In addition, since the framing process lasts as long as the parties keep interacting with each other, the "frame" governing it is not set once and for all from the start, but evolves in the course of the relationship. It is argued that focusing on framing process would allow for a better understanding of the nature of trust, the processes through it emerges, and its impact in specific situations.

A second avenue for research concerns the investigation of the impact of culture on business behaviour. The difficulty of clearly defining the boundaries of the communities relevant for the analysis of the situation of Dakar SMEs suggests that cultural identity is ultimately a matter of self-perception and identification with particular groups of people, rather than the product of specific factors. Cultural identification is made on the basis of subjective criteria, the elements distinguishing "in-group" from "out-group" members often remaining implicit or even unconscious. A better understanding of this process could provide major insights into the factors that may account for behaviour generally attributed to the existence of culturally-inherited traits. For example, the contractual flexibility of respondents, whose application is restricted to firms in similar positions, may not be the expression of cultural values of solidarity and compromise as much as the product of the "fundamental attribution error", which leads people to ascribe their own failures to adverse circumstances and blame those of others on their personality.

A final interesting avenue for research opened by the present work concerns the evolution of business practices in Dakar in the context of globalization, and its

potential impact on economic development. Although more data would be needed to show the existence of a trend, many younger respondents had acquired some professional training in business management, and/or had lived in Europe or North America, and seemed more inclined than their older counterparts to adopt the business models dominant in Europe and North America. Direct exposure to such ways of doing business while working for, or with, large local firms or foreign organizations also seemed to provide respondents with models they attempted to apply, with some adaptation, in their own business. An important question concerns the potential impact of such transformation of Dakar's society on the role played by law in contract enforcement. On the one hand, greater exposure to foreign models may lead to an increased professionalization of firms and a clearer separation between business and personal considerations, leading to a gradual shift from "social" to more bilateral types of relationships. Yet, even though more stringent business standards might eventually render some instances of excusable breach less excusable and thus reduce the level of flexibility displayed by firms, the adaptive nature of such flexibility in the context in which Dakar firms operate suggests that it is unlikely to lose its appeal in the near future. A general movement from "partnership" forms of cooperation toward more legal ones can hardly be foreseen, notwithstanding the amounts of efforts spent on improving Dakar's investment climate.

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APPENDIX I: The OHADA reform

Historical background

The idea of harmonising the commercial laws of the different countries of Francophone Africa surfaced immediately after independence. The need for a harmonized legal framework was recognized in 1961 in the Convention de coopération en matière de justice signed by the members of the Union africaine et malgache, who then committed to harmonize their commercial laws.[550] In 1962, Kéba M'Baye, then a member of the Senegalese Ministry of Justice, proposed to the Union[551] the creation of the Bureau Africain et Malgache de Recherche et d'Études Législatives (BAMREL), whose mission was to elaborate uniform laws directly applicable in the member States. However, after a few years, the BAMREL ceased to function due to a lack of funds.[552]

The idea of a general harmonization of business law was laid aside until the 1990s, when it resurfaced and was debated in several different summits. In April 1991, in Ouagadougou, the Ministers of Finance of the Zone Franc countries of the zone franc decided to organize a reflection on the feasibility of a project to harmonize business law, with a view to rationalising the legal environment in which firms conducted their activities.[553] Six months later, in Paris, a team of experts (called *mission de haut niveau*) was formed and put in charge of assessing the political and technical feasibility of the project. The team, which comprised seven members, was led by Kéba M'Baye (Judge of the International Court of Justice, and former President of the Senegal's Supreme Court and Conseil

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[550] E. Allan Farnsworth, "Law Reform in a Developing Country: a New Code of Obligations for Senegal" (1964) 8 Journal of African Law 6, at 7.

[551] The Union was replaced by the Organisation commune africaine et malgache (OCAM) in 1965.

[552] Kéba M'Baye, "L'histoire et les objectifs de l'OHADA" *Petites affiches, La loi*, no.205 (13 October 2004) 4, at 4.

[553] Joseph Issa-Sayegh & Jacqueline Lohoues-Oble, *OHADA, Harmonisation du droit des affaires* (Bruxelles: Bruylant, 2002), at 95.

