ALL IN THE FAMILY:
THE INFLUENCE OF SOCIAL NETWORKS ON DISPUTE PROCESSING
[A CASE STUDY OF A DEVELOPING ECONOMY]

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ABSTRACT

This dissertation presents the results of an empirical investigation of the influence of social networks on how individuals choose to process their legal disputes. The research focuses on business disputes and disputants in Venezuela, a developing economy. Two interconnected research questions are addressed: what dispute processing systems are preferred by business disputants, and what explains these disputants' preferences. Previous socio-legal research adopts a dichotomous view of societies, labeling them as either traditional or modern, and argues that certain forms of disputing processing are differentially preferred by most disputants in each system. This dissertation research finds a mix of so-called traditional and modern dispute processing processes and preferences in the Venezuelan business sector. Applying social network theory, I argue that rather than stage of development explaining dispute processing preferences, social networks within the Venezuelan business sector explain when and why business disputants choose different fora (formal or informal) and different mechanisms (adjudication/arbitration, mediation or shaming). The research that informs this dissertation was conducted using a multi-method approach, but the overarching research strategy has been that of a case study. Five areas of disputes processing within the business sector have been analyzed, each one referring to a different mechanism and/or forum that is available to disputants in Venezuela. The first two cases investigate the use of institutional fora and mechanisms (courts and publicly-sponsored ADR institutions). The next two investigate non-institutionalized settings and the formal (diamond arbitration) and informal (debt-collection agencies) processes that take place within them. The last case explores how disputants decide to use foreign fora (the U.S. in this case) and identifies the various incentives and obstacles that inform their choices.

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LIST OF ABBREVIATIONS

ADR Alternative Dispute Resolution

CAA Venezuelan Commercial Arbitration Act

CACCC Arbitration Center of the Caracas Chamber of Commerce

CBA Caracas Bar Association

CCM Maracaibo Chamber of Commerce

CEDCA Business Center for Conciliation and Arbitration

DCA Debt-collection Agencies

DGR Diamond Grading Report

FOC Foreign Oil Company

IADB Inter American Development Bank

IDMA International Diamonds' Manufacturers Association

INDECU Venezuelan Consumer Protection Agency

KPCS Kimberley Process Certification Scheme

NHTSA National Highway and Transportation Safety Administration

OPEC Organization of Petroleum Exporting Countries

USAID U.S. Agency for International Development

VENAMCHAM Venezuelan-American Chamber of Commerce

WB International Bank for the Reconstruction and Development

WDC World Diamond Council

WFDB World Federation of Diamond Bourses

CHAPTER ONE

INTRODUCTION

This dissertation constitutes an effort to describe the influence of social networks on how individuals choose to process their legal disputes. Its objective is to explain how social connections, shape the ways in which conflict is processed within both formal and informal institutions. Using the social context in which the Venezuelan business sector operates as a framework, this research tries to draw a real-life picture of how dispute processing occurs in society, which is in turn, important in understanding the functioning of different systems of social control.

For many years, the exploration of the ways in which the processing of legal disputes occurs in society has occupied the attention of scholars from several social science disciplines. Anthropologists, for instance, have focused on describing the social conditions that motivate the emergence of disputes as cultural processes, and the ways in which individuals –as social and cultural beings- choose among several available dispute processing institutions. Their approach has been to offer a thick and highly contextualized description of the social and cultural dynamics that take place in different environments, and its influence on how the larger social structure operates.

Social psychologists, on the other hand, have not paid much attention to the *external forces*, but rather, to individual behavior. Their focus has been to explore the ways in which people, as rational beings, conduct themselves and how they react to

social processes (the processing of disputes being one of them) that affect their individual sphere. Social psychologists have, of course, cared about the effect of individual's behavior on the larger society, but most of their analysis has been de-contextualized.

Legal scholars have, instead, turned most of their attention to the study of formal institutions, to the *official* system of social control and the ways in which its enforcement mechanisms work. They have also focused on legal actors and the processes in which they participate, but frequently from a legal centralistic viewpoint that considers government as the main source of rules and social order.

The way in which people process their disputes matters to legal scholars, but it is generally viewed as a component of a large, technical and complicated structure. And the interest is not so much in explaining how individuals actually choose to process their disputes, but rather, how they *should* do it in light of the normative order that is in place.

