LEGAL FRAMEWORKS FOR BUSINESS TRANSACTIONS AND ECONOMIC DEVELOPMENT

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ABSTRACT

This article examines the legal frameworks for business transactions in the context of economic development, with an emphasis on contract law. A conventional view emphasizes formal enforcement of contracts for economic development. However, a contrasting view, citing empirical works, holds that contract law and formal enforcement are not important for business transactions because the majority of issues and difficulties arising from business transactions are resolved informally, without reference to contractual terms. This article considers these views and examines laws and legal frameworks for contracts that are conducive to economic development. Freedom of contract, which is considered a cornerstone of the market economy, also needs to be balanced with public interest, including economic development; for instance, the government may find it necessary to intervene in private contractual relations to meet the needs of economic development, such as expropriation for infrastructure projects. This article also examines the balance between freedom of contract and public interest limits on this freedom, a balance that is constantly changing over the course of economic development. Finally, national and international development agencies have promoted law reforms to improve secured transactions to foster economic development in developing countries. This article also examines whether the legal promotion of secured transactions would be conducive to economic development.

Keywords

Contract Law, Enforcement of Contract, Economic Development, Public Interest, Secured Transactions

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I. INTRODUCTION

This article examines the legal frameworks for business transactions in the context of economic development, with an emphasis on contract law. The legal frameworks relevant to business transactions include a wide range of private and public laws, such as contract law and laws governing property rights, government regulations on business transactions, and secured transactions. This article focuses on contract law, which regulates the formation of a contract and defines the rights and obligations of the parties to a contract.

A contract may be defined as a legally binding commitment,[1] which may also be categorized into different types, such as private contracts and public contracts.[2] Contracts are an essential constituent element for business

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1 RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

2 "Private contracts" refer to contracts arising between private parties who may not necessarily share a social nexus. Breach of private contracts entails legal sanctions but civil in nature, such as monetary damages. Public contracts involve the work or improvement desired by a public authority

transactions, as they create a "price" (e.g., damages to be paid) for failing to perform the promised transaction and clarify the terms of the transaction. Contracts are formed with or without documentary execution and arise from day-to-day transactions. For example, someone who hails a taxi in a city and mutters only one word about his or her destination to the driver forms a binding contractual relationship with the taxi driver.[3] The terms of this contract include payment of the fare by the passenger and transportation of the passenger to the destination by the driver, even if these terms are not spelled out.

Other contracts are more explicit and sophisticated, and the details of their terms are set out in a document or multiple documents. Regardless of its complexity, protection and enforcement of contractual rights and obligations are important for business transactions and economic growth because this protection and enforcement improves the predictability of transaction outcomes and thereby reduces transaction costs.[4] The terms of contract law stipulate such protection and facilitate enforcement; thus, contract law is relevant to economic development and needs to be examined in this context. Formal contract enforcement, referring to a form of contract enforcement performed by the state under the terms of law, is relevant to economic development, although this avenue of formal enforcement may not be the only device for the protection and enforcement of contractual rights and obligations.[5] A conventional view emphasizes the role of formal contract enforcement for economic development.[6] However, a contrasting view, citing empirical works, holds that contract law and formal enforcement are not important for business transactions because the majority of issues and difficulties arising from business transactions are resolved informally, without reference to contractual terms.[7]

In the presence of these opposing views, the governments promoting economic development will have to consider an appropriate regulatory

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for the benefit at large, often with standardized terms and price terms, and entail regulatory sanctions. See Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 597-630 (1987).

3 E. ALLAN FARNSWORTH, CONTRACTS 129 (Aspen Publishers, 4th ed. 2004) (referring to such contracts as "implied contracts" or "contracts implied-in-fact").

4 Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 386-405 (1937); Ronald H. Coase, *The Problem of Social Cost*, 3 L.J. & ECON. 1, 1-44 (1960).

5 DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 19 (Cambridge: Cambridge University Press 1990) (discussing social risks, such as reputational risks and the risk of exclusion, that may deter breach and enable private enforcement of contract).

6 *Id.* at 54 (supporting this view, Douglas North stated that "the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World").

7 Avner Greif, *Contracting, Enforcement, and Efficiency: Economics Beyond the Law in* 1996 ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 239 (Michael Bruno & Boris Pleskovic, eds.,Washington, D.C.: World Bank, 1997).

approach; e.g., to what extent the state must use its limited resources to develop formal contract law and enforce contracts to facilitate economic development. This decision will be particularly important for developing countries facing resource constraints. Freedom of contract[8] also needs to be balanced with the public interest, including economic development; for instance, the government may find it necessary to intervene in private contractual relations to meet the needs of economic development, such as expropriation for infrastructure projects. A point of optimal balance between freedom of contract and public interest limiting such freedom may change over the course of economic development. Finally, national and international development agencies emphasize the importance of promoting secured transactions for economic development and proposed law reforms.[9] Since the facilitation of laws and institutions to encourage secured transactions requires a considerable amount of resources and administrative capacity, it is also necessary to examine whether secured transactions are imperative to economic development.

This article is organized as follows: The next section examines the constituent elements of contract law that are found across the board, including provisions on contract validity; formation of contract; form, defense, discharge; and remedy. Section III discusses the views that support or detract from the role of formal contract enforcement in the context of economic development and assesses the importance of formal contract enforcement for economic development. This section also examines the conditions required for regulatory frameworks for contracts that are conducive to economic development, as well as a strategic regulatory approach for developing countries. Section IV considers limitations on freedom of contract supported by public interest considerations, such as economic development. Section V turns to secured transactions, which have been promoted by national and international development agencies as a vehicle for economic development and evaluates the claim that law reforms promoting secured transactions are important for economic development. Section VI draws conclusions.

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[8] Freedom of contract refers to the freedom of individuals and legal persons (legally recognized entities) including corporations, to form contracts and determine contractual terms. Freedom of contract is essential to the free market economy. *See* David Bernstein, *Freedom of Contract*, ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES, vol. 2, 263-66 (David S. Tanenhaus ed., 2008).

[9] For example, the United Nations (including the United Nations Commission on International Trade Law (UNCITRAL) and the General Assembly), the Organization of American States (OAS), Organization for the Harmonization of Business Law in Africa (OHADA), the European Union, the World Bank, and the United States Agency for International Development have identified secured transactions reform as a critical component in economic development in developing countries.

