

DOING BUSINESS UNDER THE HOT SUN: HOW SMALL FIRMS DO BUSINESS AND PROCESS CONFLICTS IN KENYA

Elin Cohen*

Considerable amounts of money have been spent on reform projects aiming to strengthen institutions supporting business transactions in developing countries. To be able to evaluate the type and extent of reforms needed, this article presents a thick description of business practices among smaller businesses in Nyanza Province, Kenya. Entrepreneurs in developing countries form long-term relational contracts with a very limited number of suppliers, with whom disputes are rare and generally resolved without third party involvement. However, when entrepreneurs are unable to rely upon relational contracts with their customers, disputes are common and often remain unresolved. Due to the limited availability of suitable fora, firms are cautious to expose themselves to riskier transactions. Private mediation options have emerged in certain locations, but have, at present, limited reach. This article expands our understanding of business practices among smaller businesses in Africa and highlights institutional gaps, which if addressed, could prevent disagreements and facilitate dispute processing.

Introduction

It is well understood that smaller enterprises play a role in propelling economic development on the Sub-Saharan continent.¹ Studies from Sub-Saharan Africa estimate that

*Elin Cohen holds a JSD from Stanford Law School and is currently a consultant and a part-time lecturer at the University of Washington School of Law. I am grateful to Stewart Macaulay, Deborah Hensler, Thomas Heller and Bruce Owen for valuable comments and suggestions. I would also like to thank John Marie Mbeche and Dennis Willa for excellent research assistance and the editors at the Journal of International and Comparative Law at Chicago-Kent College of Law for their helpful comments. I would also like to thank the Fulbright-Hays Doctoral Dissertation Research Award for funding this research project.

¹ See Oliver Masakure, et al., *Performance of Microenterprises in Ghana: A Resource-Based View*, 16 J. SMALL BUS. & ENTERPRISE DEV. 466 (2009); Michael McPherson, *Growth of Micro and Small Enterprises in Southern*

micro and small businesses employ seventeen to twenty-seven percent of the adult population.² Considering that the majority of the population (sixty to ninety percent) is engaged in agricultural and pastoralist activities, the importance of this sector is significant.³

There is growing interest in supporting smaller enterprises in order to promote economic growth.⁴ In fact, billions of dollars have been spent on legal reform projects.⁵ Moreover, there is a growing consensus that the stability and the quality of institutions⁶ supporting business transactions are a determinant factor for economic development.⁷ However, what is less well understood is which legal institutions matter.⁸ Thus, assessing which legal institutions play a significant role in economic development involves highly contextualized evaluations, based on different countries, regions, industries, and segments of the population.⁹ Hence, it is of great

Africa, 48 J. DEV. ECON. 253 (1996); Donald C. Mead, *The Contribution of Small Enterprises to Employment Growth in Southern and Eastern Africa*, 22 WORLD DEV. 1881 (1994); Donald C. Mead & Carl Liedholm, *The Dynamics of Micro and Small Enterprises in Developing Countries*, 26 WORLD DEV. 61 (1998); Lisa Daniels & Donald C. Mead, *The Contribution of Small Enterprises to Household and National Income in Kenya*, 47 ECON. DEV. & CULTURAL CHANGE 45 (1998).

² Daniels & Mead, *supra* note 1, at 45.

³ *Id.*

⁴ Kevin Davis & Michael Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 896 (2008).

⁵ *Id.*

⁶ DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (James Alt & Douglass North eds., Cambridge Univ. Press 1990) (defines institutions as “the rules of the game in a society, or, more formally... the humanly devised constraints that shape human interaction. Thus, institutions reduce uncertainty in a society by establishing a stable structure around human interaction”).

⁷ NORTH, *supra* note 6, at 6; DANI RODRIK, IN SEARCH FOR PROSPERITY (Princeton Univ. Press 2003) (arguing that the quality of institutions is crucial for economic development); FRANCIS FUKUYAMA, STATE BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (Cornell Univ. Press 2004) (arguing that stable and well-functioning institutions are a precondition for economic development); Acemoglu, et al., *Institutions as the Fundamental Cause of Long-Run Growth*, in HANDBOOK OF ECON. GROWTH 385 (Philippe Aghion & Steven Durlauf eds., 2005); Philip Keefer & Stephen Knack, *Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 35 ECON. INQUIRY 590 (1997) (employing various indicators including the rule of law, the pervasiveness of corruption and the risk of expropriation and contract repudiation to show that the ability of poor countries to improve their economy is determined by the quality of institutions). Although much of the focus is on the quality of formal, public institutions (See, e.g., The World Bank Group, *Doing Business-Measuring Business Regulations*, available at <http://www.doingbusiness.org/> (where the World Bank is annually ranking countries' formal regulatory environment according to the ease of doing business). It has also been recognized that informal, private institutions play an important role in shaping business practices (See, e.g., Kevin J. Fandl, *The Role of Informal Legal Institutions in Economic Development*, 32 FORDHAM INT'L L.J. 1 (2008)).

⁸ Davis & Trebilcock, *supra* note 4, at 945.

⁹ *Id.* at 946 (“We hence conclude (rather in the spirit of Pande and Udry) that the next research frontier is likely to entail a much more labor-intensive and context-sensitive analysis of particular legal regimes and institutions (both

importance to understand how smaller businesses operate and what institutions they rely upon to be able to evaluate whether there is a need to reform the system that supports business transactions and to assess what type of change is needed. To date, there is sparse literature on business practices in Africa.¹⁰ Hence, this article seeks to expand our understanding of business practices among smaller businesses in Africa, in order to evaluate where flaws exist and how these flaws can be addressed.

There is a widespread assumption that small businesses in developing countries lack access to justice and are therefore unable to fully participate in the marketplace.¹¹ However, there is limited reliable data assessing the legal needs of these communities.¹² To this end, this article examines business practices, the prevalence of business disputes, and the means by which firms process their disputes.

To better understand the mechanisms that smaller enterprises rely upon to conduct business and how these mechanisms affect their behavior, this article examines how small businesses in western Kenya form business relationships and process business disputes. In particular, this article explores the availability and relevance of three different layers of

formal and informal) in particular societies”). See also Veronica Taylor, *Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter)*, 01 HAGUE J. RULE OF LAW 46, 50-51 (2009) (“The lack of precision and predictability in rule of law assistance is also attributable to a widespread lack of baseline research through which to develop ‘thick’ descriptions of the target legal system before we attempt the latest rule of law intervention”).

¹⁰ See, e.g., Arne Bigsten & Paul Collier, *Contract Flexibility and Dispute Resolution in African Manufacturing*, 36 J. DEV. STUD. 1 (2000); Marcel Fafchamps, *The Enforcement of Commercial Contracts in Ghana*, 24 WORLD DEV. 427 (1996); MARCEL FAFCHAMPS, MARKET INSTITUTIONS IN SUB-SAHARAN AFRICA: THEORY AND EVIDENCE (The MIT Press 2004); Marcel Fafchamps & Bart Minten, *Property Rights in a Flea Market Economy*, 49 ECON. DEV. & CULTURAL CHANGE 229 (2001); Julie Paquin, *Business Law Transplants and Economic Development: An Empirical Study of Contract Enforcement in Dakar, Senegal* (2010) (unpublished dissertation, Faculty of Law, McGill University) (on file with author).

¹¹ COMMISSION ON THE LEGAL EMPOWERMENT OF THE POOR AND THE UNITED NATIONS DEVELOPMENT PROGRAM, MAKING JUSTICE WORK FOR EVERYONE vol.1 (2008).

¹² Cf. HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (Hart Publ’g 1999) at 1 (“The rather unusually intense spotlight currently trained on the civil courts [in England] has been said to reveal a system in crisis: procedures that are too complicated; courts that are too slow; lawyers who are too aggressive; litigants who are bewildered and traumatized by their experiences; and an unquantified body of citizens whose access to the courts to vindicate rights is barred by these features. But where is the evidence for these assertions?”).

institutions that business parties might rely upon to support their business transactions, which are: (1) public institutions such as courts and chiefs; (2) personal business relations; and (3) private, non-governmental institutions such as business associations. This article is based upon extensive field work carried out among 279 small business owners in seven different towns in Nyanza Province in western Kenya.¹³ By exploring business practices among small business entrepreneurs in western Kenya, this article surveys the extent and circumstances in which small businesses in a developing economy rely upon a particular institution to process their business disputes.

I. Review of the Literature on Business Transactions in Developing Countries

The simplest contracts involve a cash-and-carry transaction where the buyer purchases a readymade product in cash and takes it with him when he leaves the seller. This form of transaction is very common among small traders and is referred to as the “flea market economy.”¹⁴ A cash-and-carry transaction requires little previous knowledge about the other partner because the buyer inspects the goods before purchase and the seller receives the full payment instantaneously. These types of transactions naturally involve fewer disagreements than more complex transactions. However, some argue that traders who avoid riskier transactions are also restricting their firms’ growth.¹⁵

¹³ The fieldwork was carried out by the author from May 2007 to December 2007. During the field work, Jean Marie Mbeche and Dennis Willa provided excellent research assistance. The study was funded by the Fulbright-Hays Doctoral Dissertation Grant. *See infra* Part II.

¹⁴ Fafchamps & Minten, *supra* note 10, at 231.

¹⁵ *Id.*, at 231 (“The need for traders to personally inspect quality of each delivery, for instance, combined with their unwillingness to delegate quality control to subordinates and their reluctance to hire additional workers for the fear of theft, undoubtedly restricts firm size and growth. The need to guard stock in person, the total absence of payment by check (which adds to the risk of theft), the infrequent use of trade credit and the difficulty in placing orders complicates the conduct of business and make trade very labor and management intensive.”).

However, for two parties to engage in a more complex transaction, they need to know that the other party has an incentive to fulfill its part of the contract. The parties might rely upon legal institutions to induce contract performance. However, McMillan and Woodruff argue that in many developing countries, the legal system is dysfunctional and contracting parties do not, therefore, rely on the courts to enforce contracts.¹⁶ Nevertheless, it is important to remember that worldwide, most legal disputes never reach a court house.¹⁷ Instead, in many disputes, the aggrieved party is resigned to the fact that a breach of contract has occurred, but decides for various reasons to take no further actions.¹⁸ Of those disputes that are processed,¹⁹ a large proportion is resolved through negotiations between the parties or by resorting to fora that are embedded in the social structure in which the dispute arose.²⁰ As a result, the majority of disputes that are brought before a third party are not brought to court.²¹ This does not

¹⁶ John McMillan & Christopher Woodruff, *Private Order under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2421 (2000).

¹⁷ See, e.g., Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (describing how business entrepreneurs in Wisconsin relied upon informal customs and understandings which often substituted formal provisions, and that formal sanctions were often replaced by informal dispute resolution mechanisms); Stewart Macaulay, *Freedom From Contract: Solutions in Search of a Problem?*, WIS. L. REV. 777 (2004).

¹⁸ Galanter, *supra* note 17, at 2.

