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ECONOMIC EFFICIENCY OF THE INTERNATIONAL COMMERCIAL LAW: A SYSTEMATIC ANALYSIS

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ABSTRACT

Compared to common law jurisdictions, civil law regimes like France offer inadequate legislative foundations for commercial law. Although defending economic efficiency as a useful instrument in the legislative process is legitimate, even in civil law jurisdictions, it cannot be the only goal of revisions to commercial law. Other facets of the rule of law ought to be just as important. In the context of internationalisation, there is a contention that this practice may compromise efforts aimed at harmonising laws.

INTRODUCTION

The economic analysis of law has lately been applied to legal reform as a means of examining national legal systems and motivating them to update their legal frameworks. The World Bank has made a substantial contribution in this area, particularly through its Doing Business reports, which rank the efficacy of national commercial regulations on an annual basis. The reports are controversially supported by the "legal origin" concept, which holds that common law jurisdictions have superior legislation that facilitates and promotes economic development and that law has an impact on economic growth. As a result, common law jurisdictions are frequently ranked among the top destinations for investment in the Doing Business reports. The World Bank provides a gauge of how easy it is to do business in 189 jurisdictions in its

Doing Business reports. The ease of starting a business, obtaining construction permits, obtaining electricity, registering property, obtaining credit, safeguarding investors, paying taxes, transnational trade, upholding contracts, and resolving insolvency are all factors that go into evaluating a country's commercial law framework. The goal is to evaluate regulatory frameworks based on how well they facilitate corporate operations and advance economic growth. Most economists would define economic efficiency as a general objective of growth and maximization of wealth that is to say, the use of resources so as to maximise the production of goods and services. The means of achieving this utilitarian goal, however, divide neo-liberal economists, Keynesians or theorists of the invisible hand (laissez-faire economic philosophy).¹ The concept of economic efficiency in World Bank reports stems from a neo-liberal understanding of free markets. Market liberals think that more "economically efficient" legal frameworks that enhance transaction speed and minimise transaction costs should be adopted to enable commercial transactions. As a result, these "economically efficient" business laws would promote economic expansion and international investment. As a result, the World Bank reports' metrics account for the quantity, expense, and length of procedures a term economists refer to as transaction costs. In addition to ranking the economic effectiveness of each country's business laws, the Doing Business project promotes legal change in those states where the studies indicate that their commercial rules are "economically inefficient." It's interesting to note that organisations like UNCITRAL and the EBRD have promoted the adoption of commercial laws by nations that are based on more "economically efficient" models. For instance, these international organisations have supported the adoption of a functional approach to the regulation of secured transactions in the area of secured credit law, which is based on the unified secured credit law regime found in Article 9 of the Uniform Commercial Code (UCC). France, being a civil law nation, has always been hesitant to judge the quality of legislation based only on economic considerations. For this reason, it was not shocking to learn that when France amended its secured credit law in 2006, the American model was not followed. In common law jurisdictions, especially the US, the importance of economic efficiency in the legislative process is widely recognised, in contrast to the majority of civil law jurisdictions like France. This methodology and model have been used in the finance industry to support the implementation of economically motivated regulations that, in general, give investors and creditors greater protection at the expense of social concerns and debtor protection. Conversely, civil law regimes, like France, have a tendency to place greater emphasis on a wider variety of

¹ A Smith, *An Inquiry Into The Nature and Causes of the Wealth of Nations* (1776), (1993, Hackett Publishing Co, Inc, Abridged edition).

ethical and social factors than just commercial effectiveness. There is a claim that the consideration of economic efficiency standards in the draughting of laws has little benefit. While such criteria have clearly aided nations including civil law jurisdictions in the direction of desirable legal changes, this paper will demonstrate some of the limitations of the application of economic analysis in the modernisation of commercial laws. This will mostly be accomplished by looking at certain facets of the World Bank's approach to evaluating national laws and encouraging legal reforms. The analysis of the Getting Credit indicator, which rates the effectiveness of certain provisions of the country's bankruptcy and secured credit legislation, will receive special attention. It is appropriate to evaluate the Getting Credit collection of metrics in light of the present state of the economy and the recent movement to change financial regulations. The goal of the analysis is to show the limitations of the World Bank's methodology used to rank the best places to invest. The study comes to the conclusion that applying this specific definition of economic efficiency alone is insufficient to evaluate legislation under commercial law and shouldn't be the exclusive goal of reforms in that area.