II. CONSTITUENT ELEMENTS OF CONTRACT LAW

A. Introduction

Today most jurisdictions in both civil law and common law traditions have a set of laws that recognize, protect, and enforce contractual rights.[10] Such laws are collectively referred to as contract law.[11] Private property rights form the essential basis for valid contract transactions among private individuals;[12] for example, a private contract to purchase a house would be an invalid contract under the communist regime that does not allow private ownership of a house. Thus, private property rights and contracts are the two key elements for the market economy. The development of various market transactions would not be possible without the recognition and protection of valid contracts. Contract enforcement, which is influenced by institutional effectiveness and state capacity, is also important.[13] To facilitate further discussion on contract law and enforcement in the context of economic development, this section discusses the constituent elements of contract law that are found across the board, including the validity of contract; the formation of contract; form, defense, and discharge; and remedy for breach.

B. Validity of Contract

Validity of contract concerns a question relating to the subject matter for contract*;* i.e., as to what private parties may contract between them. There are two regulatory approaches: liberal and restrictive approaches. The liberal approach permits parties to contract freely (i.e., freedom of contract) without restrictions, except where specific transactions are prohibited by law (e.g., transactions on illegal drugs). Most market economies adopt liberal approaches and endeavor to secure freedom of contract. In contrast, the restrictive approach limits and controls what can be contracted among private parties. For example, communist regimes restricted freedom of contract and did not allow private transactions over means of production such as

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10 For example, in German law, contract law is found in Bürgerliches Gesetzbuch (BGB) (civil code of Germany). In common law jurisdictions, such as United States, contract law is developed by judicial precedents originating in English courts. *See* FARNSWORTH, *supra* note 3, at 9-41.

11 *Id.*

12 See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (New York: Basic Books, 2003) (emphasizing the importance of protecting property rights for economic development).

13 *See* Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT'L L.J. 415, 451-54 (2017) (explaining that formal contract enforcement requires courts that render a timely decision and implement the decision effectively, and the quality of implementation is also influenced by state capacity); *see also* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (New York: The Macmillan Company, 1924).

manufacturing facilities and agricultural farms.[14] Even in market economies, the government may restrict private property rights in the context of the industrial strategy, and this may lead to the contraction of freedom of contract; for example, the restriction of private ownership of strategic minerals would render a private contract for the sale of these minerals invalid.

In the development context, the government may use licensing schemes to control the contractual capacity of private parties. For example, the government may control exports and imports by requiring traders to obtain a license prior to transactions. The government may set the terms for issuance and renewal of such license so that international trade contributes to development goals; e.g., the government may set policies to grant a lucrative import license to the firms with a certain level of export performance, as a means to promote export-led development policies.[15] The government can also operate the licensing scheme to secure revenue sources, such as tariffs imposed on imports.

In addition to trade, the government may also affect domestic business transactions and promote specific policy objectives by setting up laws that require prior authorizations. For example, the government may require authorization for land or real property transactions in the areas where strong demands drive up land prices rapidly and create social problems associated with the radical price increases. Contracts formed without such authorization will be invalid and unenforceable. Thus, the government can control the scope of legal business transactions by using licensing and authorization schemes. Such licensing and authorization schemes are further discussed in Section IV.

C. Formation of Contract

Contract law also addresses the technical issues relating to formation of contracts. In most jurisdictions, contract formation requires an act that expresses intent to create a legally binding commitment, accompanying clear and definite terms (e.g., quantity of products), and an unequivocal act of accepting such intent, commonly referred to as "offer" and "acceptance," respectively.[16] In common law, contracts also require "consideration," which refers to a bargained-for benefit or detriment that each party agrees to assume in return for the promise made by the other party.[17] For example, in a contract to buy a computer for $1,000, the consideration for the seller is $1,000, and

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14 See, *e.g.,* Wencelas J. Wagner, *The Law of Contracts in Communist Countries (Russia, Bulgaria, Czechoslovakia and Hungary*), 7 ST. LOUIS U. L.J. 292, 292-310 (1963).

15 Yong-Shik Lee, *Law and Development: Lessons from South Korea*, 11 L. & DEV. REV. 433, 445 (2018).

16 *See* FARNSWORTH, *supra* note 3, at 129-152.

17 *Id.* at 47-53. Consideration is not required in most civil law jurisdictions.

that for the buyer is the computer. Consideration is not normally an issue in commercial transactions in which a service or a good is exchanged for an economic benefit (e.g., money). The difficulty in contract formation arises where the terms of an offer and acceptance vary (e.g., an offer to sell a car for $1,000 in cash and an acceptance of the price with a suggestion to pay by a check). Common law requires that acceptance does not vary from the terms of an offer,[18] but in real life, such discrepancies are commonplace and need to be accommodated. It is necessary to recognize a contract even if there are discrepancies in the terms between the offer and the acceptance.[19]

Regulatory treatment of contract formation is not identical across the board; for example, the Uniform Commercial Code (UCC)[20] distinguishes between merchants and non-merchants and applies different rules in each scenario.[21] The UCC rules are notoriously complex when parties exchange forms with varying terms in contract formation stages (commonly known as the "battle of the forms").[22] Some civil codes governing contracts are simpler and treat an acceptance that varies the term of the original offer as a rejection and a new offer subject to acceptance by the other party.[23] In international trade, the dissimilar rules of contract laws among trading nations become a significant impediment to cross-border transactions. The United Nations Convention on Contracts for the International Sale of Goods (CISG) was drafted to address the differences in the regulatory treatment of contracts among nations. The CISG governs contract formation and rights and obligations of the parties for the sale of goods between parties in 90 member countries.[24]

D. Form, Defense, and Discharge

Contract law may also stipulate that a contract be in a certain form, such as a signed writing (primarily for enforcement).[25] Although in most jurisdictions a form is not a requirement for enforcement of every contract, contract law may nevertheless require a specified form for enforcement of

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18 *Id.* at 140-145.

19 Otherwise, numerous transactions will lose contractual protection for technical reasons where parties intend to have transactions but merely fail to match the terms of their offers and acceptances.

20 The Uniform Commercial Code, first published in 1952, is an outcome of a joint project of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) that aimed to harmonize the laws of sales and other commercial transactions throughout the United States. All states and the D.C. have accepted the UCC through legislation.