¹⁹ To describe how disputes are dealt with, this article employs the term “processed” rather than “resolved.” As this article will demonstrate, there are various ways parties cope with or process disputes without actually resolving the dispute. Compare with, Bliss Cartwright, Marc Galanter and Robert Kidder, *Introduction: Litigation and Dispute Processing*, 9 LAW & SOC’Y REV. 5, note 1 (1974) (“we prefer /.../ “processing” to “settlement” or “resolution” to avoid the imputation that the process necessarily leads there.”); William L.F. Felstiner, *Influence of Social Organization on Dispute Processing* 9 LAW & SOC’Y REV. 63, note 1 (1974) (“this paper reflects a preference for the term “dispute processing” instead of the more common “dispute settlement.” My aversion to “dispute settlement” is based on the conviction that a significant amount of dispute processing is not intended to settle disputes, that a greater amount does not do so and that it is often difficult to know whether a dispute which has been processed has been settled, or even what the dispute was about in the first place”).

²⁰ Galanter, *supra* note 17, at 2; Eric Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313 (2006) (discussing enforcement of rules and norms in the closed network of tuna traders in Japan); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing enforcement of rules and norms within the closed network of diamond traders in New York City).

²¹ Galanter, *supra* note 17, at 3 (“courts resolve only a small fraction of all disputes that are brought to their attention. These are only a small fraction of the disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes.”); Cf. Republic of Kenya, *Governance, Justice, Law and Order Sector Reform Program, National Integrated Baseline Household Report*, at 32 (2006), available at

necessarily indicate that a well-functioning court system is not important for a healthy business environment. Rather, as Macaulay has argued, the main function of trials is not dispute resolution, but to deter other trials.²²

The social and economic community in which contracting parties are operating could impose sanctions upon a party in breach.²³ Likewise a party could unilaterally impose sanctions upon the breaching party in a contract.²⁴ Thus, it has been observed that market intermediaries, such as trade associations, enable the flow of information about past transactions and can coordinate collective sanctions against defaulting parties.²⁵ Private arrangements can induce compliance through social pressure by exploiting concerns of losing one's business reputation or by threatening the use of violence.²⁶ Hence, this article explores how small business entrepreneurs in a developing country form business relationships and process disputes. In particular, the study investigates what public recourses exist and to what extent small business entrepreneurs turn to these institutions to resolve their disputes. Moreover, the article explores the role that personal business relationships play in influencing actors to take riskier transactions and to process disputes. Finally, this article examines the extent to which private associations have developed mechanisms to facilitate dispute resolutions.

<http://www.gjlos.go.ke/gjlos%20final%20report.pdf> (the Government, Justice, Law and Order survey from Kenya asked 12,000 randomly selected participants what the most common disputes in their community were and how these disputes were resolved. The survey found that the third parties that most commonly were employed to mediate disputes were the chief (45%), local elders (22%), and the police (9%), while only 4% identified the courts to commonly resolve disputes).

²² Macaulay, *Freedom From Contract: Solutions in Search of a Problem?*, *supra* note 17, at 780.

²³ Bernstein, *supra* note 20.

²⁴ Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship between Public and Private Orders*, 98 MICH. L. REV. 2459, 2460 (2000).

²⁵ McMillan & Woodruff, *supra* note 16 at 2423; Bernstein, *supra* note 20, at 119-120.

²⁶ Marcel Fafchamps, *Spontaneous Markets, Networks, and Social Capital: Lessons from Africa*, Oxford Economic Papers GPRG-WPS-058, at 4 (2006) available at www.economics.ox.ac.uk/index.php/papers/details/spontaneous_markets_networks_and_social_capital_lessons_from_africa/.

A. The Role of Courts

The discourse on the role of courts in economic development has evolved from the rigid view that courts are the main institutions enforcing contracts and that weak legal systems lead to fewer transactions²⁷ to a more nuanced and contextualized understanding of the use of courts in commercial disputes.²⁸ It is well understood that parties might find court settlements irrelevant to their needs because their case might not be settled for years or because the reliability of enforcement may be uncertain.²⁹ Furthermore, it is costly to take a case to trial.³⁰ Hence, disputes concerning smaller transactions do not reach the courts due to the high cost of legal proceedings and the relatively low amount of money at issue in the dispute.³¹ Moreover, some parties believe that litigation would harm their business reputations.³² Therefore, disputes typically reach the courts when a business relationship has come to an end.³³ Instead, a variety of factors, including the parties' relationship, the efficiency and the reliability of the legal

²⁷ WORLD BANK, *DOING BUSINESS 2004: UNDERSTANDING REGULATIONS* 41 (World Bank and Oxford Univ. Press 2004) (describing a hypothetical scenario where a client refuses to pay a bill in full upon delivery of the agreed goods and what would happen in four countries, ranging from "comply and pay" to not dealing with the client in the first place. "Why the difference? The answer lies in the efficiency of courts—the main institution enforcing contracts."). See also HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 185 (June Abbott trans., Harper and Row Publisher 1989) ("All 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, like our own, that are not industrialized").

²⁸ Macaulay, *Freedom From Contract: Solutions in Search of a Problem?*, *supra* note 17, at 780 (arguing that the main function of trials is not dispute resolution, but rather to deter other trials).

²⁹ Porat, *supra* note 24, at 2468.

³⁰ *Id.* at 2467.

³¹ *Id.*

³² FAFCHAMPS, *MARKET INSTITUTIONS IN SUB-SAHARAN AFRICA: THEORY AND EVIDENCE* *supra* note 10, at 67 (describing how respondents in African firms expressed anxiety about having their name muddied by the publicity of a contractual dispute and did not want to acquire a reputation for undue toughness. Instead, private resolution of contractual matters was deemed preferable).

³³ McMillan & Woodruff, *supra* note 16, at 2451 (found in their study among entrepreneurs in Vietnam that in 86% of the cases where courts were used, the disputant's relationship with the other party ended); See also Bigsten & Collier, *supra* note 10, at 28 (found that firms in six African countries would only seek assistance from lawyers or the court when they lost confidence in the other party. As long as the firm thought that the other party acted in good faith, legal institutions were not invoked).

system, as well as the availability of alternative dispute resolution forums determine how disputants process disputes.³⁴

B. The Role of Relational Contracts

Globally, the exchange of goods and services often takes place between parties that have built a relationship over time, rather than between strangers.³⁵ Macneil refers to this concept as “relational contracts.”³⁶ The basis for this enforcement mechanism is a reciprocal cooperation strategy.³⁷ Macaulay notes that “long-term continuing relations have their own norms and sanctions that will serve to get almost all contracts carried out in an acceptable fashion.”³⁸ As a result, it has been observed that the majority of contractual disputes are resolved amicably, which enables trade between the disputing parties to resume.³⁹

Contract flexibility plays an important role in accommodating the realities of doing business in a developing country. For instance, due to poor infrastructure and power shortages,

³⁴ See, e.g., Manuel A. Gomez, *All in the Family: The Influence of Social Networks on Dispute Processing - A Case Study of a Developing Economy*, 36 GA. J. INT’L & COMP. L. 291, 331-332 (2008) (In a corrupt legal setting, a plaintiff’s decision about whether he will bring a case to court depends on whether he thinks the corrupt practice will work in his favor or not. In a study on procedural choices among business disputants in Venezuela, Gomez finds that social networks determine where disputes are settled. “An average business disputant in Venezuela knows that the first step before filing a lawsuit is to identify a well-connected lawyer, a friendly court, a familiar judge, and of course be open to gratify court employees for being diligent”).

³⁵ Jane Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC’Y REV. 193 (1994) (For a discussion on relational contracts among small businesses in Taiwan); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Harvard Univ. Press 1991) (for a description of how cattle rangers in northern California settle disputes); Kathryn Hendley et al., *Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises*, 52 EUR. ASIA STUD. 627 (2000) (for a discussion on how business partners in Russia process disputes); AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* (Cambridge Univ. Press 2006) (for a historical perspective of relational practices in medieval trade).

³⁶ Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 886-887(1978).

³⁷ Robert Axelrod, *The Emergence of Cooperation among Egoists*, 75 AM. POL. SCI. REV. 306, 308 (1981). (Axelrod refers to this strategy as “TIT FOR TAT,” which he defines as “the policy of cooperating on the first move and then doing whatever the other player did on the previous move.”)

³⁸ Macaulay, *Freedom From Contract: Solutions in Search of a Problem?*, *supra* note 17, at 788-789.

³⁹ Bigsten & Collier, *supra* note 10, at 11 (found in a study of business practices in six African countries that firms had long term and loyal relationships with their clients and suppliers. The study found that the majority of contractual disputes were resolved amicably and trade was resumed in most cases).

manufacturing businesses in Africa are often faced with delays beyond their control.⁴⁰ Hence, studies on small business entrepreneurship carried out in Africa show that when a business party is temporarily unable to perform, the contract is renegotiated.⁴¹

Relational contracts work well in situations where it takes time and is costly to replace a business relation.⁴² Therefore, relational contracts are adequate in situations where a producer is locked into a relationship because it is very difficult to identify reliable suppliers.⁴³ Fafchamps finds that the difficulty in finding another reliable supplier gives value to the relationship and incentivizes the supplier to extend credit to regular customers.⁴⁴ Cooter observes that dependence upon relational contracts is stronger when the state enforcement of contracts is ineffective.⁴⁵ He argues that relational contracts increase trust, but channel transactions away from potentially better deals with outsiders, thereby reducing competition.⁴⁶ This assertion presumes that there is an abundance of suppliers, but as this study shows, in many locations and industries the number of available suppliers is very limited.

The passage of time is necessary for more complex transactions to take place, but it also makes a party more vulnerable to a breach of contract. Likewise, creditors are vulnerable to a breach of contract when available or suitable venues for recourse are limited, as they are in most

⁴⁰ Marcel Fafchamps et al., *Inventories and Risk in African Manufacturing*, 110 *ECON. J.* 861, (2000) (found in a study from Zimbabwe that manufacturing firms hold large inventories to shelter themselves from late deliveries and late payments); Paquin, *supra* note 10, at 122–125 (found that firms in Dakar, Senegal were faced with uncertainties due to poor infrastructure, unreliable supply of electricity, political instability in neighboring countries and unpredictable public institutions).

⁴¹ See Bigsten & Collier, *supra* note 10 (found that firms expected contracts to be flexible and that contract flexibility was the norm among surveyed firms in five African countries); Paquin, *supra* note 10, at 135 (argued that firms adopted a flexible approach towards contract enforcement to preserve future relations).

⁴² Avner Greif, *Commitment, Coercion and Markets: the Nature and Dynamics of Institutions Supporting Exchange*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 727, 732 (Claude Ménard & Mary Shirley eds., 2005).

⁴³ Fafchamps, *supra* note 26, at 15; Simon Johnson, John McMillan & Christopher Woodruff, *Courts and Relational Contracts*, 18 *J. L. ECON. & ORG.* 221, 261 (2002) (found in a study from Vietnam that customers paid their bills because they had nowhere else to go if they lost their current supplier).

⁴⁴ Fafchamps, *supra* note 26, at 15.