Constitutionnel). On September 17, 1992, the mission filed its final report. A three-member steering committee (*directoire*) was thereafter formed and given responsibility for drafting in international treaty and identifying the areas of the law to be harmonized. The draft treaty establishing the Organization pour l'harmonization en Afrique du droit des affaires (OHADA) was examined and approved at a meeting of the Ministers of Justice and Finance held on September 21-22, 1993. It was signed on October 17, 1993, in Port-Louis (Mauritius), by 14 countries,[554] and entered into force on September 19, 1995. It was later slightly revised in Quebec, on October 17, 2008. [555]

Although the Organization is open to all African Union members,[556] the vast majority of its 16 present members are Francophone and former French colonies or mandate territories of Africa.[557] All but two of them[558] are also members of the Franc zone.

The OHADA system

In conformity with the new development approach, the objective of the OHADA reform is to attract foreign investors, facilitate trade, and favour the emergence of a dynamic private sector. Judicial reform is meant both to create a more attractive "investment climate" and facilitate business activity and as a preliminary step to economic integration.[559] The reform aims at creating a single legal framework

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[554] Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, and Togo.

[555] *Traité relatif à l'Harmonisation en Afrique du Droit des Affaires,* Journal Officiel de l'OHADA N° 4, 1er novembre 1997. The text of the Treaty is available online at http://www.ohada.org/traite-ohada-initial.html.

[556] Other States may also join upon invitation (art. 53).

[557] The exceptions are Guinée Bissau (Portuguese), Equitorial Guinea (Spanish), and the English-speaking provices of Cameroon (which was a French/British mandate territory).

[558] Guinea and Comores.

[559] See the objectives mentioned in the *préambule* of the initial treaty: "Déterminés à accomplir de nouveaux progrès sur la voie de l'unité africaine et à établir un climat de confiance en faveur des économies de leurs pays en vue de créer un nouveau pôle de développement en Afrique ; Réaffirmant leur engagement en faveur de l'institution d'une communauté économique africaine ;

adapted to the needs of investors and likely to improve legal security and facilitate trade and economic activity at the regional level. As mentioned in Article 1 of the Treaty, the reform process has three major aspects: the "modernization" of the law, its "harmonization" within the OHADA region, and the creation of appropriate procedures, including arbitration, for the settlement of contractual disputes.[560]

Observers have noted that OHADA's name does not reflect its true mission,[561] which is not the harmonization but implementation of an "aggressive"[562] scheme for the uniformization of business laws. The "harmonization" sought by OHADA consists in the "de-nationalization" of the law-making and judicial processes, by replacing national political and judicial institutions with new "regional" instances in charge of adopting and applying the new law. For this purpose, the OHADA Treaty provides for the creation of four supranational institutions. The Council of Ministers, which is comprised of the Ministers of Justice and Ministers responsible for Finance of the member countries,[563] is at the apex of the OHADA system. It elects or appoints the members of the other institutions, and approves the annual harmonization prepared by the Permanent Secretary Office,[564] and, on consultation with the Common Court of Justice and Arbitration (CCJA), adopts

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[…] Persuadés que la réalisation de ces objectifs suppose la mise en place dans leurs États d'un Droit des affaires harmonisé, simple, moderne et adapté, afin de faciliter l'action des entreprises ; […] Conscients qu'il est essentiel que ce droit soit appliqué avec diligence, dans des conditions propres à garantir la sécurité juridique des activités économiques, afin de favoriser l'essor de celles-ci et d'encourager l'investissement". (available at http://www.ohada.org/traite-ohada-initial.html (last visited March 24, 2009)).

[560] "Article 1 : Le présent Traité a pour objet l'harmonisation du droit des affaires dans les Etats Parties par l'élaboration et l'adoption de règles communes simples, modernes et adaptées à la situation de leurs économies, par la mise en oeuvre de procédures judiciaires appropriées, et par l'encouragement au recours à l'arbitrage pour le règlement des différends contractuels."