21 U.C.C. § 2-207.

22 *Id.*

23 *See, e.g.*, Civil Code of Korea § 534.

24 *International Trade and Development*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en (last visited Apr. 26, 2019).

25 FARNSWORTH, *supra* note 3, at 353-410.

specific types of contracts. For example, in common law (under the statute of frauds), a signed writing is required for specific types of contracts, such as a contract that transfers interests in land, contracts that cannot be performed within a year, a contract of suretyship, and a contract for the sales of goods over a certain value.[26] Form, such as a signed writing, is also important for evidentiary reasons even if not required for enforcement of a contract per se: an oral contract would be more vulnerable to a dispute over its terms or even its very existence. The form is also relevant where government authorization is required for a particular transaction (such as certain land transaction as exampled above). Proof of the government authorization in a required form, such as a dated seal, might be required to affirm the validity and enforceability of the contract.

A defense is a legal ground for excuse from performance of an otherwise valid contract. Most jurisdictions recognize justifiable grounds for non-performance, such as mistake (mutual mistake of a material fact), misrepresentation, duress, and undue influence.[27] Most jurisdictions also excuse minors or those lacking mental capacity from performing under a contract other than for necessity, as they are seen as not yet possessing mental capacity, due to their young age or other reasons such as mental illness, to form a contract.[28]

Contractual duties are discharged by performance under the contract. Performance must comply with the terms of the contract and must meet the standard of "substantial performance," at the minimum, of all the terms that are essential to achieve the objective of the contract. Performance that does not meet the standard of substantial performance constitutes a material breach, and the non-breaching party may cancel the contract and sue for damages. For example, in a contract to build a house, a builder who fails to complete the roof does not meet the standard of substantial performance (i.e., one cannot live in a house without a complete roof) and commits a material breach. However, one who fails to paint a section of the house in an agreed color does not, although the other party may still sue for damages (but is not permitted to cancel the contract).[29]

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[26] *Id.* at 357-84.

[27] *Id.*

[28] *Id.* at 219-24 (subjecting the rule to exceptions, such as a contract to purchase necessities).

[29] The applicable standard to determine substantial performance is reasonable compliance under the local standard. Also, the privity of contract requires that contract performance is only required between the parties to the contract. C.f. third party rights (intended or incidental beneficiaries). *Id.* at 651-78.

E. Remedy

One of the most important roles of contract law is to set the terms for remedy in case of a breach. The primary remedy for contract breach is damages (monetary compensation) in common law and most civil law jurisdictions.[30] The measure of damages is compensation for the "lost bargain," and damages that cover this loss are called "expectation damages."[31] For example, suppose that A has a contract with B to purchase a computer from the latter for $3,000. B subsequently refuses to sell the computer to A in breach of the contract, and A had to buy the identical computer from another seller for the best price of $4,000. In this case, the amount of expectation damages is the difference between the contract price and the purchase price, which is $1,000. If A paid $2,000 for the alternative computer, then A's position actually improved because of B's breach, and no damages can be awarded. Damages under contract law are compensatory in nature, not punitive.

A breaching party may also be liable for consequential damages, which cover the loss that is foreseeable and consequential to the breach.[32] In the hypothetical case above, suppose further that A is in a business that requires the use of a computer, and A was unable to work for three days because B did not sell the computer in time. B had knowledge that A's business required the use of a computer and that A would not have immediate access to an alternative computer should it fail to deliver the computer under the terms of the contract. If A lost business income in the amount of $1,500 for the three days because of B's breach, B is also liable for the lost income in consequential damages. The breaching party is, however, not liable for the loss that is not foreseeable as a result of the breach. The measure of these damages could vary and raises uncertainty as to whether the court will consider the circumstances warranting the award of damages; thus, parties may also agree to stipulate the amount of damages in the contract under defined circumstances (e.g., delays in the completion of a construction project) to remove this uncertainty. These damages are called "liquidation damages," and courts tend to approve them as long as they are reasonable and proportionate to the loss.[33]

Other types of remedies may be available where monetary compensation is not deemed appropriate. In other words, the court may award non-monetary, discretionary damages such as "specific performance" (ordering a breaching party to perform under the contract) or "injunction"

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30 See, *e.g.*, ALAIN BÉNABENT, DROIT DES OBLIGATIONS 680-690 (15th ed. 2016) (for French law).
31 FARNSWORTH, *supra* note 3, at 757-74.
32 *Id.* at 792.
33 *Id.* at 811-20.

(ordering a party to refrain from an act damaging to the other party).[34] Courts are cautious about rendering these types of remedies due to difficulty in supervision and the possibility of intrusion. Other examples of non-monetary remedies also include rescission (the prospective cancellation of a contract) and restitution (returning the money received under a contract).[35] For example, in a contract for the sale of a concert ticket, if the concert hall is subsequently destroyed in a fire without the fault of the parties to the contract, the contract is canceled prospectively (rescinded), and any prepayment for a ticket must be returned in restitution. Reformation is yet another type of contract remedy*;* i.e., a court may order a contract to be reformed to correct obvious errors.

In the context of development, effective remedy would be monetary damages for they are easier to implement, but specific performance may also be ordered to perform a project that would be essential for economic development (e.g., supplying a material that is crucial to building critical infrastructure where there is no alternative supply source for the material).

III. CONTRACT ENFORCEMENT AND ECONOMIC DEVELOPMENT

A. Private v. Formal Contract Enforcement

A contract will not be very effective if its terms are not enforced in the case of a breach, leaving the non-breaching party with no remedy. A party may attempt to enforce a contract privately, without involving a state agent such as the court.[36] The party may use various means at its disposal, such as using a third party collector, a means of pressure such as a warning to exclude the breaching party from further transactions, a bad review on the internet, or even self-help (e.g., take possession of the breaching party's property) that may or may not be legitimate under the law.[37] There is an argument that private enforcement is an effective alternative to formal contract enforcement,[38] but private contract enforcement can be costly, the outcome might be unpredictable, and the adopted measure carries a risk (particularly when the method used to enforce the contract is not strictly legal), thereby

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34 In the common law system, a non-monetary remedy is ordered in "equity" which is a remedy ordered by the discretion of the court. *Id.* at 739-57.

35 *Id.* at 820-29.

36 *See* BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE, THE INDEPENDENT INSTITUTE (2011).