⁴⁵ Robert Cooter, *Doing What You Say: Contracts and Economic Development*, 59 *ALA. L. REV.* 1107, 1112 (2008).

⁴⁶ *Id.*

developing countries. Therefore, creditors are cautious and vet their clients carefully before they extend credit.⁴⁷ McMillan and Woodruff found that firms offer customers credit when the customer is locked into the relationship and finds it hard to locate an alternative supplier.⁴⁸ As the use of formal collateral is impractical for most business transactions, trade credit gets allocated on the basis of trust.⁴⁹ Trade credit is typically offered on a selective basis and those who do not qualify for credit must pay in cash. Consequently, as only very small firms can operate on a cash-only basis, the mode of establishing trust and selecting who gets credit is believed to determine which firms have the potential to grow and which must remain micro-enterprises.⁵⁰

C. Business Associations as Market Intermediaries

It has been argued that trade associations or market intermediaries can substitute for a weak legal system.⁵¹ However, it has also been observed that business parties in certain industries opt out of a seemingly functional public legal system to instead rely upon a private order which is perceived to respond better to the particular culture and customs in the industry.⁵²

⁴⁷ FAFCHAMPS, MARKET INSTITUTIONS IN SUB-SAHARAN AFRICA: THEORY AND EVIDENCE, *supra* note 10, at 172-173. (Discussion results from an extensive study among African firms to determine how trade credit from suppliers was established. Fafchamps found that credit was extended to buyers based upon trust and reputation. In practice this was attained by first having the buyer pay in cash to establish that the buyer was a good paymaster. A small amount of credit would then be extended and, if the buyer was successful at paying on time, the credit limit would be raised after a period of time. Some creditors would also inspect the client's workplace to be able to locate the client and to assess the success of the business. Business relations played a role in establishing credit while family relations or formal requirements played almost no role in establishing credit).

⁴⁸ John McMillan & Christopher Woodruff, *Interfirm Relationships and Informal Credit in Vietnam*, 114 Q. J. ECON. 1285, 1286 (1999).

⁴⁹ Fafchamps, *The Enforcement of Commercial Contracts in Ghana*, *supra* note 10, at 441.

⁵⁰ Marcel Fafchamps, *Ethnicity and Credit in African Manufacturing*. 61 J. DEV. ECON. 205, 209 (2000).

⁵¹ McMillan & Woodruff, *supra* note 16, at 2421; *See also* Deborah Bräutigam, *Substituting for the State: Institutions and Industrial Development and Eastern Nigeria*, 25 WORLD DEV. 1063 (1997).

⁵² ELLICKSON, *supra* note 35, at 283 (finding in his study of cattle rangers that "members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members. This hypothesis suggests that people often choose informal customs over law not only because customs tend to be administratively cheaper but also because substantive content of customary rules is more likely to be welfare maximizing"); *See also* Feldman, *supra* note 20; Bernstein, *supra* note 20.

Hence, studies have observed that when members of a group repeatedly transact with each other, the members have an interest in adhering to the group's internal rules so as to be able to transact in the future.⁵³ In these types of vertical business networks, where members of the group are continually transacting with each other, contracts between the members of the group can be enforced through group punishment.⁵⁴ In her study of diamond merchants in New York City, Bernstein describes how traders were dependent on membership in the industry's bourse to be able to conduct business.⁵⁵ Hence, parties to a dispute had to adhere to the same rules which effectively could be enforced.⁵⁶ Other similar arrangements have been observed within specialized industries in the United States,⁵⁷ in Japan⁵⁸ in ethnically-based business networks⁵⁹

⁵³ Bernstein, *supra* note 20; ELLICKSON, *supra* note 35; Winn, *supra* note 35, at 206; Greif, *supra* note 42, at 731 (discussing how public order institutions, such as courts and the police are sanctioned by the state, while private order institutions rely mainly on social and economic sanctions).

⁵⁴ Bernstein, *supra* note 20, at 115 (describing how diamond traders who dominated the industry developed an elaborate set of internal rules and sanctions to handle disputes among industry members).

⁵⁵ *Id.*

⁵⁶ *Id.* at 128, 149 (finding that diamond traders used a very sophisticated method for group punishment where internal arbitrators handle disputes between members of trade bourses. The existence and the outcome of the dispute was kept secret as long as the parties complied with a decision on time. In case a party did not comply, the decision and a picture of the non-complying member was posted in the club room and the information was also communicated to all other bourses in the world federation. The exposure of a non complying member could put that person out of business almost instantaneously).

⁵⁷ Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

⁵⁸ Feldman, *supra* note 20 (finding in his study of tuna traders in Japan (a highly specialized and closely knit industry) that a state sanctioned dispute resolution forum was embedded in the tuna trading market. This so-called "tuna court" was exclusively used by the tuna traders for settling disputes, since it was highly adaptable and responsive to the specific needs in the industry. The author argues that the tuna traders did not reject state law, as such, nor did they utilize the centrally administered system of courts, but rather they embraced the specialized, state-created tuna court).

⁵⁹ It has been observed in many parts of the world that the ethnic makeup of prominent business communities is quite different from that of the population at large. See Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349 (1981); Bernstein, *supra* note 20; Bernstein, *supra* note 57. See also Yuan-Li Wu, *Chinese Entrepreneurs in South East Asia*, 73 AM. ECON. REV. 112 (1983); William Glade, *The Levantines in Latin America*, 73 AM. ECON. REV. 118 (1983); Vijaya Ramachandran & Manju Kedia Shah, *Minority Entrepreneurs and Firm Performance in Sub-Saharan Africa*, 36 J. DEV. STUD. 71(1999); Tyler Biggs, Mayank Raturi & Pradeep Srivastava, *Ethnic Networks and Access to Credit: Evidence from the Manufacturing Sector in Kenya*, 49 J. ECON. BEHAV. & ORG. 473 (2002) (finding that Kenyan-Asian firms could access trade credit more easily and faster than Kenyan-African firms due to their socialization patterns which created channels for credible information flows).

and in medieval Europe.⁶⁰

However, effective group punishment for non-compliance requires the circulation of correct information about the contract breach and a coordinated community response. For the community responses to be effective, the business network must (1) monitor and screen its own members; (2) inspect both their members and the other parties doing business to verify the claim of cheating; (3) coordinate community responses; and (4) ensure that all members adhere to the sanctions.⁶¹ The ability of business or trade associations to have such control over the dealings of their members has proven to be difficult in most settings. Fafchamps, who has conducted extensive research on manufacturing firms and agricultural traders in many countries in sub-Saharan Africa, finds no evidence of coordinated community responses in this region.⁶² Instead, he found that respondents displayed little fear that failing to pay a supplier would affect their credit among other suppliers.⁶³ Fafchamps argues that coordinated punishment strategies are difficult to sustain because a member of a business club that refuses to punish (not trade) with a cheating buyer, will himself face punishment by other members.⁶⁴ This requires that members be able to observe each others' dealings and that the members be dependent on each other to trade.⁶⁵ Hence, the literature demonstrates that collective sanctions administered through business groupings work in closed industries like the diamond industry, but appear to be difficult to enforce in less coherent groups.

⁶⁰ Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: the Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); GREIF, *supra* note 35; Paul Milgrom, Douglass North & Barry Weingast, *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant*, 2 ECON. & POL. 1 (1991).

⁶¹ McMillan & Woodruff, *supra* note 16, at 2426-2430.

⁶² Fafchamps, *supra* note 26, at 21; Fafchamps & Minten, *supra* note 10, at 257-258 (“Trust is established primarily through repeated interaction. Information on bad clients does not circulate widely; hence, group punishment for nonpayment is severely limited.”).

⁶³ Fafchamps, *supra* note 26, at 21.

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 17-21.

II. Methods

This study was carried out in seven towns, located in four different districts in Nyanza Province in western Kenya from May to December 2007. Nyanza Province is located in the southwest corner of the country and is one of the country's eight provinces. Nyanza is located on the eastern shore of Lake Victoria. The Lou is the main ethnic group in the province.⁶⁶ The provincial capital is Kisumu, the third largest city in Kenya. The province is made up of twelve districts and has a total population of 4.4 million people.⁶⁷

This study included seven towns, each with a population ranging from 22,000-65,000 people.⁶⁸ In each town there was one business association for small business entrepreneurs. An enumeration of all the businesses in these towns showed that the five dominant trades were carpentry, metalworking, tailoring, automobile repair maintenance and food production. The food production traders were not included in the study as they predominantly conducted business on a cash-and-carry basis, and some of the questions this study sought to answer were not applicable to that group. The remaining four trades, which display similarities in both training and business practices, formed the study population. The study population was grouped into two strata.⁶⁹ The first stratum contained small business owners that were members of the small business association. The second stratum contained small business owners that were not members of the small business association. For the purpose of this paper, the two strata have been merged unless otherwise noted. The study includes 279 participants, chosen through optimum allocation, or in other words, through random sampling from the two groups.⁷⁰

⁶⁶ MILLENNIUM CITIES INITIATIVE OF COLUMBIA UNIVERSITY, INVEST IN KENYA: FOCUS KISUMU JULY 2007 6-7 (2007) available at <http://www.vcc.columbia.edu/documents/KisumuGuide-FINAL.pdf>

⁶⁷ CENTRAL BUREAU OF STATISTICS (KENYA), KENYA 1999 POPULATION AND HOUSING CENSUS 5, xxxiii (1999).

⁶⁸ *Id.* at 3-2.

⁶⁹ FLOYD J. FOWLER JR., SURVEY RESEARCH METHODS 33-34 (2001).

⁷⁰ *Id.* at 18.

Furthermore, focus group discussions with a smaller number of participants were carried out at each of the seven locations after the survey had been administered.⁷¹ The participants in the focus group discussions were selected based upon their experience with the topics covered by the discussions.⁷² Moreover, multiple in-depth interviews with key informants were carried out.⁷³ In addition, the business associations' meetings were observed throughout the research period.⁷⁴ To protect the privacy of the participants, the names of the towns are fictive.

III. The Business Communities in Nyanza Province

In Kenya, the small business sector is referred to as the *jua kali* sector. The term, which in Swahili means “under the hot sun,” refers to small-scale retail, manufacturing, and service businesses. The sector employs about two-thirds of the economically active population outside of farming and pastoralist activities⁷⁵ and is considered to play a vital part in the country's economy.⁷⁶

The businesses included in this study were small manufacturing and repair businesses with just a few employees.⁷⁷ Besides their regular employees, it was common for businesses to hire temporary help for bigger orders.⁷⁸

⁷¹ JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 211 (2009).

⁷² *Id.* at 178.

⁷³ *Id.* at 181.

⁷⁴ *Id.*

⁷⁵ GOVERNMENT OF KENYA, NATIONAL DEVELOPMENT PLAN 2002-2008 at 4 (2001).

⁷⁶ GOVERNMENT OF KENYA, SESSIONAL PAPER NO 2 OF 2005 ON DEVELOPMENT OF MICRO AND SMALL ENTERPRISES FOR WEALTH AND EMPLOYMENT CREATION FOR POVERTY REDUCTION, iii (2005) (“Micro and small enterprises (MSEs) cut across all sectors of the country's economy and provide one of the most prolific sources of employment, not to mention the breeding ground for medium and larger industries, which are critical for industrialization. Today, these enterprises are found in every corner of Kenya and they have great potential for creating a variety of jobs, while generating widespread economic benefits”).