In this sense, dispute processing mechanisms are examined in terms of formal steps and pre-existing sets of rules, and individual behavior is observed in terms of how it conforms (or not) with what the law says. It is true, though, that for several years now, a number of legal scholars have expanded their interest to understand dispute processing that occurs outside formal institutions. But the traditional legal

centralistic approach has been so powerful and overwhelming that any attempt to offer an alternative approach looks almost insignificant.

Formal law and legal institutions have been portrayed by legal scholars as the backbone of society, as an essential component that not only guarantees social order but also progress and economic efficiency. And during the last two decades, multilateral institutions have embarked on an enormous enterprise to propagate this idea.

In fact, most judicial reform agendas (as proposed by multilateral organizations) prescribe that in order to achieve progress, developing countries need to replicate legal institutions and processes that are used in developed and more advanced societies. As a result, institutions and dispute processing models have been transplanted from one place to another not only as development tools but with a wide, and sometimes contradicting, range of objectives in mind.

The actual benefits of these initiatives have been much less than its proponents expected, in great part because their implementation has taken place without considering the context, the social and cultural environments of the places for which they were devised.

Take for example, the implementation of Alternative Dispute Resolution (ADR) mechanisms in Latin America. The vast majority of the judicial reform

initiatives proposed by the World Bank and the Inter-American Development Bank in Latin America included the promotion of ADR as a way to attract foreign private investors to the region, and as a remedy for the perceived congestion and malfunctioning of the Courts. ADR processes were believed to work well in developed countries (namely, the U.S.) to process disputes at many different levels, thus reform advocates viewed them as a panacea for the region.

Latin American governments felt compelled to implement policies regarding ADR. And, at the same time, a number of private corporations and chambers of commerce began funding initiatives to create ADR centers to serve mainly the business community. It was believed that by helping this sector, the country was creating favorable conditions to attract foreign investment, which considered the existence of modern and transparent dispute processing institutions a priority.

However, in spite of the vast amount of resources invested in the implementation of ADR institutions and the campaigns geared to highlight the benefits of the modern, cost-efficient, and transparent mechanisms that were now available to business disputants, ironically, members of the business community did not embrace these *new* processes. Business parties continued processing most of their disputes in the same ways they did before the judicial reform craze. Informal conciliatory processes channeled through the existing social networks were (and still are) widely utilized, instead of the new institutionalized ADR. Some close-knit communities (e.g. the diamond industry) continued employing the same traditional ways of dealing with

disputes among its members, also with the help of their dense social networks; and even official courts, are often utilized by business disputants with their social connections in mind.

We know from previous research[1] that disputants, in general, contemplate a wide array of procedural choices and that official institutions are just one of their alternatives, but little has been done in order to present a comparative view[2] about the different avenues that are available to them by taking into account their social and cultural context. Such an analysis would definitely improve the understanding about how the dispute processing business of a given society –or particular sector within a society- is distributed.[3]

Why Explore the Business Sector

If we want to obtain a more complete picture of dispute processing activities in society we cannot limit ourselves to studying the courts, but also need to expand our research to other levels of social organization and the processes that take place in these other levels. The study of procedural choices in the larger context is therefore, very

[1] See, Chapter 2 *infra.*

[2] Austin Sarat, Alternatives in Dispute Processing: Litigation in a Small Claims Court, 10 LAW & SOC'Y REV. 339, 342 (1976) ["Most studies of litigation are not comparative, that is, they do not place litigation in the context of the full range of dispute processing alternatives which society provides. Few have inquired as to why disputants choose one alternative over others which might deal with their problem"]

[3] Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 341 (1976) ["Thus the choices which people make among dispute processing alternatives are important in determining the way in which society's dispute processing business is distributed".]

important. In order to do such a study, one would have to take into account all the available choices (or, at least, the greatest possible array of choices) in a particular society. Such an effort would obviously require an enormous data collection task beyond the capabilities of an individual researcher.

A more limited -and by no means less important- and feasible approach is to limit the scope of the research to a particular sector of a given society, explore the available options that are presented to individuals in that specific context, and try to identify the factors that shape their procedural preferences. This way, we could obtain a picture that is closer to reality, and would be able to explore what works, what does not and why. The business sector may be suitable for this approach, for a number of reasons.