37 See Hamish R. Gow, Deborah H. Streeter, & Johan F. M. Swinnen, *How Private Contract Enforcement Mechanisms Can Succeed Where Public Institutions Fail: the Case of Juhocukor a.s.*, 23 AGRIC. ECON. 253, 253-65 (2001) (discussing private contract enforcement).

38 *Id.*

increasing transaction costs and deterring investments.[39] The elements of uncertainty, cost, and risks associated with private enforcement have led to an argument supporting formal enforcement of contract by the state following the outcome of the court proceedings.

The mainstream position, advocated by numerous academics, including the Nobel laureate Douglas North, and by international development agencies, such as the World Bank, support the development of formal enforcement. North argued that the rules and norms governing economic interactions (including both formal law and informal norms) are the most significant drivers of an economy's success or failure.[40] According to North, private enforcement may work in the initial stages of economic development, in which personal knowledge of transacting parties about one another is extensive,[41] and repeat dealings are pervasive; however, as the economies become more fully integrated into the broader global economy, formal contract enforcement mechanisms become more important.[42] The World Bank, in support of developing formal enforcement mechanisms, also stated that "better courts reduce the risks firms face, and so increase the firms' willingness to invest more."[43] In fact, all of the OECD countries have developed formal contract enforcement mechanisms, but with a varying degree of expediency in contract enforcement, as illustrated by the table below:

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39 Thus, the World Bank report emphasized the importance of courts (formal enforcement) for reducing the risks firms face to increase their willingness to invest more. THE WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 86 (2004).

40 NORTH, *supra* note 5, at 3.

41 *Id.* at 55.

42 *Id.* at 59.

43 WORLD BANK, *supra* note 39.

Table 1: Time in Days to Enforce a Contract by Means of a Suit[44]

Group 1		Group 2		Group 3	
Country	Days	Country	Days	Country	Days
Singapore	164	Chile	480	Algeria	630
New Zealand	216	Sweden	483	Ireland	650
Belarus	275	Denmark	485	Botswana	660
Korea	290	Finland	485	Czech Rep	678
Russia	337	China	496	Poland	685
Mexico	341	Germany	499	Venezuela	720
Japan	360	Belgium	505	Uruguay	725
Ukraine	378	Iran	505	Brazil	731
Hong Kong	385	Morocco	510	Portugal	755
France	395	Spain	510	Canada	910
Austria	397	Romania	512	Philippines	962
Vietnam	400	Netherlands	514	Israel	975
Australia	402	Ethiopia	530	Argentina	995
Indonesia	403	Rep. Congo	560	Egypt	1,010
USA	420	Bulgaria	564	Pakistan	1,071
Malaysia	425	Bolivia	591	Italy	1,120
Peru	426	Switzerland	598	Colombia	1,288
UK	437	South Africa	600	Bangladesh	1,442
Nigeria	454	Hungary	605	India	1,445
Kenya	465	Turkey	609	Greece	1,580

The above table indicates that a formal system does not necessarily guarantee a speedy resolution of contract disputes.

Additionally, formal enforcement requires considerable institutional capability: the state must have access to considerable financial, technical, and personnel resources to set up and maintain the judicial system that adjudicates effectively on contract disputes, identifies appropriate remedies, and enforces them against the unwilling breaching party.[45] Developing countries that are facing serious resource constraints may not have access to these resources to the extent necessary to set up and maintain a functioning system. As a result, judicial reform has often failed to take root once external

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[44] WORLD BANK, DOING BUSINESS: REFORMING TO CREATE JOBS (Washington, D.C., 2018) (explaining that "days" represent the number of days before resolution (enforcement) is achieved).

[45] On the importance of institutions, the OECD states: "Having a contract law on the books is not sufficient. What matters equally are the role and practices of the legal institutions that support the effective implementation of contract law. The legal institutions relate to the organization of courts, an independent and competent judiciary, the legal profession, the enforcement services and the process of law making itself." *Policy Framework for Investment*, OECD, https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm, (last visited May 4, 2019).

aid is discontinued.[46] A well-functioning court system and effective formal enforcement may be an outcome of economic development which enables the government to afford the needed resources for the court system. The push for judicial reform to improve formal enforcement, without due consideration of the state's resources and capacity, may prove to be ineffective and fail to result in effective formal enforcement.

These examples help to illustrate that the importance of contract law and formal enforcement may have been over-emphasized by scholars, particularly in regards to the early stages of economic development.[47] Both in developed and developing economies, the vast majority of business disputes are resolved without ever resorting to contract law or formal enforcement. It is also not conclusive that the absence of effective formal enforcement necessarily lowers investments and impedes economic development. The cost of enforcement and the risk of contract breach is only a part of the cost assessment for investors, even in the absence of effective formal enforcement. In other words, entrepreneurs and investors may well consider such a risk an acceptable cost and not necessarily refrain from making investments and engaging in transactions if the other benefits, such as the market viability and growth potential, outweigh the cost. This explains the rapid growth of investment and economic development in China since the 1980s when there was no developed contract law or robust formal contract enforcement.[48]

Leading scholars, such as Michael Trebilcock, agree. Trebilcock concluded that a lack of formal enforcement is not necessarily a barrier to economic development in the early stages of economic development."[49] According to Trebilcock, formal enforcement becomes more relevant only in

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46 *See* Roberto Laver, *The World Bank and Judicial Reform: Overcoming 'Blind Spots' in the Approach to Judicial Independence,* 22 DUKE J. INT'L & COMP. L. 183, 183-238 (2012) (discussing the issues arising from externally-driven judicial reform).

47 The early stages of economic development, which should be distinguished from Rostow's five stages of economic growth, refers to the initial state of economic development with the characteristics of over-dependency on primary industries (non-manufacturing industries), low-level industrialization, and low per-capita income, as compared to the later stages of economic development referring to the more advanced economic state with sustained economic growth, industrialization, and higher (mid-level) per capita income. In the early stages of development, there is generally a surplus of unskilled labor and shortage of skilled labor and capital that need to be imported. As economic development progresses, the stock of unskilled labor diminishes and those of skilled labor and capital rise, resulting in increases in the price (wage) of the former and decreases in the prices of the latter. YONG-SHIK LEE, LAW AND DEVELOPMENT: THEORY AND PRACTICE 44 n. 259 (2019).