The World Bank Reports' effects on civil law jurisdictions: "le choc"

The World Bank's assessments, which rate countries based on how well their laws govern business dealings, have done a significant amount of "mapping" of commercial laws. A World Bank subsidiary publishes the annual reports, which rate 189 nations based on how easy it is to conduct business in each of them. The reports are based on a number of empirical research investigations that essentially found their analysis on the legal origin thesis, which is more disputed than the concept of economic efficiency. Accordingly, it is claimed that legal origin affects economic growth and that the law from common law jurisdictions is more effective than commercial laws from civil law jurisdictions in promoting the development of the economy. Needless to say, the postulates of the legal origin theory are very controversial. In particular, in the present context of the financial downturn, it is arguable that what would seem to actually dictate the new commercial legal framework are the current economic circumstances and not the other way round. The World Bank reports also make a series of assumptions that are questionable. For instance, it is claimed that the more reforms are introduced in a given jurisdiction, the better. However, when there are several reforms in place, it can be challenging to determine whether one reform will result in better laws on its own. However, it should come as no surprise that common law jurisdictions consistently rank among the most positively rated jurisdictions, whereas civil law jurisdictions consistently receive extremely low ratings, according to the Doing Business surveys. The civil law community has undoubtedly been

disturbed by the low ranking that civil law jurisdictions received in World Bank publications. As a result, they have had to respond constructively to perceived attacks. Many scholars question the process and standards employed to arrive at these results and question the actual value of creating such a financial map.

The limits of economic efficiency within commercial law reforms

The internationalisation of commercial transactions in recent times has shown that national commercial rules frequently do not provide commercial actors with sufficient means to conduct their business activities across national borders. Because of this, some have claimed that national commercial law changes ought to be implemented with the intention of encouraging the convergence of national legal regulations in order to promote trade across national borders. In this regard, it's critical to highlight that the World Bank's studies seek to both inform foreign investors on the quality of national commercial laws and to motivate governments to amend their legal systems in light of legal approximations. It is obvious that the World Bank wants to promote legal reforms by introducing more economically viable models into the legal system. Nonetheless, there is room for debate over the economic efficiency standards employed by World Bank publications to evaluate national commercial law laws. Specifically, the pursuit of implementing more "economically efficient" legal frameworks may ultimately jeopardise efforts towards modernising and harmonisation. In common law jurisdictions, the ideas and methodology behind the World Bank Doing Business reports have generally not received the same level of criticism as they have in civil law jurisdictions. The reports make the claim to assess how well laws facilitate corporate operations. What is actually measured, though, is quite dubious. Specific aspects are taken into consideration while comparing national business legislation. Each of these variables has a variety of indicators that have been identified in order to produce an economic efficiency model that is based on how simple it is to do business. Thus, achieving economic efficiency is the ultimate objective to be fulfilled if one hopes to perform well on the reports' measures. The methodology used to gauge these various components is still somewhat ambiguous, though. The Doing Business reports rely heavily on the opinions of largely unnamed experts and professionals whose views are derived from surveys that provide the empirical data. In general, it doesn't seem like employing questionnaires is a sufficient and impartial method to evaluate national laws.

This was even recognised by the authors of the reports in its first edition of 2004. The results will always be influenced by the perceptions of the respondents which may produce subjective results. From a linguistic perspective, there is also the obvious issue of translation. Initially, these questionnaires were only available in English. Despite the fact that questionnaires have recently been translated, the issue of legal translation still remains. For example, in “*Getting Credit*”, the methodology sets out some case scenarios which refer to terminologies specific to common law jurisdictions such as the security interest or the floating charge. These are unknown legal concepts in France and in many other civil law jurisdictions. Thus, the objectivity of the assessment carried out by the World Bank can once again be challenged. Moreover, the methodology within the report is inconsistently applied which significantly challenges the validity of the ranking. It is recognised that the availability of information concerning the solvency of companies might increase the production of good investments, reduce risky credit and provide better control for creditors over the credit. Because there isn't a private bureau in France, the country received a poor score on the depth of credit information index. Through a unique registration known as the Fiben for corporations and the FICP for individuals, the public Banque de France makes information about businesses and individuals who have previously defaulted available. Regarding the Fiben, not all businesses are graded by the Banque de France, which is a significant criticism stated in the World Bank studies. To feature in the Fiben database, a company must have a turnover of at least 750 000 euros or a credit of at least 380 000 euros. In France, the provision of information by individual banks is crucial, and as a result, borrowers (including single traders and small limited businesses) typically have a long-lasting connection with their bank. Because it doesn't seem to have an impact on banks' lending decisions, it is debatable if, at least in France, the creation of a database including data on company solvency and information exchange among private bureaux is sufficient. In addition, the topic of gathering data about businesses brings up fairness concerns. The information given to creditors has a big impact on how loans are decided. Therefore, it is imperative that the data supplied is accurate. However, empirical studies have demonstrated that errors have often been made by private credit agencies.²