First of all, the business sector is usually an affluent segment of society, whose members tend to have more access to resources and to innovation than other groups. As a result, businesspeople encounter fewer barriers when accessing formal and informal dispute processing fora and mechanisms, than members from other segments of society. However, in their everyday life, businesspeople usually have to circumvent other obstacles and their exposure to dispute processing choices is generally broader than what is experienced by other groups.

Secondly, as a result of their interaction with other actors –both within and outside their environment- businesspeople are in a constant process of learning new

techniques to conduct their activities, and also in adapting to other settings and learning different ways of dealing with difficulties.

Finally, the business sector has been the focus of several legal and judicial reform efforts (e.g. World Bank reform agendas) due to the idea that strengthening and devoting important resources to business will lead to greater economic welfare and to overall improved socioeconomic conditions. As a result, the business sector has been the test ground for new dispute processing techniques (namely, Alternative Dispute Resolution, or ADR), which represents yet another reason to focus on it when exploring disputants' behavior and procedural choices.

This project, therefore, focuses on business disputes. We define business disputes broadly to mean potential legal conflicts in which a business has a stake or interest. Given this broad definition, business disputes are not necessarily of a commercial nature. They can also relate to labor and intellectual property, for example. We are not considering, however, disputes that involve public entities or the state even if the other party is a private business entity or individual businesspeople. Each of these categories may have different features, and are often processed in very different ways.

This work addresses two interconnected research questions: which dispute processing systems are preferred and why. We will try to answer these questions

through the subjective lens of Venezuelan business disputants.[4] We do not aspire to draw generalizations or much less to derive some theory from our observations, as our goal is simply to offer a description of how the social and cultural dynamics shape the ways in which individuals behave.

Although I have chosen to explore the business sector of Venezuela, my intention has not been to do a study *only* about how social networks influence the ways in which business disputes are dealt with *in* Venezuela. Rather, it is research about how the social, cultural, economic and political dimensions *of a given society* (it could be, indeed, any society) interplay with the existing social networks in affecting individual procedural choices. But in order to correlate theory with reality, Venezuela is employed as a case study.

I believe that this approach represents a helpful way of understanding how, in a more general way, formal and informal mechanisms are used in light of the existing institutions and other fora. I do not expect to run the risk of making observations that may generalize this limited project, but would like to offer some insights that can aid in understanding the same phenomenon in other contexts.[5] Also, in taking this approach I will hopefully make this project of interest to a broader audience.

[4] See, Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker,* 3 L. HUM. BEHAV. 21, 36 (1979)

[5] *Analytic generalizations* and not statistical generalizations is what can be drawn from case studies, as the purpose of this approach is to use "single or multiple cases to illustrate, represent, or generalize to a

Being able to study the Venezuelan business context has offered me a tremendous opportunity to discover dispute processing choices in an environment that combines many features that are typically seen in technologically advanced, modern and affluent societies; and at the same time, some of the characteristics that socio-legal scholars attribute to societies considered to be primitive, indigenous or traditional. This interesting contrast allows us to explore how the different mechanisms of social control interact within a specific social and cultural context, and how the social network paradigm can facilitate its study.

theory". See, LEONARD BICKMAN AND DEBRA J. ROG, HANDBOOK OF APPLIED SOCIAL RESEARCH METHODS 239 (Sage Publications 1998)

CHAPTER TWO

METHODOLOGICAL APPROACH

This dissertation used a multi-method approach, as different methodologies have served to collect, classify and analyze the data that informed its various pieces. However, the overarching approach has been that of a case study.

In order to gain a broad but still meaningful view of how social networks influence dispute processing choices in the business sector, I collected data on five areas of business disputing, each one referring to a different mechanism and/or forum that is available to disputants in that country. Five situations were analyzed as a result, each of them containing a mini study of procedures and procedural choices within a larger case study of the Venezuelan business sector. I used different data collection and analysis for each of these mini-studies.

When selecting the cases for study and the individuals to be interviewed during the research process, I wanted to ensure that I could capture the entire range of variations in dispute processing choices that take place within the business setting. I also wanted to focus on specific situations that allowed describing the contrasts that exist between the different mechanisms and fora.

The first two cases, investigate the use of institutional fora and mechanisms (courts and ADR institutions alike). The next two, investigate non-institutionalized

settings and the formal (diamond arbitration) and informal (debt-collection agencies) processes that take place within them. Lastly, I explored the case of disputants that decide to use foreign fora (the U.S. in this case) in light of the different incentives and obstacles of varied nature that inform their choices.