⁷⁷ The majority of firms did not have any regular staff (57%), 19 % of the participants had only one employee, 15% had two employees and 5% had three employees. A small number of participants (4%) had four to eight staff, but no one had more than eight regular employees. Of the 279 participants, 16% were auto mechanics, 29% tailors,

The majority of participants started their own business because they could make more money than if they were employed in the same profession (43%, N=119). One focus group participant said, “I can’t accept to be employed because when employed, you only wait for your salary that comes at the end of the month and you can be employed for only 300 shillings per day. While here at *jua kali* you can even make 3,000 shillings per day.”⁷⁹

Most entrepreneurs used their own savings to start a business (65%, N=180). They started often with just a few tools and would then add more tools and machinery as the business progressed. One participant noted: “[As an employee,] I bought tools one by one every month until I was ready to start my own garage.”⁸⁰ About a quarter of the respondents obtained monetary or in-kind assistance from family or friends (24%, N=66). There were also instances where a mentor assisted a trainee in opening his or her own shop (6%, N=16). However, loans from micro-finance institutions were rarely used to start a business (4%, N=12). During the course of running the business, fifteen percent of the entrepreneurs had taken out a micro-finance loan, which most commonly was used for business-related investments.⁸¹

24% metalworkers and 29% carpenters. Due to the nature of these businesses, a majority of all owners were men (81%). The female owners were predominantly running tailoring businesses (94%).

⁷⁸ It was also common to train apprentices in the workshop. An apprenticeship is typically two years (three for auto mechanics) and the apprentice pays the trainer an annual fee. The fee is negotiated but is typically around 10,000 Kenyan shillings per year. Sixty-six percent of the participants had at least one trainee.

⁷⁹ Focus group discussion #10, in Kumi, Kenya (Aug. 13, 2007). At the time of this research project, \$1=68 Kenyan shillings. Note that the stated earnings in this case are well above the estimated average. One quarter of the participants started their own business because they could not find other employment (25%). It was much more common for women (39%) than men (22%) to start their own business due to lack of other work opportunities. However, an almost equal number of artisans (23.5%) started their own business out of desire to be their own boss.

⁸⁰ Interview with Participant # 351214 (Oct. 18, 2007).

⁸¹ Microfinance loans were commonly used for a business related investment (77%) but were also used to pay school fees (19%). As collaterals are often not available, it is a common practice that borrowers need to save a certain amount of money with the micro finance institution before a loan is granted. Twenty two percent of the participants said they were unable to save money and they could therefore not obtain a loan. One man said: “I earn so little I can’t even afford to save.” One-fifth of the participants said that there was no microfinance institution located close to their business. Participants from all the seven towns are represented in this category but in fact, there were microfinance institutions (MFI) in all towns but one. People in the other towns might not have been aware of the MFI or found the distance between the MFI office and their business to be too far. A third important factor for why the participants did not seek out the MFIs can be attributed to their own personal bad experience (13.5%) or friends’ or relatives’ (18%) negative experience with a microfinance institution. One auto mechanic

Sixty-four percent (N=176) of the entrepreneurs did not keep accounting books of their earnings. Consequently, a majority of the participants did not know what their profit was. Eight percent (N=23) of the participants found their business to be successful. One carpenter said, “I have done a lot with my business. I have a piece of land and good tools because of my business.”⁸² However, the majority of the owners (67%, N=186) thought that their business was doing fair; while one quarter thought that it was not doing well.

Half of the participants included in this study were members of a small business association, also known as a *jua kali* association. In each town, there was only one small business association and the number of actively participating members ranged from thirteen to one hundred and twenty. These associations were primarily started to be able to access assistance from the government for small business development, but some associations also took an interest in supplying their members with services that were otherwise not available.⁸³ The small business associations observed in this study were made up of entrepreneurs who operated similar types of businesses; and the members primarily transacted business with partners, such as customers and suppliers, who did not belong to the association.

A. Crimes, Physical Security and the Police

Relatively few participants had been burglarized, but a break-in could have devastating consequences for the individual business owner. The police appeared to play a rather passive role in burglary investigations and a sizable number of victims of burglaries or attempted

said: “We fear it because [an MFI] collapsed with my 28,000 shillings.” There exists a myriad of lenders and as there is not coordinated regulation or oversight it is not uncommon that money is misappropriated. Moreover, as the interest rates on many microfinance loans are 20%, 10% of the participants found the loan condition unfavorable. Finally, some entrepreneurs (7.5%) said they did not need a loan.

⁸² Interview with Participant # 321021(Aug. 22, 2007).

⁸³ Elin Cohen, *Improving the Business Climate Under the Hot Sun: Do Small Business Associations Make a Difference? A Study of Four Districts in Nyanza Province, Kenya*, (Mar. 12, 2010) (unpublished dissertation, Stanford Law School) (on file with author).

burglaries decided to not report the crime to the police. During the year preceding the study, five percent (N=14) of the firms had been burglarized and another five percent (N=14) had experienced an attempted burglary.⁸⁴ Fifty-five percent (N=154) of all the firms used either shared or individual night security.⁸⁵ Some owners spent a fair amount of money on security,⁸⁶ despite the fact that an almost equal number of shops with security as compared to those without security were attacked.⁸⁷

For the individual owner, a burglary could have catastrophic consequences. One such owner explained: “Thieves came and broke into my workshop. I went to the police station and the police didn’t do anything. I had hoped that they would find even one thing but they didn’t. Everything that I had was gone and I had to start afresh. Stock worth over 100,000 shillings was lost in a night.”⁸⁸ Moreover, if an artisan was burglarized and customers’ goods were stolen, the artisan had to repay the customer. For instance, one artisan said: “I was burglarized at the store where I keep my things. The customers took me to the chief and I have been paying them [back] in bits.”⁸⁹

Fifty-nine percent (N=16) of businesses that experienced burglaries or attempted burglaries reported them to the police. Besides the hope that the police would be able to recover the stolen goods, which happened in only two of the sixteen reported cases,⁹⁰ business owners reported that they found it helpful to file a formal complaint in order to explain to the customers

⁸⁴ Interviews with 279 study participants, in Nyanza Province, Kenya (Aug. 1 – Dec. 1, 2007).

⁸⁵ *Id.*

⁸⁶ *Id.* (One night watchman would typically cost 2,000-3,500 shillings per month, divided by the number of shops that shared him).

⁸⁷ We do not know if the businesses that did hire night guards were more prone to being burglarized. There might be other explanations as well; the watchman could have been outnumbered by the attackers or complicit in the burglary. One participant in a focus group discussion said, “At the time we had the break-ins we had two night guards. When we asked them about the night raids they told us they never heard anything and so we decided to terminate their services since we can’t pay them and still there is insecurity. For now we don’t have any night security.” Focus Group Discussion #7, in Nene, Kenya (Nov. 19, 2007).

⁸⁸ Focus group discussion #3, in Nene, Kenya (Nov. 14, 2007).

⁸⁹ *Id.*

⁹⁰ It appears that it was the same perpetrator in the two resolved cases.

that their property had been stolen. One owner explained: “I had to report it so that I could prove to the customer that indeed there was a break-in; and with that the customers gave me more time to repay them.”⁹¹ However, forty-one percent (N=11) of the victims of burglary or attempted burglary decided to not report the matter to the police. The respondents stated the following reasons for not reporting the attack: i) in case of an attempted burglary there was no point in reporting the matter since nothing was stolen;⁹² ii) the police could not act on the complaint unless the business owner knew who the suspect was;⁹³ or iii) the business owner feared the police.⁹⁴ One owner explained: “I didn’t report it. It was the second [burglary] in two years. The first time I reported it to the police, but they ended up locking me in saying that I was the one who sold the customers goods, then staged a managed raid.”⁹⁵ In some instances, following an attack on the business premises, the business owner or his employees would sleep in the workshop to guard the property. One such owner said: “I didn’t report [the attempted burglary] because there were no suspects. So what I do is to sleep here in the workshop every night to take care of it. I bought a generator for 40,000 shillings this year that is in the workshop.”⁹⁶ Another owner reported that he would bring his tools home every night to keep them safe: “The police asked if I suspected somebody. But I was home asleep. It was at night so how can I suspect someone? They took machinery for 15,000 shillings. Now I carry my tools home every evening. I take them home on the back of my bike.”⁹⁷

⁹¹ Interview with Participant # 351208 (Nov. 18, 2007).

⁹² *See, e.g.*, Interview with Participant # 330102 (Sep. 11, 2007) “I didn’t report it because nothing was stolen and I had no suspects.”

⁹³ *See, e.g.*, Interview with Participant # 350238 (Oct. 24, 2007) “There was no need since I didn’t have any suspects and the police is always insisting on a list of suspects.”

⁹⁴ *See e.g.*, Interview with Participant #330119 (Sep. 13, 2007) “No I didn’t report it. I fear dealing with them. They once beat up a person [thinking] that he is a suspect; yet he was the victim.

⁹⁵ Interview with Participant # 330115 (Sep. 13, 2007).

⁹⁶ Interview with Participant # 391257 (Oct. 30, 2007). *Cf.* Fafchamps & Minten, *supra* note 10, at 230 (reporting that grain traders in Madagascar slept in their store to ensure that their stocks were protected).

⁹⁷ Interview with Participant # 341046 (Aug. 30, 2007).

B. Business Relations and Business Disputes

The business relations that the small business owners in Nyanza had with their suppliers and with their customers had very different characteristics. The relationships between the entrepreneurs and the suppliers could be characterized as relational contracts. There were few disputes between artisans and suppliers, and those that did occur were settled without outside involvement. The relationships between artisans and their customers, on the other hand, were more complex. Many more disputes arose between these two groups due to certain practices in the business culture and flaws in sanctioning breaches of contract. As these businesses operated in resource poor settings, a business culture developed where the primary focus was to secure orders, with little consideration for whether the order could be delivered on time or if the price would cover the cost of producing a good quality product. Secondly, the limited availability of fast, fair and inexpensive means to resolve disagreements created opportunistic behaviors.

Nevertheless, it is important to keep in mind that some of these results are expected and typical. For instance, even in some settings where access to reliable courts is widely available, most disputes are settled without any litigation.⁹⁸ However, the prevalence of other findings, such as late deliveries, the inability to collect debts, and the use of the police to enforce contracts can be attributed to the specific business environment in which these enterprises operate.

C. The Relationships between Entrepreneurs and their Suppliers

There were very few suppliers in each of the seven towns included in this study. It appeared to be common practice for these suppliers, at times, to collude to set a uniform price for supplies.⁹⁹ Approximately half of the entrepreneurs travelled to another town to purchase

⁹⁸ See, e.g., Macaulay, *Freedom From Contract: Solutions in Search of a Problem?*, *supra* note 17 at 779-780.