48 Jiangyu Wang, *The Evolution of China's International Trade Policy: Development Through Protection and Liberalization*, *in* ECONOMIC DEVELOPMENT THROUGH WORLD TRADE 191, 192-96 (Y.S. Lee, ed. 2008) (exploring how China initiated an economic reform process in the late 1970s, accommodating the market mechanisms in the economy gradually throughout the 1980s).

49 Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1517-580 (2006).

the later stages when informal business arrangements and private enforcement based on community networks and personal ties become less effective due to the increasing complexity of transactions and the involvement of parties from outside the community networks who may not necessarily share the common business practices or traditions.[50] As discussed above, institutional capacity is an issue for the establishment and operation of effective courts and formal enforcement systems.[51] As economic development progresses, the economy will secure the resources necessary to set up and operate formal enforcement mechanisms, and the government will be in a better position to facilitate them as necessary. However, there is no cut-off point or a universal guideline as to when formal enforcement systems become absolutely imperative and how much investment should be made into formal enforcement. Even a developed economy, such as Japan, may still prefer out-of-court adjudication over formal court proceedings and enforcement. Although it is true that globalization requires a degree of formalization, the actual use of formal enforcement will vary among the developed economies.

B. Strategy for Developing Countries

Effective contract enforcement is conducive to fostering business transactions, but it is not conclusive whether formal enforcement is imperative to economic development, particularly in the early stages of economic development where a majority of transactions are based on community networks and informal arrangements.[52] The successful development cases of the East Asian countries indicate that formal law and formal enforcement are not key requirements for economic development in the early stages of development.[53] Nonetheless, the expansion of economic transactions and globalization necessitates formal mechanisms (i.e., contract law and formal enforcement). As discussed above, the development and successful operation of the formal mechanisms require substantial institutional capability and resources; thus, there is a case for gradual

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50 *Id*.

51 Local residents in developing countries may prefer to use informal, traditional venues to resolve disputes. A recent study indicated the necessity to engage customary dispute resolution processes in developing countries. *See* Paul Zwier, *Human Rights for Women in Liberia (and West Africa): Integrating Formal and Informal Rule of Law Reforms through the Carter Center's Community Justice Advisor Project*, 10 L. & DEV. REV. 187, 187-235 (2017).

52 *See supra* Section III.A.

53 Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions in East Asia*, *in* LAW, CAPITALISM, AND POWER IN ASIA (Kanishka Jayasuriya ed., 1999); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 L. & SOC'Y REV., 829, 829-56 (2000); Amanda Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Social Approaches*, 29 J. L. & SOC'Y 282, 282-307 (2002).

adoption of formal mechanisms, in consideration of the available resources, as a working strategy for developing countries.

Developing countries may adopt a flexible regulatory approach which allows both informal and formal enforcement mechanisms to the extent that these two mechanisms do not conflict. The government, for example, would not be able to allow the creditor's self-help that forcefully takes possession of the debtor's property outside a legal process. An attempt to overhaul the existing contract law and enforcement mechanisms through blanket legal transplant, without due consideration of the institutional capacity and the available resources, would be costly and ineffective. The recently-developed general theory of law and development, which presents the causal mechanisms by which law impacts development, lists regulatory compliance as one of the key elements.[54] Thus, even if the government were able to set up laws and formal enforcement mechanisms, they would not be effective without due compliance, which is, in turn, affected by socioeconomic conditions on the ground.[55] For example, efforts to improve court efficiency would not be very useful in adjudicating contract disputes and facilitating contract enforcement where populations do not resort to courts for dispute resolution but prefer alternative, informal means of dispute settlement.[56]

For developing countries facing resource constraints, another workable strategy would be to focus on recurring problems in business transactions that may have an effect of suppressing economic growth. For example, if a fraud involving a loan agreement is a recurring issue (e.g., a borrower entering into a loan agreement without an intention to repay the principle and/or the interest), the government may adopt a criminal penalty for this type of contract breach. The adoption of criminal proceedings may help to prevent the recurrence of fraud in loan transactions. Alternatively, the government may facilitate the development of a credit reporting system in collaboration with business communities. The credit reporting system would be particularly important with the development of formal lending businesses (e.g., bank loans).[57] The government may also facilitate the use of arbitration and mediation for contract disputes in lieu of or in conjunction with the formal court system. This alternative would also be helpful where populations do not resort to courts for dispute resolution as mentioned earlier.

Lastly, international investment agreements (IIAs) are relevant for developing countries in attracting foreign investments for economic

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54 LEE, *supra* note 47, at 13.

55 *Id.*

56 This lack of use may be a result of limited access to the court due to the cost of litigation; an absence of the knowledge required to use the court; the physical remoteness of the court; or cultural reasons. *See* Zwier, *supra* note 51.

57 WORLD BANK, *Credit Reporting* (Aug. 29, 2019), http://www.worldbank.org/en/topic/financialsector/brief/credit-reporting.

development. IIAs set forth enforceable contractual terms between the government of the host country and foreign investors of the signatory country. The terms of IIAs require the most-favored-nation principle (foreign investors from the signatory country will receive no less favorable treatment than investors from any other country), the national treatment (foreign investors will receive no less favorable treatment than domestic investors, subject to stipulated exceptions), and protection of foreign investments from undue government interference (such as a demand to transfer technology) and expropriation (without due process and fair compensation).[58] The IIA terms that stipulate these principles may induce foreign investments, as they accord legal protections, but at the same time, they also restrict the policy space for the host developing country.[59] For example, the government will not be able to offer subsidies exclusively to domestic investors to facilitate domestic industries if the terms of the IIA prohibit such differential treatment to domestic investors. Thus, developing countries must carefully weigh the benefit and cost in concluding an IIA and set the terms to ensure that the IIA does not preclude its key development policies related to investment.[60]

IV. LIMITATIONS ON CONTRACT

Freedom of contract is a cornerstone of the market economy and a key element for economic development. The preceding discussion has advanced the theory that freedom of contract, regardless of whether it is protected by formal contract law and facilitated by formal enforcement or de facto secured by an informal arrangement, enables market transactions that will lead to economic growth and development. Nonetheless, governments impose limitations on freedom of contract[61] under particular circumstances to promote strategic economic considerations or to meet broader policy objectives. This section discusses limitations on contracts that are imposed to serve these needs and examines the socioeconomic considerations that call for such limitations. This section also inquires where an optimal balance between freedom of contract and its limitations should be found and whether

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58 *See* CHRISPAS NYOMBI & TOM MORTIMER, REBALANCING INTERNATIONAL INVESTMENT AGREEMENTS IN FAVOUR OF HOST STATES (2018).