The majority of the data collected for the different chapters that form this dissertation were obtained from secondary sources, and also from semi-structured interviews with at least seventy respondents who were selected because of their familiarity with the particular aspects of each case.

Individual businesspeople and executives representing business entities of varied size and nature were the core of my research population. Most of them were domestic in the sense that the majority of their business activity took place in Venezuela, but I also looked into foreign investors and also to Venezuelans who conduct their activities in other jurisdictions.

Interviewees were selected -as it commonly happens when doing qualitative research- through non-random purposive sampling technique; that is, a deliberately chosen group of persons, settings or events that possess certain characteristics or information that cannot be obtained from other choices.[6]

[6] Joseph A. Maxwell, *Designing a Qualitative Study, in* HANDBOOK OF APPLIED SOCIAL RESEARCH METHODS 69 (Sage Publications, 1998)

As I gained access to the databases of several business organizations and chambers of commerce, it was possible to get a complete picture of how the business community is organized in Venezuela, and most importantly, about the different relations that exist among its members. The lawyers that serve these people and organizations were also taken into account as they are usually the ones who make -or heavily influence- the decisions to use a particular forum or dispute processing method. My personal experience as a legal practitioner for several years in Venezuela also played an important role.

Most interviews were also semi-structured and based on several protocols prepared in advance. Even though our informants agreed with no hesitation to participate in our study, we promised most of them to keep their identities confidential, which helped to promote candor during our conversations. The majority of the interviews were conducted face-to-face when I was in Venezuela, and only a relatively small number had to be conducted by phone or electronic mail when some interviewees were in a different city or country.

Some of my interviewees agreed to meet on more than one occasion either for follow-up conversations or to talk about new issues that emerged after our initial encounters. The average interview lasted ninety minutes, and sometimes digital recording was possible, but in general I did not transcribe the conversations; I rather used the recorded files to complete my notes or to confirm notions that weren't clear when the conversation took place. Whenever I was not able to record the interview,

personal notes were taken, then organized and coded for further use during the writing process.

I will briefly describe the methodology employed for each chapter. The chapter regarding the use of the courts, was built on administrative data (judicial statistics on court usage, examination of official records and private databases alike) and a series of semi-structured interviews with lawyers, their clients, court officials (judges, clerks) and other public administrators (judicial reform program managers).

The section about the use of institutionalized ADR is a further elaboration of the exploratory study that informed my SPILS masters' thesis.[7] For this, I relied on a survey distributed among business lawyers in Venezuela between 2001 and 2002, and a series of interviews conducted during that same period. The SPILS thesis, however, only took into consideration the views of lawyers and not that of their clients and other stakeholders. For this dissertation, I expanded the scope and incorporated more recent information obtained from ADR administrators and users (both lawyers and non-lawyers). An analysis of specific arbitration centers from the systems design perspective also gave me a deeper insight of how ADR centers are organized, which barriers are posed to its users and what incentives are perceived to drive people to use

[7] Manuel A. Gomez, The Use of Institutional Mediation by Venezuelan Business Lawyers (2001) (unpublished J.S.M. thesis, Stanford University) (on file with the Stanford Law School Library).

their services.[8] Finally, even though my initial focus was on institutionalized ADR,[9] I later broadened my interest to non-institutional alternative processes.

The two sections pertaining to private ordering were explored by using a case study approach. Firstly, to understand how some processes, which operate within non-institutional environments may yet be very formal and structured. I selected the case of the diamond industry. The diamond industry has been similarly studied by scholars in the U.S.[10] but I focused instead on how Venezuelan diamond dealers interact with the global trading network. Secondly, I studied the involvement of debt-collection agencies in dispute processing, as an example of informal (and often, illegal) mechanisms of enforcement that operate outside formal institutions. The case study approach allowed me to obtain a detailed and contextualized picture of two situations for which there were no statistical data or official records. Numerous interviews as well as the analysis of archival materials were the key methods on which I relied for these parts.

[8] See, Manuel A. Gomez, An Assessment of ADR Providers in Latin America: A case study of CEDCA (2002) (unpublished seminar paper) (on file with author).