⁹⁹ Interview with Participant # 390272 (Nov. 2, 2007).

supplies. Due to the limited number of local suppliers and the extra time and cost involved in purchasing supplies from another town, entrepreneurs did business with a limited number of suppliers.

The entrepreneurs included in the study had, on average, only two regular suppliers.¹⁰⁰ Almost half of the main suppliers (47%) were located in the town in which the entrepreneurs operated.¹⁰¹ The artisans visited their suppliers frequently, sometimes daily. Most business owners kept basic supplies in stock, but a new order generally required a visit to the supplier.¹⁰² In between orders, the entrepreneurs visited the supplier to check on prices, settle bills, or to inspect supplies with prospective customers before placing an order. As long as the entrepreneur was satisfied with the quality of the material and the pricing, he or she took care to cultivate the relation and remained loyal to the same supplier(s).¹⁰³

Two-thirds of the artisans could not buy supplies on credit, while twenty percent (N=55) received credit from suppliers located in the same town.¹⁰⁴ A supplier might perceive it to be a greater risk to grant credit to a customer located in another town because it is harder to visit that workshop or learn from other customers or suppliers about that customer's success or hardship in the business.¹⁰⁵ It is unsurprising therefore that fewer artisans obtained credit from suppliers located in a different town (12%, N=32).¹⁰⁶ For the most part, the entrepreneurs traveled in person or sent an employee to collect supplies purchased on credit from a supplier in another

¹⁰⁰ Interviews with 279 study participants, *supra* note 84.

¹⁰¹ *Id.*

¹⁰² *See e.g.*, Interview with Participant # 321008 (Aug. 22, 2007) "I used to buy in bit but very frequently and so with time they have come to know me."

¹⁰³ *See e.g.*, Interview with Participant # 330102, *supra* note 92, "I am a long time customer and all my materials I get from them."

¹⁰⁴ Interviews with 279 study participants, *supra* note 84.

¹⁰⁵ Fafchamps, *The Enforcement of Commercial Contracts in Ghana*, *supra* note 10 at 431.

¹⁰⁶ Interviews with 279 study participants, *supra* note 84.

town.¹⁰⁷ This was rather time-consuming and took at least half a day. Therefore, it is interesting that, in a small number of cases, the business owner was able to call the supplier to have the goods delivered by a *matatu*, or public service vehicle. One auto mechanic explained that “if a *matatu* brings it, I pay them more than the normal [one way] fare since [the *matatu* crew] will go and pick it [from the supplier] and bring it to my place of work.”¹⁰⁸ This is a very effective way to order supplies because it is less costly and much more time-efficient, but it requires a higher level of trust because multiple parties are involved.

As opposed to the diamond industry described by Bernstein¹⁰⁹ or the Bazaar economy described by Geertz¹¹⁰ where social and religious norms and values penetrate business decisions, business decisions among small firms in Nyanza were a function of a partner’s trustworthiness as demonstrated by previous transactions. Consequently, a supplier’s decision to grant credit was most frequently based upon the trustworthiness of an entrepreneur, while family and social relations played a marginal role.¹¹¹ In a vast majority of cases (76%, N=63) the entrepreneurs were granted credit because they had been long-time, regular customers who always paid dues on time.¹¹² One metalworker explained: “We have done business for a long time and he has come to trust me since I always pay as agreed.”¹¹³ An artisan could also gain a supplier’s trust by being recommended by one of the supplier’s current “good” customers. Fifteen percent

¹⁰⁷ See e.g., Interview with Participant # 381126 (Sep. 26, 2007) “I always go personally since I am the one who knows exactly I need to buy.”

¹⁰⁸ Interview with Participant # 331080 (Sep. 6, 2007).

¹⁰⁹ Bernstein, *supra* note 20 at 140-141.

¹¹⁰ Clifford Geertz, *Sug: The Bazaar Economy in Sefrou*, in MEANING AND ORDER IN MOROCCAN SOCIETY 159 (Clifford Geertz, Hildred Geertz & Lawrence Rosen eds., 1978).

¹¹¹ See e.g., Interview with Participant # 351219 (Oct. 19th, 2007) “I had gone to buy from him. Then he gave me more change. I noticed it after I had left his shop and it was evening. I took back the money the next day and we become good friends. That’s when he told me I can always take supplies even if I don’t have cash.”

¹¹² Interviews with 279 study participants, *supra* note 84.

¹¹³ Interview with Participant # 341051 (Aug. 30, 2007).

(N=12) of those that had supplier credit were introduced to the supplier by another artisan.¹¹⁴

Family relations (4%, N=3) and other social networks, such as church acquaintances (6%, N=5), played a much less significant role in establishing credit with a supplier.¹¹⁵

Disagreements between artisans and their suppliers were rare. During the year preceding the study, only seven percent (N=19) of the participants had a falling out over a business matter with one of his or her regular suppliers.¹¹⁶ There was no third party involved in mediating any of the disagreements. There were two possible outcomes to the disagreements: either the parties settled the issue and resumed business or the business owner discontinued the relationship and had to find another supplier.

The business relation continued in situations where the cause for the disagreement was temporary. This was the case when artisans sent an employee to purchase supplies but the supplier charged higher than the agreed price. One artisan explained: “I sent one of the people working for me and the supplier didn’t know him and overcharged him. I went back and introduced him and the employee... and also complained about the higher price charged. [The supplier] was apologetic and refunded me part of the money and we still do business together.”¹¹⁷ This was also the case when mitigating factors caused the entrepreneur to not settle a bill on time or when the supplier delivered supplies late. One carpenter explained: “I gave them money in advance to bring me material and they took long, about one week. That made me lose some business, but he is still my supplier since we handled the matter well.”¹¹⁸ Even though the incident could have accrued an extra cost, the business relationship continued in these types of cases because it was a valuable relationship, in which trust could be reestablished.

¹¹⁴ Interviews with 279 study participants, *supra* note 84.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Interview with Participant # 351210 (Oct. 24, 2007).

¹¹⁸ Interview with Participant # 351221 (Oct. 19, 2007).

In a sense, some delays or misunderstandings could almost be expected and when the explanation for the breach of contract was reasonable, the business partners could continue to trade. However, in half of the cases, the business relationship was discontinued because the disagreement was of a more permanent nature.¹¹⁹ These complaints related to the substandard quality of material or unjustified price increases. A metalworker explained a disagreement with his former supplier: “They used to either inflate [the prices] or bring low standard material, so I got another supplier who is more reliable.”¹²⁰ In the entire sample, there was only one dispute between an artisan and his suppliers who extended credit. In that case, a misunderstanding occurred and once the parties resolved the mistake, business resumed as usual. The artisan explained: “I sent somebody to go and pay the money that I owed the supplier, but this money didn't reach [him] as expected. When the supplier called, I told him that I had sent the money and he wanted to con me. Later I found that he had not been paid and I apologized to him.”¹²¹ In sum, the relationships between the artisans and suppliers were based upon relational contracts where disagreements, when they did occur, were resolved between the two parties. Because access to trade credit was desirable and because it took a long time to gain credit, business owners avoided confrontations with suppliers once they had attained trade credit.

Cooter refers to a survey from Peru to illustrate how relational contracts channel transactions away from potentially better deals with outsiders.¹²² According to the findings from the survey, businessmen were reluctant to change suppliers due to ineffective contract enforcement.¹²³ Therefore, the survey found that the a new supplier would have to offer material at a thirty percent lower cost before the businessmen would switch from their current

¹¹⁹ Interviews with 279 study participants, *supra* note 84.

¹²⁰ Interview with Participant # 331081 (Sep. 10, 2007).

¹²¹ Interview with Participant # 320034 (Aug. 29, 2007).

¹²² Cooter, *supra* note 40, at 1112.

¹²³ *Id.*

supplier to a new supplier.¹²⁴ However, this study from Nyanza shows that a “better deal” is a concept that involves more than just the price. As there were so few local suppliers, it was relatively easy for the entrepreneurs to learn if the price and quality of the goods their suppliers supplied was comparable to those of other suppliers. If another supplier offered a better deal than their regular supplier, the entrepreneurs switched supplier. However, “a better deal” was not just a matter of price or quality, but of a combination of factors. To gauge whether the relationship with their supplier was worth maintaining, the entrepreneurs took the price and the quality of the goods into consideration,¹²⁵ but most importantly, they considered whether the supplier extended credit.¹²⁶ Moreover, the entrepreneurs valued that the trust they had established with their suppliers allowed for some contract flexibility when one of the parties was temporarily unable to perform.¹²⁷

D. The Relationships between Entrepreneurs and their Customers

The relationships between entrepreneurs and customers looked quite different from those between entrepreneurs and suppliers. The artisans had many more relationships with customers that were one time transactions, along with others that turned into long-term business relations. Moreover, the nature of the relationships with the suppliers was such that interactions often occurred several times per week. However, very few of the relationships with customers involved such frequent transactions. Furthermore, there was much more competition among

¹²⁴ *Id.*

¹²⁵ *See, e.g.*, Interview with Participant # 331081 (Sep. 11, 2007) “They used to either inflate [the price] or bring low standard material. So I got another supplier who is more reliable.”

¹²⁶ *See, e.g.*, Interview with Participant # 351215 (Oct. 19, 2007) “Most of the time I go [to] one shop and this has made the owner to know me and even developed trust because I have been their customer for some time now.”

¹²⁷ *See, e.g.*, Interview with Participant # 320024 (Aug. 22, 2007) “I took long to pay [the supplier] the money that I had promised. I explained what had happened and I still get credit.”

artisans because there were a large number of the same types of businesses in each location.¹²⁸ As a result, the artisans could more easily be substituted.

To understand how business relationships were formed, business owners were asked how their last five customers had become their customers.¹²⁹ Most commonly, a customer would walk in from the street (52%), sometimes after comparing prices.¹³⁰ However, recommendations from other customers also played an important role (39%) in a customer's choice.¹³¹ Relatives, friends and neighbors made up four percent of the customers, while less than two percent were referrals from other artisans.¹³² Marketing initiatives, including applications for public tender or advertising, were also rare, at less than three percent.¹³³ The entrepreneurs valued regular customers and, in order to retain these customers, three-quarters of the business owners gave their regular patrons a preferred lower price.¹³⁴ Moreover, as will be discussed further below, some business owners granted credit to retain their most loyal, long-term customers.

The most frequent disputes between customers and artisans concerned the quality of the goods or service, late delivery, and late payments.¹³⁵ During the three months prior to the survey, forty percent (N=109) of the respondents had had at least one customer place a complaint about an order.¹³⁶ Of these complaints, fifty-nine percent were due to the late completion of

¹²⁸ Although it varied between different trades and locations, there were often 20 to 40 businesses in the same town that provided the same type of goods or services. Interviews with 279 study participants, *supra* note 84.

¹²⁹ As a majority of the participants did not keep any books, they found it difficult to recall previous transactions. Therefore, the question was limited to the last five transactions.