[561] See *e.g.* Joseph Issa-Sayegh, "L'OHADA: Bilan et perspectives" (2001) 3 International Law FORUM du droit international 156, at 156; Mamadou Kone, *Le nouveau droit commercial des pays de l'OHADA: comparaisons avec le droit français* (Paris: LGDJ, 2003) at 4.

[562] Dickerson, *supra* note 354, at 59.

[563] *Traité relatif à l'Harmonisation en Afrique du Droit des Affaires, supra* note 555, art. 27.

[564] *Ibid*., art. 11.

the legislation prepared by the Secretary.[565] The fourth institution is the Regional School of the Judiciary (École régionale de la Magistrature or ERSUMA), which provides training for the judges and judiciary staff of the member states.[566]

The OHADA unification process takes place at two levels. At the normative level, it is made through the adoption of Uniform Acts which are directly applicable in each Member State, notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.[567] No implementing legislation is required. The Permanent Secretary is in charge of preparing the new legislation, in consultation with the Governments of the member States.[568] One or many experts are first commissioned to prepare a draft act, which is then submitted for review and comment to each national government, generally acting through "national committees".

At the judicial level, the main unification institution is the Common Court of Justice and Arbitration (CCJA). It consists of seven judges elected for seven years and chosen from among the nationals of the Contracting States.[569] The CCJA has jurisdiction over all matters pertaining the application of OHADA law.[570] It can hear appeals of the decisions pronounced by the appellate courts of the member states (save decisions regarding penal sanctions pronounced by these courts),[571] and has jurisdiction in cassation with respect to the decisions not subject to ordinary appeal. As a result of the CCJA jurisdiction, the national courts retain jurisdiction with respect to OHADA law only in first instance and on ordinary

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[565] The adoption of the Uniform Acts by the Council of Ministers requires the unanimous approval of the representatives of the member States present and voting. Two thirds of the member States must be represented in the voting process (*ibid*., art. 8).

[566] *Ibid*., art. 41.

[567] *Ibid*., art. 10.

[568] *Ibid*., art. 6.

[569] *Ibid*., art. 31.

[570] *Ibid*., art. 14.

[571] *Ibid*., art. 15.

appeal. Where a case reaches the highest appellate level, the national Supreme Court concerned must decline jurisdiction over the case and send the matter to the CCJA. The decisions of the CCJA are final and enforceable in conformity with the rules of civil procedure applicable to national judgments in the State in which enforcement is sought. The CCJA also serves as an arbitration centre; it can name and confirm arbitrators, monitors the progress of the arbitration proceedings, and examine arbitration awards before they are signed.[572]

The matters covered by the reform extend beyond commercial law per se and aims at transforming the entire legal framework applying to economic activities. Article 2 of the Treaty mentions as coming within the ambit of the Organization such matters as company law, the legal status of commercial operators, the recovery of debts, securities, enforcement measures, insolvency proceedings, arbitration, employment, accounting law, sales, transport, as well as any other subject which the Council of Ministers may decide to include as falling within the definition of business law. Eight Uniform Acts have been adopted so far, with respect to general commercial law (April 1997), company law (April 1997), collateral law (April 1997), debt recovery procedures and measures of execution (April 1998), bankruptcy (April 1998), arbitration (March 1999), accounting (February 2000) and transportation of goods by land (March 2003). Uniform Acts on contract law, telecommunications, cooperatives, consumer protection and employment law are still in preparation.

Reactions to the reform

Although the proponents of the OHADA are prone to insist on its "African-ness",[573] it is clear that non-Africans played an important role in the design and implementation of the reform. France, in particular, not only provided financial

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[572] *Ibid*., art. 21.