59 *Id.*

60 *Id.*

61 Limitations on freedom of contract or limitations on contract refer to specific limitations imposed by the government on the scope of a valid contract. The government imposes such limitations by setting qualifications for entering into a certain type of contract (e.g., a license requirement for export and import transactions), imposing restrictions on the subject matter of a valid contract (e.g., a contract for an international sale of a product subject to an export quota when the quantity covered by the contract is in excess of the quota limit), or requiring government authorization for a specific type of contract (e.g., a contract for a land transaction in the area that requires government authorization) as discussed in this article.

it is ever desirable to implement general restrictions on freedom of contract in any stage of economic development.

A. Contract Limitations for Strategic Development Needs

The government may impose limitations on contracts in various forms when it serves the country's strategic development need. For example, a country may impose limitations on international contracts for the sale of strategic natural resources, such as rare earth materials. These limitations are called "export restrictions." In 2009, China imposed export restrictions in multiple forms, including export duties and export quotas, on rare earth minerals such as bauxite and fluorspar used for a range of modern industries including chemical industries and ceramics.[62] Export duties are the charges imposed on exporters for exportation of the covered commodity, the effect of which is to increase the export prices and reduce the export quantities. Export quotas are quantitative restrictions that set the maximum amount of the covered products that can be exported. A contract that provides for the sale of a covered product in a quantity that exceeds the quota would not be enforceable. Thus, export restrictions, along with the licensing schemes as discussed above, impose limitations on freedom of contract associated with international trade.

The government imposes these contract limitations for strategic economic concerns. In the case of China's export restrictions, the government intends to secure a sufficient quantity of rare earth minerals for the use of domestic producers by restraining exports,[63] and this policy facilitates domestic industries that require these minerals. The government may also run general licensing schemes for export and import businesses, and under such schemes, only the licensed exporters and importers would be authorized to engage in international trade. Such licensing schemes were prevalent prior to trade liberalization under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), and still exist today.[64] As discussed earlier,[65] the government may affect trade and the economy with the licensing schemes by, for instance, setting the license renewal terms to provide incentives for the preferred economic activities such as exports (favoring firms with export performance in the license renewal for lucrative imports).[66]

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62 *See also,* Ruth Jebe, Don Mayer & Y.S. Lee, *China's Export Restrictions on Raw Materials and Rare Earths: A New Balance Between Free Trade and Environmental Protection?*, 44 GEO. WASH. INT'L L. REV. 579, 579-642 (2012).

63 *Id.*

64 *See* YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM (2d ed., 2016) (discussing the international trading system under the GATT and the WTO regimes).

65 *See supra* Section II.B.

66 *Id.*

The licensing schemes have a more general effect on freedom of contract beyond international trade. Licensing schemes set limits on those who can engage in certain types of contracts, and such schemes have a general impact on freedom of contract and the economy. For example, a licensing scheme that stipulates credentials for certain professionals such as doctors, lawyers, and accountants limit those who may engage in professional contracts under these professions to the individuals who meet the defined credentials stipulated under the law. These types of licensing requirements are related to the public concerns for safety and professional reliability (e.g., it will be in the society's interest to allow only the qualified doctors to perform surgery), which may outweigh the negative impact on freedom of contract, and such licensing is in an increasing trend. Lastly, as discussed earlier, the government may also require "authorization" for specific categories of contracts (e.g., authorization required for contracts on land transactions to prevent speculative transactions that drive up land price).[67]

Licensing schemes and government authorization may be adopted in conjunction with economic development policies, particularly in the early stages of economic development where the private sectors are relatively weak, and the government can support and facilitate economic transactions conducive to economic development. The aforementioned example of licensing schemes for international trade is a good example.[68] Such government interventions, however, limit freedom of contract, and their economic effectiveness has been debated for centuries.[69] Cases of government misuse and abuse of these schemes abound, although several countries that have successfully achieved economic development, such as the East Asian countries—South Korea, Taiwan, Singapore, and more recently China—have been remarkably successful with government-led development policies.[70] In these countries, government control over certain contracts (e.g., licensing and authorization) was stronger in the early stages of economic development, and the government relaxed them in the later stages as the private sector grew and became robust.[71]

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67 *Id*.

68 *Id*.

69 *See* LEE, *supra* note 64, at 14-32.

70 The East Asian countries have achieved unprecedented economic development sustained for over three decades; between 1961 and 1996, Korea increased its GDP (gross domestic product) by an average of 8.75 percent per annum, Hong Kong by 7.61 percent, Taiwan by 8.64 percent, and Singapore by 8.61 percent (calculated with real GDP figures at constant 2005 national prices), while the world's average annual GDP increase and the annual GDP increase of the low and middle-income countries for the corresponding period were 3.85 and 4.39 percent, respectively. Robert C. Feenstra, Robert Inklaar, & Marcel P. Timmer, *Penn World Table Version 8.1* (April 13, 2015), www.rug.nl/ggdc/productivity/pwt/pwt-releases/pwt8.; World Bank Data, THE WORLD BANK (Aug. 29, 2019), https://data.worldbank.org/indicator/ NY.GDP.MKTP.KD.ZG.

71 LEE, *supra* note 47, at 44-45.

B. Control for Public Policy Considerations

The government may also impose limitations on contracts for broader public policy considerations such as the need to address unequal bargaining power between parties, the need to protect consumers against better-organized producers and suppliers, and the need to prioritize public interest over private interest under contracts through the exercise of eminent domain ("expropriation").[72] The growing concerns for social welfare in the twentieth century called for government interventions in many areas of market transactions, which had been previously left to the market, and the government responded by beginning to regulate contractual relations on public policy grounds.[73] Thus, these grounds are broader than economic development interests, but the limitations on contracts based on broader public policy grounds need to be addressed because they may still affect economic development.