¹³⁰ Interviews with 279 study participants, *supra* note 84.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

work.¹³⁷ In thirty-four percent of the cases, the customer complained about the quality of the work.¹³⁸ The remaining seven percent of complaints related to other issues, such as theft.¹³⁹

In most cases, the artisans handled complaints without the involvement of a third party. For example, one artisan explained: “As a mechanic, what we see is maybe something gets lost in the customer’s car, or the customer is not satisfied with how the work has been done. We sort this by having a meeting with the customer to see how the matter can be well-handled.”¹⁴⁰ In general, business owners wanted to settle the matter quickly and in a way that would not spoil their reputation. One metalworker explained: “When the customer called me to complain, I immediately went to his place. I don’t want complaints in my workshop because other customers could hear that. I redid the work and shared the cost of the material with the customer.”¹⁴¹

The manner in which an artisan resolved a matter depended on the nature of the complaint. If the customer was not satisfied with the quality of the work and only a small adjustment or replacement was needed, the artisan would typically correct it free of charge. If the customer wanted the alteration of a product due to events outside of the artisan’s control, as in one instance when a pest invaded a chair that was already in the customer’s possession,¹⁴² or if the customer changed his mind about the specifications or brought the wrong specifications, then the customer would normally pay for the correction. Alternatively, the customer could return the product and, once the entrepreneur had sold it to somebody else, the business owner would remake the product for the original customer. One surveyed artisan said: “We agreed that I sell

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Focus group discussion #4, in Tatu, Kenya (Nov. 9, 2007).

¹⁴¹ Interview with Participant # 321020 (Aug. 22, 2007).

¹⁴² Interview with Participant # 321002 (Aug. 23, 2007).

that steel door, then make for him one that he likes.”¹⁴³ Moreover, the artisans would try to protect themselves against complaints relating to the quality of the work by advising customers to use good quality material. Eighty percent of the participants said they regularly advised a customer to use good quality material even if it was more expensive.¹⁴⁴ One tailor explained: “The clothes shrunk after a few washes and the customer came back to complain. But there was nothing I could do because I warned her that the material was of low quality, but she insisted [on using it].”¹⁴⁵

A majority of the complaints were related to work not being completed on time. The difficult competition for orders made business owners take on orders that they knew they would not be able to deliver on time. “The problem is that as a *fundi* [or artisan] you can never tell your customer that you are busy. How can you send away three customers for the sake of one that you have at that time? So there will be delay.”¹⁴⁶ Secondly, micro-businesses operate on very small profit margins. It was not unusual for customers to pay in small installments, which made it hard for the artisan to purchase the right material and finish the product on time. As one metalworker explained, this compromised the quality and delayed the work: “We in *jua kali*, we are survivors. At time you have stayed for one week without any work, then a customer come and bargains. You won’t talk much because you fear you might scare him off. So once you have been given the down payment, you end up using low quality metal. Then the customer refuses to take this product. Then you have to convince them to wait until you sell it [to someone else] or sweet talk them to just take it.”¹⁴⁷ Furthermore, due to low cash flow, an entrepreneur would often use the down payment of a new order to finish up the last order.

¹⁴³ Interview with Participant # 320031 (Aug. 22, 2007).

¹⁴⁴ Interviews with 279 study participants, *supra* note 84.

¹⁴⁵ Interview with Participant # 320028 (Aug. 29, 2007).

¹⁴⁶ Focus group discussion #6, in Saba, Kenya (Nov. 13, 2007).

¹⁴⁷ Focus group discussion #2, in Tano, Kenya (Nov. 12, 2007).

Hence, if the business owner did not get a new order soon after the first order, the first order would be delayed. One metalworker explained: “It is not uncommon that we as *jua kali*, we don’t have money. So sometimes somebody brings you work and you don’t have money. So you take the work and find yourself spending this money.... At times you can get a loan from somewhere else or another artisan or wait for you to get another order from a customer and use their money to finish the first order.”¹⁴⁸ However, when the artisan did not finish the order on time, there was ample flexibility for the artisan to negotiate additional time to finish the product. In one case, an artisan explained: “The customer complained that the furniture was not done on time; I told him to wait just one more day.”¹⁴⁹

For the business owners, customers’ late payments constituted the main source of grievance. An owner explained that collecting debts takes “a lot in time and money because if I give [customers] credit I will always call them on the phone or go in person to get the money.”¹⁵⁰ Debt collection was expensive and time consuming and the entrepreneurs had limited options for recourse. One business owner complained: “There is no laid down procedure of repayment and in case of default there is no place I can go for resolution.”¹⁵¹ As will be discussed below, owners could collect debts through the chief or through bribing the police, but this kind of recourse was rare. Instead, the business owner typically carried the loss. For instance, a focus group participant explained: “Once I have done work for someone and they don’t pay, I have to forget about it. I have never taken any case to court. The only thing I do to make the customers pay is just to try and follow up with them. If I am defeated, it’s a loss on my side.”¹⁵² In order to avoid exposure to the very credible risk of not being able to collect a debt, sixty-two percent

¹⁴⁸ *Id.*

¹⁴⁹ Interview with Participant # 371177 (Oct. 4, 2007).

¹⁵⁰ Interview with Participant # 351224 (Nov. 17, 2007).

¹⁵¹ Interview with Participant # 380150 (Sep. 26, 2007).

¹⁵² Focus group discussion #1, in Tisa, Kenya (Nov. 21, 2007).

(N=170) of the respondents did not grant credit to any of their customers, but dealt purely on a cash basis.¹⁵³ The respondents also said that credit could encourage customers to complain about the quality of the product. A survey participant said: “If a customer is given credit to then pay later, they always come with complaints after the job is done, so that they can deduct the balance they have. That's why I always avoid giving them credit.”¹⁵⁴ Moreover, other business owners found that the process of claiming unpaid debts created hostilities and destroyed business relations. One such owner explained: “Dealing on credit has made me lose money and some customers too because when they don't pay, they never come back.”¹⁵⁵ Another artisan put it this way: “It saves time not to give credit and keeps the friendship between the customer and me going.”¹⁵⁶

Although some artisans found that they could lose customers by granting credit, others found that granting credit was a way to retain valuable customers. An artisan explained: “A business cannot flourish only on cash sales so I give my most loyal and regular customers credit. That ensures me that they will always come back.”¹⁵⁷ Therefore, the business owners that granted credit (38%, N=106) to a selected number of customers did so after carefully screening the customers.¹⁵⁸ Typically, these few, selected patrons were long-term, regular customers who paid punctually. Business owners also considered new customers that were recommended by existing “good” customers to be more trustworthy. For instance, one business owner said: “I only give [credit] to a few who are either my regular and long time good customers or the ones who have been brought to me by my good customers.”¹⁵⁹ The business owners tested the

¹⁵³ Interviews with 279 study participants, *supra* note 84.

¹⁵⁴ Interview with Participant # 380152 (Oct. 1, 2007).

¹⁵⁵ Interview with Participant # 351207 (Oct. 24, 2007).

¹⁵⁶ Interview with Participant # 380144 (Sep. 26, 2007).

¹⁵⁷ Interview with Participant # 380157 (Oct. 1, 2007).

¹⁵⁸ Interviews with 279 study participants, *supra* note 84.

¹⁵⁹ Interview with Participant # 320041 (Aug. 27, 2007).

customer by starting out with a small extension of credit. They then increased the credit if the initial sum was paid on time. One owner reported: “I started them with a little credit and expanded it since they always paid as they said.”¹⁶⁰ Consequently, the relationships between the business owners and customers that received credit can be characterized as relation contracts. However, should the customer defect and not pay a debt, business owners had limited means of recourse. Moreover, there was no coordinated information-sharing system that circulated information about bad payers. Thus, in the absence of a credit rating bureau or a similar arrangement, the incentive for customers to pay was of less significance because a default or late payment did not affect future transactions with other businesses. Furthermore, in relationships between the artisans and customers, as opposed to the relationships between the artisans and the suppliers, the customers were not locked into a contractual relation because there were a relatively large number of other businesses which could perform similar work. The combination of these factors made it a risky venture to grant credit to customers.

Finally, entrepreneurs reported frustration with the late collection of goods. An entrepreneur said: “Some people just bring their products for repair and they don’t come back to collect it. At the moment, I have an ox plough that has been in my workshop for two years and it’s not been collected. Should it get stolen the owner will ask me to pay for it.”¹⁶¹ In accordance with the Sale of Goods Act, a buyer not collecting his order within a reasonable time is liable for any loss occasioned by his neglect and to reimburse the seller for the storage of the goods.¹⁶² Furthermore, the seller has the right to resell the product to another buyer, if the original buyer does not collect the product within a reasonable time.¹⁶³ However, to avoid a dispute, many

¹⁶⁰ Interview with Participant # 340061 (Sep. 4, 2007).

¹⁶¹ Focus group discussion #1, *supra* note 152.

¹⁶² The Sale of Goods Act, (2003) Cap. 31 § 38 (Kenya).

¹⁶³ *Id.* § 40.

artisans chose to not resell the product “after a reasonable time”. One focus group participant explained: “According to the law it’s allowed to keep a product for only 90 days. After that you can dispose of it. But there is a problem in disposing it because the customer can come to claim it on the 91st day and then there will be a dispute. To avoid all this I just keep it until the owner comes for it.”¹⁶⁴

E. The Use of Public Order Institutions to Process Business Disputes

Although parties mutually settled most disputes, in some instances, one of the parties sought assistance from the police or the chief. At other times, the threat of law enforcement was enough to make the defaulting party comply with his contract obligations. For the most part, customers called upon law enforcement, while the artisans preferred a mutual agreement with customers without involving law enforcement.

Although customers rarely threatened artisans with the use of law enforcement, artisans took threats seriously. During the year preceding the study, customers threatened to take less than six percent (N=15) of the participants [artisans] to the police, four percent (N=11) to the chief and less than two percent (N=5) to the court.¹⁶⁵ Almost all cases where a customer threatened an artisan concerned the late completion of an order. In response, the artisans used three different strategies to prevent a customer from acting on a threat: i) the artisan finished the order quickly, before the customer could involve a third party; ii) the artisan explained the advantage of settling the dispute amicably without outside involvement; or iii) the artisan

¹⁶⁴ Focus group discussion #3, *supra* note 88. The Sale of Goods Act stipulates that goods that are not collected can be resold within a “reasonable time.” However, several entrepreneurs included in this study were of the impression that the law provided that there was a hard rule of 90 days before the goods could be resold, which is not the case.

¹⁶⁵ Interviews with 279 study participants, *supra* note 84.

pleaded with the customer to not hand him over to police or court custody.¹⁶⁶ The artisans were able to convince customers not to involve third parties by explaining that third party involvement would take time, would be costly, and would destroy the business relationship. One surveyed artisan explained: “I promised the customer that I will do the job in time and also explained that the chief will only take our money and then ask me to finish the work, and that is something we can just sort out ourselves.”¹⁶⁷ Late delivery of an order is a civil matter, but some participants in this study believed that any case that was brought before the court, whether civil or criminal, could lead to imprisonment.¹⁶⁸ In this example, an entrepreneur threatened with court action by a customer explained how he pleaded his case: “I looked for [the customer’s] house and went to plead with him that I might be jailed and my family will suffer. He understood and we agreed on the time I was to finish the work.”¹⁶⁹ However, the threat is often intended to just get the work done. One threatened artisan recalled: “I started working on the order and also looking for money from elsewhere so that when I am taken to court I can pay the bail. The customer came back after about ten days and found the work finished. He said he was just threatening me so that I would finish the work.”¹⁷⁰

1. The Chief

A chief is a civil servant in the provincial administration, who is mandated with maintaining order in the area.¹⁷¹ In order to prevent crimes, a chief may arrest any person who is planning to commit an offense within the locality and take that person to the nearest police

¹⁶⁶ *Id.*

¹⁶⁷ Interview with Participant # 330113 (Sep. 12, 2007)

¹⁶⁸ The Sale of Goods Act § 51(1) (Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery).