[573] See *e.g.* M'Baye, *supra* note 552, at 4 ("Il me faut affirmer avec force, à l'adresse de certains détracteurs, que l'Ohada a une origine africaine".)

and technical assistance but actively promoted the harmonization process.[574] As to the harmonized laws themselves, they were mostly drafted by European experts, including the Paris offices of a number of US law firms.[575] French law, as it existed when the Acts were drafted, is also the most important source of inspiration for the Acts,[576] the second one being the law of Guinea, whose *Code des activités économiques* was partly copied in the Uniform Act on Company law.[577]

France's deep involvement in and influence on the reform process, which involved only limited national input, has led to criticisms concerning the political legitimacy of the Acts as well as their potential lack of fit to local conditions.[578] The national committees, which aimed at reflecting "informed public opinion" and contributing to popular buy-in,[579]appeared to be vehicles in which local professionals could participate. However, in some States, they were either not properly constitutive or not operative.[580] Concerns were also voiced concerning the impact of the decision to locate the CCJA in Abidjan on its accessibility to

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[574] Stéphane Marchand "L'Afrique a besoin de changer d'image pour attirer les investisseurs: La zone franc veut unifier son droit des affaires" *Le Figaro Économie* (8 December 1998), 10 (pointing by the central role played by the French ministre de la coopération in the launch of the project and noting that France has financed most of the capital appreciation fund).

[575] W. Paatii Ofosu-Amaah, *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa* (Washington, DC: World Bank, 2000), at 45.

[576] Jean Paillusseau, "Le droit de l'OHADA: un droit très important et original" JCP - Cahiers de droit de l'entreprise 2004.1, at 3.

[577] *Ibid*.

[578] See Wilfrid Mbilampindo, "Réflexion iconoclaste sur l'OHADA" *Jeune Afrique Économie* 267 (29 June 1998) ; Djibril Abarchi, "Problématique des réformes législatives en Afrique: le mimétisme juridique comme méthode de construction du Droit" (2003) 113 Recueil Penant 88, at 104; Xavier Forneris, "Harmonising Commercial Law in Africa: the OHADA" (2001) 46 Juris Périodique 77, at 83. See also Rio Ouro-Sama, "Harmonisation du droit des affaires: un bon départ?" *Jeune Afrique Économie* 260 (16 March 1998) , and the response of the OHADA General Secretary in Aregba Polo, "Les précisions du secrétaire général de l'Ohada" *Jeune Afrique Économie* 262 (13 1998) 6.

[579] Dickerson, *supra* note 354, at 61.

[580] Ofosu-Amaah, *supra* note 575, at 45. The World Bank recently injected 1,5 million dollars in the "reinforcement" of the Commissions: see "1,5 million de dollars de la Banque Mondiale pour le Droit des Affaires OHADA en Afrique", Agence de Presse Africaine, 30 May 2008.

disputants outside Côte d'Ivoire.[581] Finally, a vocal debate was sparked in 2007 when supporters of the OHADA vehemently opposed the World Bank's use of Doing Business methodology to assess the results of the OHADA reform.[582]

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[581] Doudou Ndoye, "OHADA, mythe et réalité" (1995) 27 Revue internationale de droit africain EDJA 7, at 7. The available statistics on the CCJA courtload provide support to this position: see Ba, *supra* note 392; see also the report of the OHADA Université d'OHADA 2008, available at http://www.ohada.com/fichiers/newsletters/438/compte-rendu-universite-ete.pdf (last visited 23 March 2009).

[582] For more details on this debate, see the OHADA newsletters of 15 February 2007, 27 February 2007, 20 July 2007, and 6 June 2008, available at http://www.ohada.com/newsletter.php.

APPENDIX II: Final interview guide

Introduction

-présentations

-expliquer le projet et la procédure d'entrevue

-formule de consentement

Section I. Renseignements sur l'entreprise

1. Renseignements généraux :
    a. Histoire, fondation, début des activités, croissance
    b. Propriété : entreprise individuelle ou société ? nombre d'associés

2. Activités principales
    a. Secteur : production, commerce, services...
    b. Description des activités
    c. Dimension géographique des activités : import-export ? Dakar, le pays, la sous-région, le continent, ailleurs dans le monde ?

3. Taille de l'entreprise, position concurrentielle

Section II. Rapports contractuels

J'aimerais maintenant que l'on parle de vos partenaires d'affaires, c'est-à-dire essentiellement vos clients et vos fournisseurs.

4. Avec qui faites-vous affaire en général ?

    -Nature et origine des partenaires : particuliers, PME, grosses entreprises, gouvernement ; étrangers, régionaux, ou locaux?