The development of banking and financing industries has also led to the unique circumstance in which consumers are not in an equal position vis-à-vis banks and other financiers ("suppliers") in mass financial transactions such as consumer finance and insurance contracts. In such financial transactions, individual consumers are not on equal footing with the suppliers in terms of knowledge, access to information, experience, and bargaining power, which renders the consumers unable to negotiate the terms of the contract. The terms of such contracts are also standardized so as to maximize the benefit and minimize the risks for the suppliers.[74] Freedom of contract presumes that parties are free to negotiate the terms, but under these circumstances, such a presumption is not a reality. The government, thus, has justification for intervening and regulating the terms of such contracts to "level the playing field" and protect consumer interests.[75]

The lack of inter-party parity in contracts does not only exist in the banking and financing industries. A majority of consumer contracts are standardized throughout industries, and consumers are presented with contracts containing standardized or preset terms prepared by the suppliers with little or no chance for negotiation of the terms. This standardization is supported by economic rationales. For example, the cost of a flight ticket will be much higher if airliners should engage each passenger in the negotiation of the terms of each flight. Increasing government regulations and

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72 Professor Holcombe warns that government limitations on contract, including expropriation, are subject to abuse, as demonstrated by the frequent abuse by local governments in the United States. Personal correspondence with the author.

73 *See* FARNSWORTH, *supra* note 3, at 308-11, for a further discussion of the public policy concerns on contracts.

74 *Id*. at 285-94.

75 *Id*. at 308-11.

interventions may fill in the gaps by preserving the standardized contracts and their economic utility but protecting the rights and interests of consumers who cannot negotiate with the suppliers. In the early stage of economic development, lack of competition among producers and the existence of dominant producers will cause unequal bargaining power between suppliers and consumers, and there is a call for the government to regulate contracts on behalf of the weaker customers.[76]

Lastly, the state power to expropriate private property for public interest imposes a substantial limit on contract. The government may take possession of private property through expropriation for a public interest, regardless of a prior contract concerning such property. Contract law normally treats unexpected government action, including expropriation, as legitimate grounds to rescind the contract without any legal liability for breach on the part of the parties.[77] Nonetheless, to the extent that the parties are unable to perform under the contract, expropriation creates a substantial limitation on contract, and it becomes a significant impediment to the development of the market economy when the government exercises this power without due care and prudence.[78] This means that the countries that pursue economic development must be careful about expropriation, even where it is justified for economic development, and the prudent government will only use expropriation after considering its ramification for private ownership and private contracts.

C. General Restrictions on Freedom of Contract?

As discussed above, freedom of contract has never been completely removed in any economic system at any time in history;[79] conversely, it has never received unfettered protection anywhere. There has always been some limitation on contracts, based on strategic or broader public policy grounds. Market transactions have sustained economic development; whether the development strategy is the government-led industrial policy, export promotion, or the neo-liberal prescriptions minimizing government interventions, market transactions have formed the foundation for continued economic development, and freedom of contract is at their core. Thus, an attempt to remove freedom of contract or place general restrictions on

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[76] Thus, consumer protection agencies have addressed these issues in some of the successful developing countries, such as South Korea. For example, Korea Consumer Agency, http://www.kca.go.kr/index.do.

[77] FARNSWORTH, *supra* note 3, at 619-47.

[78] *See* George Leef, *It's Bad Policy To Use Eminent Domain For Economic Development, Even If It Sometimes "Works"*, FORBES (Aug. 28, 2015), https://www.forbes.com/sites/georgeleef/2015/08/28/its-bad-policy-to-use-eminent-domain-for-economic-development-even-if-it-sometimes-works/#4c884d0a7f80.

[79] NAUM JASNY, THE SOVIET ECONOMY DURING THE PLAN ERA (1951).

contracts would simply be unfeasible and unproductive in any stage of market-based economic development. The proliferation of "marketplaces" in today's most closed and restricted country, North Korea, and its subsequent economic growth due to the increased market transactions is a testament to the importance of freedom of contract for economic development.[80]

The real question is not whether freedom of contract is conducive to economic development, nor whether general restrictions on freedom of contract have any positive effect on economic development; rather, the question is where the government should try to strike a balance between protection of freedom of contract and promotion of public interest, including economic development, necessitating some restrictions on freedom of contract. There is not likely a universal guideline to this question, but the case of successful development in the past presents some indication for the answer. The East Asian countries, which have achieved the most successful economic development in history,[81] have all maintained a market economy but introduced strong government measures to promote exports and facilitate domestic industries, the effect of which inevitably imposed limitations on private contracts. Notwithstanding these limitations, the courts in those countries generally protected contractual rights and enforced contracts where government limitations were not imposed. This suggests that strategic government interventions which are carefully contemplated, designed, and selected could be effective, despite the consequential limitations on contracts, where freedom of contract is protected in principle.

V. SECURED TRANSACTIONS: A VEHICLE FOR ECONOMIC DEVELOPMENT?

This section offers a brief account of secured transactions and discusses its effect on economic development. Secured transactions refer to a loan or a credit transaction in which the lender acquires a security interest in collateral owned by the debtor. The availability of secured transactions is expected to enhance access to credit by creating a security interest in collateral in the form of a preferential right to possession or control in the case of default.[82]

Collateral for secured transactions can include both real property and personal property, but law reform initiatives have focused on personal property for individuals and small businesses that do not own real property.

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80 *See* Yong-Shik Lee, *A Note on Economic Development in North Korea: Call for a Comprehensive Approach*, 12 L. & DEV. REV. 247, 247-59 (2019) (discussing economic development in North Korea). North Korea's economic growth was halted by the strengthened international economic sanctions due to its nuclear ambition. *See also* Y.S. Lee, Young-Ok Kim & Hye Seong Mun, *Economic Development of North Korea: International Trade Based Development Policy and Legal Reform*, 3 L. & DEV. REV. 136, 136-56 (2010).

81 LEE, *supra* note 64, at 19.

82 *Secured Transactions*, BLACK'S LAW DICTIONARY 884 (6th ed. 1997).