¹⁶⁹ Interview with Participant # 381143 (Oct. 1, 2007).

¹⁷⁰ Interview with Participant # 390280 (Nov. 13, 2007).

¹⁷¹ Chiefs’ Authority Act, Cap. 128 § 6 (1998) (Kenya).

station.¹⁷² However, a chief cannot retain anyone in his or her own custody.¹⁷³ In cases where they do not have direct legal authority, chiefs often act as mediators in accordance with the customs of their clan.¹⁷⁴

However, this study found that the institution of the chief plays only a marginal role when settling business disputes; only two percent (N=5) of participants appeared before the chief during the year preceding the study.¹⁷⁵ However, it is difficult to explain why the chief plays such a marginal role. Time and money might explain why parties did not engage the chief more often. As one focus group participant explained: “At the chief’s office, both the accused and the complainant have to pay 100 shillings to help facilitate movement by the chief’s [assistants] to summon [the parties]. The problem is that the chief can tell you he spent 200 shillings for soda, like in my case. It’s a loss, because they always deduct it from the full amount [to be paid].”¹⁷⁶ Thus, further research will have to be conducted to fully understand why the chief played such a minor role to settle business disputes.

2. The Police

The chief has the mandate to hear civil disputes, but adjudicates disputes to a very limited extent. More often, dissatisfied customers relied upon the police to arbitrate and enforce resolutions to business disputes.¹⁷⁷

Police officers hear business disputes for a fee as a “side business.”¹⁷⁸ One business owner explained: “At the police station, for them to come and arrest somebody you will need to

¹⁷² *Id.* at § 8(2).

¹⁷³ *Id.* at § 20(c).

¹⁷⁴ Elin Henrysson & Sandra Fullerton Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 *LAW & SOC'Y REV.* 39, 48 (2009).

¹⁷⁵ Interviews with 279 study participants, *supra* note 84.

¹⁷⁶ Focus group discussion #6, *supra* note 146.

¹⁷⁷ Interviews with 279 study participants, *supra* note 84.

pay 300 shillings or 400 or even 1000 shillings for their fare.... The police come from within town but they charge so highly because they say that wasn't their duty and they were not assigned to do it and so you just have to pay them.”¹⁷⁹

During the year preceding the survey, five percent (N=13) of the participants had appeared before the police to resolve a business disagreement.¹⁸⁰ In a majority of these cases, the customers brought the case before the police.¹⁸¹ The police often used strong-arm tactics in handling a complaint and individual police officers handled cases differently. One study participant said: “A customer accused me that I used sub-standard material for his work, but the police understood that I had told the customer to add more money or else I would use the material that the money could buy. The customer took the order as it was. [I was satisfied] but I wasted time at the police station and also had to give the police 200 shillings for fuel when they came to arrest me.”¹⁸² However, it was more common for the police to use their power to press the “defendant” to comply with the complaint rather than trying to understand the dispute. As one participant explained: “[For not completing the order on time] the police locked me in for 3 days and still expected me to finish the work.”¹⁸³ One metalworker, who was held in police custody for two days for not finishing an order on time, explained why some customers took their complaints to the police: “All they want is a refund or their goods made, so what they do is

¹⁷⁸ Focus group discussion #3, *supra* note 88, Artisan A: “No, we don’t [go to the police] because at the police you are going to pay for the bribe and yet you need the money.” Artisan B: “You will be wasting your time.” Artisan A: “In fact the police can even go round you and tell the customer what you said at the police station and then now it becomes a grudge, not business.”

¹⁷⁹ Focus group discussion #6, *supra* note 146.

¹⁸⁰ Interviews with 279 study participants, *supra* note 84.

¹⁸¹ The customer initiated nine of the thirteen cases that were brought to the police. *Id.*

¹⁸² Interview with Participant # 331093 (Sep. 6, 2007).

¹⁸³ Interview with Participant # 320028, *supra* note 145.

to give the police some bribe so that we can be locked up in the cells until we agree to finish the disputed product.”¹⁸⁴

Because of the relatively limited number of cases presented to the chief and the police, it is difficult to determine why parties preferred police assistance over the chief’s assistance. As the police heard the disputes in addition to their regular duties, they might have been more prone to accept a bribe and to resolve the issue in favor of the party who paid the highest bribe. As a result, parties may have sought outcomes at the police station because of its relative predictability. Another possible reason for the parties using the police could be that the chief cannot hold people in custody and so poses less of a threat. However, because the chief resolves disputes with less confrontation than the police do, the parties have a higher chance of sustaining the relationship.

Interestingly, entrepreneurs appeared reluctant to involve either the police or the chief in settling business disputes. During the year preceding the study, only two artisans sought assistance from the police or the chief to collect outstanding debts.¹⁸⁵ Although debt collection was a common problem, entrepreneurs wrote off debts that they were unable to personally collect. Artisans chose against involving the chief or the police because they found the involvement to be time consuming, costly, and more importantly, a potential stain on their reputation. One study participant stated: “The disadvantage is that if it goes to the police it only spoils your reputation as an artisan.”¹⁸⁶ To avoid these confrontations, a majority of the artisans operated on a strict, cash-only basis.¹⁸⁷

¹⁸⁴ Focus group discussion #4, *supra* note 140.

¹⁸⁵ Interviews with 279 study participants, *supra* note 84.

¹⁸⁶ Focus group discussion #2, *supra* note 147.

¹⁸⁷ Sixty-two percent (N=170) of the respondents did not grant credit to any of their customers. Interviews with 279 study participants, *supra* note 84.

3. The Court System

Throughout their careers, none of the participants had ever taken a contractual dispute to court. Moreover, only four participants had hired a lawyer for a business-related matter.¹⁸⁸ In three of those cases, the artisan engaged the lawyer to draft an agreement for a relatively large order. In the fourth case, the business owner hired the lawyer to file a law suit. This owner explained: “I wanted to grow my business and start a transport company. I bought a lorry and fixed it up. I paid 90,000 shillings and was supposed to pay 230,000 shillings in total. I thought I would fix it up and, once I started to use it, I would make more money and could pay it off. I got new tires, I rebuilt the engine, I put a lot of money into it. Then the previous owner saw that the lorry was running. He came and towed it away one day when I was not here. A friend recommended a lawyer in Kisumu I went to see. The lawyer was supposed to sue him for taking the lorry. I paid the lawyer 30,000 shillings, but he never sued him. He just ate my money. He is still in Kisumu and avoids me. I still see the man with my lorry driving around here. I spent everything I had on the lorry, fixing it up, and the lawyer. Now I just try to forget about it.”¹⁸⁹

Although the participants did not use the court system for business disputes, seventeen percent (N=47) of the participants had been involved in court cases over other criminal or civil issues.¹⁹⁰ In fact, the majority of the participants (86%, N=239) believed that courts could resolve business disputes.¹⁹¹ Moreover, seventy-nine percent (N=219) thought that it was wise to use the courts to resolve disputes involving a large sum of money.¹⁹² Furthermore, sixty-six percent (N=184) of the respondents felt confident in the court’s ability to resolve a case fairly.¹⁹³

¹⁸⁸ Interviews with 279 study participants, *supra* note 84.

¹⁸⁹ Interview with Participant # 331099 (Sep. 6, 2007).

¹⁹⁰ Interviews with 279 study participants, *supra* note 84.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

However, eighty-nine percent (N=248) of the participants criticized the courts as an expensive forum and only fifteen percent (N=42) thought that courts were time-efficient.¹⁹⁴ Participants that had personal experience with the court system displayed little difference in their perceptions about it. Consequently, a majority of the artisans believed that courts were impractical in dealing with business disputes, yet the same artisans maintained the possibility of taking a case to court in the future. In a sense, artisans acknowledged the courts as a necessary institution, but one that failed to serve their current needs. Hence, the threshold to the courts was too high to be of relevance to resolve business disputes generated by small businesses.

IV. Private Ordering: The Possibility of Mediation

Small business owners have few options for resolving their grievances. Options include the police and the chief, but these venues have the shortcomings of being somewhat costly, time consuming, and a potential harm to an artisan's business reputation. One business owner said: "Sometimes the case that you have taken to [the police] is worth about 1000 Shillings. They will harass you and then take a bribe of 200 Shillings or more, then promise to look into the case. After that it becomes a daily trip to the police station. At the end you waste your time and you lose your money."¹⁹⁵ Due to the cost, a business owner might not pursue the collection of an unpaid debt. As one owner explained: "I went to the Administration Police [who works under the chief] to help recover some money from a customer, but the A.P.s turned me away, saying that the money that I needed was too little and there isn't anything that will be left for them. And so I had to let go of that debt."¹⁹⁶

¹⁹⁴ *Id.*

¹⁹⁵ Focus group discussion #9, in Tisa, Kenya (Nov. 2, 2007).

¹⁹⁶ Focus group discussion #7, in Nne, Kenya (Nov. 19, 2007).

In response to this problem, two small business associations included in this study have recently created mediation committees to handle disputes. A member of the Mbili *jua kali* association explained why they formed a mediation committee: “Before when there were disputes, the cases would go to the police and the police would take you to the station and then threaten you with court.... So we sat down and came up with a committee that if you had a dispute with a customer that case would be taken to the committee and then the committee would tell you what to do and how to go about it.”¹⁹⁷ In Mbili, if a customer brings a complaint against a *jua kali* member to the police or the chief, the mediation committee, or caretaker committee, requests that the police or the chief refer the case back to the association. A member explained that “[t]he caretaker committee will go to the police and then explain to them that they belong to an organization [that] is charged with handling cases before it goes to the police. Some customers are not aware of this, so they go to the police to report the matter.... The police let [us] solve the matter. Only when [we] can’t solve it, it is taken back to [the police].”¹⁹⁸ In the Tatu *jua kali* association, a case can be withdrawn from the police or the chief if both parties agree for the dispute committee to hear the case instead.¹⁹⁹ Once a case is decided, the dispute committee in both locations appoints one or two “mediators” to supervise and ensure that the committee decision is executed and both parties remain satisfied.²⁰⁰

During the year preceding the study, only two of the seven business associations surveyed provided mediation services to their members. The associations with mediation services have a subcommittee that is charged with hearing disputes. The committees heard a

¹⁹⁷ Focus group discussion #5, in Mbili, Kenya (Nov. 7, 2007).