    -Nombre de fournisseurs et de clients

    -Stabilité et durée des relations d'affaires

5. Comment choisissez-vous vos fournisseurs (i.e. sur quelle base) ?

6. Pourquoi vos clients font-ils affaire avec vous plutôt qu'avec un de vos concurrents ?

7. Utilisez-vous l'écrit dans vos relations contractuelles ? Dans quelle mesure ?

8. Faites-vous appel au crédit ?
    a. Obtenez-vous du crédit auprès de vos fournisseurs ?
    b. Octroyez-vous du crédit à vos clients ?

9. On dit qu'au Sénégal les opérateurs économiques font toujours affaire avec les mêmes partenaires et fondent leurs rapports d'affaire sur la confiance mutuelle. Qu'en pensez-vous? Est-ce une affirmation qui s'applique à votre situation?

Section III. Résolution des conflits entre l'entreprise et ses partenaires

Dans les rapports d'affaires, il arrive qu'une des parties ne remplissent pas ses obligations, par exemple en ne payant pas au moment convenu, en n'effectuant pas le travail correctement, etc.

10. A quelle fréquence êtes-vous confrontés à de tels problèmes?

-si fréquent :

Pouvez-vous me décrire un problème que vous avez rencontré et qui est typique de ceux que vous rencontrez en général?

Comment le problème a-t-il été réglé?

Pourquoi avez-vous choisi ce moyen?

Dans des cas semblables, procédez-vous toujours de cette manière? Pourquoi? Que faites-vous sinon?

S'il y a eu recours à des négociations avec l'autre partie, avez-vous eu à faire beaucoup de concessions?

Aviez-vous prévu cette possibilité dans le contrat initial (marge de manoeuvre)?

-si peu fréquent :

Pouvez-vous me décrire un problème que vous avez rencontré récemment?

Comment le problème a-t-il été réglé?

Pourquoi avez-vous choisi ce moyen?

Dans des cas semblables, procédez-vous toujours de cette manière? Pourquoi? Que faites-vous sinon?

S'il y a eu recours à des négociations avec l'autre partie, avez-vous eu à faire beaucoup de concessions?

Aviez-vous prévu cette possibilité dans le contrat initial (marge de manoeuvre)?

-si aucun problème n'est reporté

Comment faites-vous pour éviter de tels problèmes?

Avez-vous des conseils à donner aux gens qui aimeraient éviter de tels problèmes?

Refusez-vous de faire affaire avec certaines personnes afin d'éviter les problèmes? Si oui, avec qui?

11. J'ai ici une liste de moyens qui sont utilisés par certaines personnes pour prévenir ou régler des différends contractuels. J'aimerais savoir à quelle fréquence vous faites appel à ces moyens : (jamais, parfois, souvent, toujours)

    - Renoncer, laisser tomber
    - Insister, "harceler"
    - Négocier
    - Demander à une relation commune d'intervenir – préciser qui (parents, amis, leader...)
    - Demander à la police d'intervenir
    - Demander à une autorité gouvernementale d'intervenir
    - Médiation d'un tiers avec l'accord de l'autre partie
    - Consulter un avocat
    - Envoyer une mise en demeure écrite
    - Centre d'arbitrage
    - Déposer une demande en justice
    - D'autres moyens? (menaces, force, honte, réputation...)

12. Recours judiciaires

    -Si le recours judiciaire a déjà été utilisé dans un autre cas que le problème décrit :

    Vous avez mentionné que vous avez déjà fait appel aux tribunaux judiciaires (parfois, souvent ou toujours).

    -Dans quel(s) cas (brièvement)?

    -Le feriez-vous de nouveau?

    -Si le recours judiciaire n'a jamais été utilisé :

    Vous avez mentionné n'avoir jamais recours aux tribunaux.

    -Avez-vous déjà considéré cette possibilité?

    -Qu'est-ce qui vous a convaincu de procéder autrement?

13. On dit qu'au Sénégal, les normes morales et religieuses font en sorte que les gens sont réticents à recourir aux tribunaux. Qu'en pensez-vous? Est-ce le cas dans votre secteur d'activités? Comment cela vous touche-t-il?