² M Miller, ‘Credit reporting Systems Around the Globe : The State of the Art in Public and Private Credit Registries’ (2000) World Bank Policy Research Working paper 3443, M Miller, *Credit Reporting Systems and the International Economy*, (MIT Press, 2003), R Hunt, ‘The Development and Regulation of Consumer Credit Reporting in America’ (2002) Federal Reserve Bank of Philadelphia Working paper 02-21, November 2002 < <http://www.phil.frb.org/research-and-data/publications/working-papers/2002/wp02-21.pdf>.> [accessed 14 June 2014].

Commercial law change, economic efficiency, and transplantation

The primary objective of the World Bank studies is to encourage legal reforms in countries that are seen to be "economically inefficient," rather than only supplying information to foreign investors. It might be argued that the reports may also facilitate the legal transplantation of more "economically efficient" models, especially common law models like Article 9 of the American UCC in the area of secured credit, in order to promote legal convergence. However, given that legal reforms are predicated only on arguments of economic efficiency and that the so-called more "economically efficient" legal system cannot be proven to be of higher quality by any set of unchanging absolute standards, this occurrence is subject to criticism. As previously mentioned, other values that are fundamental to each unique national legal culture should also play a significant role in establishing business laws. Economic indicators are not able to provide an empirical answer to the question of whether a certain piece of national legislation may be considered "economically efficient." Although the World Bank's desire to support legal reforms and convergence of laws may be commendable in theory, achieving these goals may prove difficult. One could argue that the modernisation of commercial laws shouldn't be determined only by measures of economic efficiency and most surely shouldn't be the outcome of political economy-based strategy. It is always possible, after all, for reformers and other private actors involved in the legal process to propose initiatives that are more affected by political and economic power than by legal knowledge. Thus, the Doing Business reports' methodology may be detrimental to legal changes, as nations concentrate more on raising their rankings than on addressing the actual problems with their legal systems. Every jurisdiction has a different cultural, economic, political, social, and commercial background; therefore, it is not appropriate to assume that "economically efficient legislation" in one jurisdiction will have an equivalent impact in another. Economic considerations alone cannot be the only driving force behind the complex task of reforming commercial law frameworks. In fact, when it comes to regulating business transactions, there are important policy decisions that must be made. Questions about the extent to which debtors should be allowed to use their assets as security, the extent to which secured creditors should have priority over other unsecured or involuntary creditors in the event of a default, and the extent to which third parties should be notified of the creation of property rights through public registration are some examples of issues that arise in the field of secured credit. Every jurisdiction chooses a different approach to the issue. Naturally, economic efficiency and the advancement of economic growth play a significant role in the development of commercial law, but other fundamental principles ingrained in each country's legal system also play a significant role in the process. Because law

is cultural and there can never be a universal culture, advocates of the preservation of legal cultures contend that there should never be a universal law. Finding out if one can offer a sound defence for the adoption of a foreign legal system is the main goal, not endorsing one legal culture over another.

Conclusion

By alone, the economic efficiency criterion is insufficient to evaluate the calibre of legislation. Its application in civil law nations, especially in light of legal reforms, has drawn harsh criticism for dictating the general nature of commercial law. The underlying legal origins thesis, which is evident in the World Bank assessments evaluating the business-friendliness of over 180 jurisdictions, is insufficient to adequately convey the calibre of legal systems. The essence of commercial law contains a particular legal culture that should not be undermined by solely taking economic imperatives into account, together with a wider range of values and interests. This article also made an effort to show that, even while the World Bank's willingness to support legal reforms that try to harmonise laws may be a desirable thing in theory, economic efficiency should not be the only factor used to support such reforms. This essay acknowledges that while economic efficiency can be a useful instrument for reforming commercial law, it shouldn't be the main goal of those changes. The fact that the World Bank publications have promoted legal changes by evaluating national company laws in a way that is culturally biased is also debatable. It is evident from this that this fosters rivalry among legal systems, which in the end tends to strengthen some and weaken others. It is crucial to stress, nonetheless, that national legal reformers must not undervalue the unique legal knowledge required to draft appropriate legislation that also takes into account the social, political, and economic values of their particular jurisdiction.