Former U.S. Secretary of State Hillary Rodham Clinton described the importance of secured transactions reform:

> We're also working on reforms with the OAS to update what is called the "secured transactions law." Now put simply, that is to allow small businesses and entrepreneurs to use assets like refrigerators or sewing machines as collateral for loans. Many of these businesses could grow and employ more people, but they don't own the property that they work in or the home that they live in. But they have a refrigerator or a sewing machine, and we want to change the laws so that that can serve as collateral.[83]

Secured transactions create advantages for borrowers. For example, a single property can be used to support a series of loans: debtors do not have to surrender the title to the property. Thus, multiple loan arrangements could be made on single collateral, *albeit* with different priorities among the creditors. There is also substantial flexibility with the types of collateral that can be used for secured transactions: a security interest can be created in any property susceptible to monetary valuation, whether it is the property presently owned by the debtor or the property to be owned in the future, tangible or intangible.

A security interest can be created by contract, the terms of which specify the credit arrangement between the parties, including the duration of the loan, payment of interest, repayment of the principal, and disposition of collateral in case of default. However, these contracts do not protect the interests of third parties such as subsequent creditors who may seek a security interest in the same collateral; thus, a core function of secured transaction law is the protection of a third-party interest. To promote confidence in a secured transaction system, third parties must have access to information on the status of the collateral in which the party wishes to create a security interest. Public notice would provide such information, and the possession or control of collateral by the creditor or registration may give such notice.[84] The latter method will be particularly important: registration of a security interest facilitates secured transactions by providing access to the information on any security interest created in the collateral, while the debtor does not have to surrender the possession or control of the collateral. Priority will also be an issue where multiple security interests are created in a single

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83 SECRETARY OF STATE HILLARY RODHAM CLINTON, POLICY ADDRESS ON OPPORTUNITY IN THE AMERICAS (June 8, 2010), https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/06/142848.htm.

84 *See* Jens Hausmann, *The Value of Public-Notice Filling under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property*, 25 GA. J. INT'L & COMP. L. 427, 427-78 (1996).

item of collateral. The time of filing may determine priority, depending on the specific provision governing this issue.[85]

The availability of secured transactions, which can be facilitated by laws that support them, may indeed assist small businesses and individuals without substantial real property to access cheaper credit. However, it is not clear whether the promotion of secured transactions can lead to economic development on a national scale for the following reasons. First, the proliferation of secured transactions depends on the effective public notice and the accessibility and reliability of the registration system. Building such a system takes considerable administrative resources and expertise which many developing countries facing resource constraints lack. Furthermore, the promotion of secured transactions may also create conflict with communal rights in a property, which is not registered.

To avoid or minimize such conflicts, the legal facilitation of secured transactions must be promoted in careful consideration of the informal property rights and the local lending practices, which is not always a straightforward task. Also, it is not clear whether the small-scale consumer loans to be raised by secured transactions will replace the need for larger loans and investments to promote economic development on a national scale; secured transactions could be a useful device to raise small-scale loans, but it is not certain whether it can be an effective vehicle for economic development.[86]

VI. CONCLUSION

Legal frameworks for business transactions, such as contract law, may contribute to economic development by clarifying and protecting the rights and obligations of the parties to transactions and thereby reducing transaction costs. Advocates of contract law and formal enforcement have argued that the lack of them is a reason for economic stagnation in developing countries.[87] In contrast, dissidents have pointed out the cases of successful development in which the absence of the formal mechanisms did not necessarily impede economic development.[88] Informal arrangements, based on a social nexus and reputational elements, can be practical in protecting and enforcing contractual rights and support market transactions, particularly in the early stages of economic development. The development of contract

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85 *Id.*

86 For instance, financial investments for the successful economic development of East Asia have been made from sources such as international loans, foreign direct investments, and public savings, rather than small-scale loans raised by secured transactions.

87 *See supra* Section III.

88 *Id.*

law that is congruent with the socioeconomic conditions on the ground[89] and the facilitation of effective enforcement requires resources and expertise that many developing countries lack.

This explains why a number of judicial reforms have had limited success,[90] lasting only for the duration of external aid. The lesson is that efforts to develop contract law and facilitate formal enforcement should be paced with the availability of resources and expertise so that the reform can be sustained after the expiration of external aid. As shown by the cases of the East Asian development, the progress of economic development broadens the ambit of business transactions well beyond those sharing a common business and cultural heritage, and informal mechanisms based on the latter become insufficient to afford the protection and enforcement of contractual rights. The increased resources and expertise, as a result of economic development, would enable courts to secure the capacity required for effective enforcement. Well-developed contract law and effective formal enforcement is as much a result of economic development as a potential cause. A need-based, gradual adoption of the formal mechanisms, rather than a prescriptive transplant, is a key for success.

Governments have imposed limitations on contracts to achieve strategic development objectives or to meet broader policy considerations. These objectives and needs have necessitated the government to impose various forms of limitations on contracts, such as regulating the terms of the contract and requiring licensing schemes and authorization on particular transactions. Scholars disagree as to the economic utility of these schemes, but the successful developing countries in the past used them to promote industrial development and economic growth. Expropriation also imposes limitations on private ownership and private transactional interests in the property. The economic effect of expropriation is controversial,[91] but regardless of the debate, even if the call for economic development should broadly justify expropriation, abuse of eminent domain without due process and compensation will disrupt and reduce the reliability of the market-based economic system, and this will not be conducive to economic development.

Finally, secured transactions have been widely promoted as an essential element for economic development, and there has been a focus of international assistance on secured transactions law reform as previously stated in Section V. Secured transactions may indeed facilitate small-scale credit access by enabling small businesses and individuals to leverage their personal property to obtain credit, but it is not certain whether the facilitation

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89 The contents of contract law tend to have common elements across the board, as discussed in Section II, but the terms also need to recognize prevalent local practice to increase applicability and effectiveness.

90 *See supra* Section III.A.

91 Leef, *supra* note 78.

of the small-scale loans would be a replacement for the large-scale investments necessary for successful economic development on a national scale. The development of a reliable and accessible registry of security interests could be a challenging task for developing countries lacking resources and administrative capacity, and it may also impede communal property interests that are not registered, which can in turn become a cause of social unrest. Careful consideration should be given to the potential benefit drawn from secured transactions reform against the economic and social costs of developing a reliable system of secured transactions, which may vary from place to place.

Solid, well-defined legal frameworks for business transactions, such as contract law and formal enforcement, are important for economic development as have been advocated by the mainstream scholars and international development agencies. However, as discussed throughout this article, the degree of their importance may vary, depending, for example, on the stages of economic development. Policy makers and law reformers must be mindful of the potential benefit and cost associated with law and institutional reform in this area, which also changes over the course of economic development.