¹⁹⁸ *Id.* In this association, none of the members in the sample had a case before the police or the chief during the year preceding the study. However, since there were so few cases before the police and chief in the whole sample, we are unable to show a relation between the role of the caretaker committee and the absence of cases before the police and the chief.

¹⁹⁹ Focus group discussion #4, *supra* note 140.

²⁰⁰ *Id.*; focus group discussion #5, *supra* note 197.

relatively small number of cases during that year; one committee heard four cases and the other heard five cases.²⁰¹ Four of the nine hearings were between members, three of which related to accusations of stolen tools or other materials.²⁰² The fourth hearing related to the late repayment of a loan that one member extended to another member to help him finish an order quickly. In all nine cases handled through mediation, the parties and mediators knew each other well and both parties were satisfied with the outcomes and the handling of the cases.²⁰³

The remaining five cases were between members and their customers.²⁰⁴ The members initiated the mediation in all but one case. In four of these cases, the customer failed to collect custom-made products on time and the entrepreneur sold the product to another customer. In these cases, the mediation committees decided that the artisan had the right to sell the product if the customer failed to collect the product within a reasonable time; although the entrepreneur was directed to promptly remake the product for the customer at no extra charge.²⁰⁵ For instance, in one case, the customer came to collect his finished product three months after the agreed date of collection. The artisan “felt that the customer took too long and decided to sell off the good to recover... money that was trapped in it.”²⁰⁶ In this case, both parties were satisfied with the committee’s decision and the customer, thereafter, brought the artisan more work. Finally, the last case concerned a disagreement over the specifications on a made-to-order product. The mediation committee decided the case in the customer’s favor and, “the customer was happy and up to date, he still brings the owner more business and work.”²⁰⁷

²⁰¹ Interview with members of the mediation committee, in Mbili, Kenya (Oct. 11, 2007); Interview with members of the mediation committee, in Tatu, Kenya (Oct. 23, 2007).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Interview with members of the mediation committee in Mbili, Kenya (Oct. 11, 2007).

²⁰⁷ Interview with members of the mediation committee in Tatu, Kenya (Oct. 23, 2007).

There are several advantages to using a business association's mediation committee. The service is free of charge, the dispute is heard by fellow artisans who have technical know-how, and the issue is resolved quickly, in a non-confrontational manner. One study participant stated: "You see, if a case is taken to the police they don't understand [the business], all that they will do is to tell you to make the product in two or three days. This will result in poor workmanship and the customer won't be happy with it. But if it is taken to the committee, they understand how business operates and they will give enough time to make the product and this will make the customer happy."²⁰⁸

However, for a business association to provide mediation services, the organization has to be well-managed and transparent and to have some level of oversight by its members. The members have to trust their leaders and the general public has to trust that the association has the capacity and integrity to hear and decide disputes without bias. Of the seven business associations at which the study looked, only two, Mbili and Tatu, had the capacity to provide mediation services.²⁰⁹ Therefore, these types of mediation services were not readily available. In some towns they were not available at all, while in other towns it was only available to members and their customers.²¹⁰

Secondly, this dispute mechanism will only be used if it is perceived as unbiased and without favoritism for its own members. To explore this topic, the study asked artisans who were not members of the association if they thought that the business association in their town could resolve a business related disagreement between them and a member of the association in a

²⁰⁸ Focus group discussion #5, *supra* note 197.

²⁰⁹ The remaining five associations had not formed mediation committees or undertaken any other form of joint actions because they were primarily formed to access a government program supporting small business associations or they had been severely mismanaged and were incapable of carrying out joint actions. *See* Elin Cohen, *supra* note 83.

²¹⁰ The business associations in two out of the seven towns included in this study provided mediation services to their members.

fair manner. Thirty-one percent (N=40) of the respondents²¹¹ thought that the disagreement would be resolved fairly, fifty-five percent (N=72) did not think the mediation would be fair, and fourteen percent (N=18) were unsure.²¹² A majority of those who thought the decision would be unfair believed that the committee would favor their own members.²¹³ In addition, some respondents thought that the associations lacked competence to mediate business disputes.²¹⁴ However, those that thought the associations could be a fair mediator, perceived the association to have the capacity and technical expertise to handle business disputes.²¹⁵ Others trusted the associations because of previous business dealings with individual members or thought the committee would be unbiased in order to maintain the association's reputation.²¹⁶ One participant noted: "They know that if it is not fair, it will spoil their business and the name of the association."²¹⁷

Conclusion

In this study, we observed that business owners have distinct relationships with their customers and suppliers. We found that there are few suppliers in each town and each artisan has a very limited number of regular suppliers (mean = 2). When there is a long-term business relationship between the supplier and artisan, suppliers offer preferred prices and extend credit;

²¹¹ Note that this includes non-members in towns that did not have functioning mediation services. In the two towns with *jua kali* associations that provided mediation, 35% thought that it would be fair, 47% thought that it would not be fair, 5% were unsure and 12.5% did not respond to this question. Interviews with 279 study participants, *supra* note 84.

²¹² Interviews with 279 study participants, *supra* note 84.

²¹³ *Id.*; *see, e.g.*, Interview with Participant # 330111 (Sep. 11, 2007), "I can't trust that they will be just to non-members like me."

²¹⁴ Interviews with 279 study participants, *supra* note 84; *see, e.g.*, Interview with Participant # 390268 (Oct. 30, 2007), "I don't think they have the mandate and the capacity to deal with such issues."

²¹⁵ Interviews with 279 study participants, *supra* note 84; *see, e.g.*, Interview with Participant # 320036 (Aug. 22, 2007), "They are business people like myself and they will understand."

²¹⁶ Interviews with 279 study participants, *supra* note 84; *see, e.g.*, Interview with Participant # 340073 (Aug. 30, 2007), "Most of us we do business together we have trust amongst us."

²¹⁷ Interview with Participant # 340068 (Sep. 4, 2007).

and the artisans are loyal to their suppliers and always pay on time. There were relatively few business disputes between entrepreneurs and their suppliers and when disputes occurred, they were always resolved without involving a third party. There were two possible courses of action to processing these disputes: (i) if the business owner did not deem the relationship worth maintaining, he or she did not engage in further transactions with the supplier; or (ii) if the entrepreneur deemed the business relationship valuable, he or she took care to maintain the relation by negotiating a mutually satisfactory resolution.²¹⁸ In particular, entrepreneurs take great care to preserve their relationship with a supplier that extends them credit and business disputes were, therefore, extremely rare.

However, breaches of contract were commonplace between artisans and their customers. In many instances, the parties resolved their disputes through contract flexibility. However, it is very challenging for the entrepreneurs to collect debts from their customers. In general, the transactions between a particular customer and a firm occurred much more infrequently than the transaction between a particular supplier and a firm. Moreover, the abundance of firms performing similar services made artisans more easily replaceable. Hence, unlike the contracts between entrepreneurs and suppliers, the contracts between entrepreneurs and their customers are not self-enforced. For example, in debt collection disputes with a customer involving small amounts of money, the aggrieved business owner would often be resigned to the breach of contract and take no further action.²¹⁹ However, for many business owners, the debt collection grievances added up and became burdensome. Out of fear of spoiling their business reputation and due to the harsh methods the police used, entrepreneurs were reluctant to seek the assistance of the chief or the police in processing disputes. Therefore, the business owners' inability to

²¹⁸ Interviews with 279 study participants, *supra* note 84.

²¹⁹ *Cf.* Galanter, *supra* note 17, at 2.

recover outstanding loans affected their business practices and many chose to forgo transactions by not extending credit.

The absence of a systematic means to gather the credit history of their customers was an underlying reason for the firms' reluctance to extend credit. Studies have shown that information-sharing can increase lending and reduce default rates.²²⁰ Future studies addressing the relevance of asymmetric information would be useful. For instance, it would be of interest to explore how information could be exchanged through "brokers" or credit bureaus. These credit bureaus could be voluntary or mandated through regulation.²²¹ Hence, by accessing accurate information about business partners' previous transactions (both good and bad credit history) it appears that many disputes could be prevented.

However, when disputes occurred and the parties could not reach a mutual agreement, the business owners surveyed in this study had very limited options for processing their disputes in a satisfactory manner. This study found that the police utilized their power to extort "compliance."²²² However, due to the confrontational nature of the tactics the police utilize, disputes settled by the police tended to terminate the relationship after the disputed transaction was completed. On the other hand, the chief settled disputes in a less confrontational manner so the parties could more easily continue their relationship after the settlement.

Interestingly, customers preferred to take their case to the police over the chief. The reason for this preference is not fully understood and would need to be further researched, but the confrontational nature of the police hearings, and the use or threat of violence in custody, appears to have appealed to aggrieved customers seeking a particular outcome to an ongoing

²²⁰ Tullio Jappelli & Marco Pagano, *Information Sharing, Lending and Defaults: Cross-country Evidence*, 26 J. BANKING & FIN. 2017 (2002).

²²¹ *Id.* at 2018 (discussing how voluntary credit bureaus operate on the principle of reciprocity by collecting and disseminating accurate information).

²²² Focus group discussion #3, *supra* note 88.

dispute. However, customers initiated these processes while entrepreneurs were less likely to seek out these venues to settle disputes with their customers.²²³ Courts, on the other hand, were generally perceived to be reliable, but impractical to use. It is against this background that business associations created mediation committees to assist their members in processing disputes. The restorative procedures and the fast and inexpensive hearings that mediation committees provided met the business owners' need to resolve conflicts in an amicable manner that allowed the parties to transact business in the future.

Although the mediation mechanism provided by two small business associations included in this study has some clear advantages, it has very little reach in its current format. As the association members were primarily transacting with non-member business partners, the business associations had few opportunities to regulate their members' behavior and members were not expected to adhere to the group's internal rules in order to be able to transact in the future.²²⁴ Hence, to serve their members' need to process their business disputes in a less confrontational setting, the associations had to offer their mediation services to their members and their non-member business partners.

However, entrepreneurs that were not members of the associations were skeptical of the committees' ability to independently adjudicate a dispute involving one of their members. The committee members recognize that their services have limited reach in the current format because the mediation committees are not endorsed by the state. As one surveyed member said: "[A] small business court here is a good idea because at times you do business with an outsider and have a dispute with him or her, [but] they are not under the dispute and caretaker committee.

²²³ Focus group discussion #2, *supra* note 147, "Most of the time it's the customer who take us to the police but not us taking them. When these policemen are brought over to us, it's just to scare us. But should it happen that you spend the night at the police cells, the least amount of money you will pay is 500 Shillings [to be released]."

²²⁴ *See, e.g.*, Bernstein, *supra* note 20, at 128.

These cases will be taken to the police and will take a long a time, but if it is taken to this court here maybe [it] will be faster.”²²⁵ Therefore, to address this problem, a public-private hybrid that would be similar to the “tuna court” described by Feldman,²²⁶ where the state provides guidelines and some over-sight of the mediation carried out by respected artisans in the community, is an idea worth further consideration.

²²⁵ Focus group discussion #5, *supra* note 197.

²²⁶ Feldman, *supra* note 20, at 320.