[9] By Institutional ADR we mean when these processes are offered in a professional manner either by individual neutrals who have dedicated their practice to ADR or by dispute resolution providing organizations (ADR centers) that maintain a roster of mediators and arbitrators to handle the cases.

[10] See, MURRAY SCHUMACH, THE DIAMOND PEOPLE (W.W.Norton & Co. 1981); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 117 n. 2 (1992); Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 11 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/ ; RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 24 (2002); Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L&Soc. Inquiry (2006).

Finally, the section about litigants in foreign jurisdictions is also built from a case study. While originally conceived of as a paper for the Complex Litigation course in which I participated at Stanford Law School during 2002;[11] the final version takes into account my broader interest in why individuals choose, as they do, among different venues to channel their disputes. I must stress, however, that even though this chapter contains elements comparing two jurisdictions (Venezuela and the U.S.), it cannot be regarded as a full comparative study in the sense that it does not give equal treatment to the systems being presented. What this section tries to do, however, is to at least introduce the reader to the idea that when considering different alternatives, certain disputants take into consideration not only the official institutions of their own countries, but also those that operate in other jurisdictions.

The field research was conducted during at least eight trips to Venezuela in the four years between the fall of 2001 and the summer of 2005. As some trips were two or three months long, I was often able to organize data collection efforts with relatively low pressure.

The methodological approach that I have selected for this project has some distinctive advantages. First of all, it has allowed me to obtain a deep and contextualized description of the social, cultural and institutional environments in which business disputants interact; secondly, it has made possible the gathering of data

[11] See, Manuel A. Gómez, Dealing with Foreign Claimants in Complex Litigation: A study of the Ford-Firestone Rollover cases (2003) (unpublished seminar paper) (on file with author)

through different empirical methods; and lastly, it has given me an opportunity to explore a social phenomenon in its real-life form and to analyze it from a sociological perspective, in a way that has been generally overlooked by socio-legal scholars.

As for the limitations, perhaps the most important one -as is true of any case study- lies in the fact that this research is not *representative*, in the sense that we cannot infer frequencies or generalizations from it. Notwithstanding, the kind of qualitative research that I have selected seems to be the most appropriate, given the type of research questions posed, and the objectives that inform our research.

CHAPTER THREE

CONCEPTUAL FRAMEWORK: THE COMPETING PARADIGMS IN THE STUDY OF DISPUTE PROCESSING AND PROCEDURAL CHOICES

UNDERSTANDING DISPUTES

The study of disputes is a frequent topic among scholars interested in social control,[12] and has given rise to several avenues of research. One interesting area mostly covered by socio-legal scholars has dealt with the fundamental task of conceptualizing disputes; that is, to answer the question of what constitutes a dispute?[13] The ways in which people process conflict situations has also been studied, as well as the comparison among different ways of handling legal conflict.

Disputes are social constructs,[14] cultural events,[15] normal -and often inevitable[16]- occurrences in everyday life.[17] They are also a form of social

[12] Narrowly constructed, social control refers to the reaction to deviant behavior. DONALD BLACK, THE SOCIAL STRUCTURE OF RIGHT AND WRONG, 4 (Academic Press Inc., 1993)

[13] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 225-7 (1973); William L.F. Felstiner, Richard Abel, And Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming Claiming…*, 15 LAW & SOC'Y REV. 631 (1973)

[14] William L.F. Felstiner, Richard Abel, And Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming Claiming…*, 15 LAW & SOC'Y REV. 631 (1973)

[15] Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 157 (1984) ["But disputes are cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kinds of remedies are acceptable"].

[16] Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976)

[17] Klaus-Friedrich Koch et. al. Political and Psychological Correlates of Conflict Management: A Cross-cultural Study, 10 LAW & SOC'Y REV. 443 (1976)

relationship.[18] And even though disputes are usually subject to a negative connotation,[19] there may be some positive aspects to them. Disputes emerge for many different reasons, but in general are the result of a process of internalization, and further voicing of a disagreement about an event perceived as grievous.[20]

Once a situation is labeled as a dispute, those involved in it may either be compelled or voluntarily choose to react in different ways.[21] Firstly, they may simply avoid the conflict[22] or not do anything to change the status quo; they could also take a specific action and attempt negotiating directly with others, or try imposing their will by using coercive force, violence, or any other form that enables them to "square their accounts with others"(self-help).[23] After deciding to take action, disputants may seek the intervention of a third party whose role may be that of a neutral decision-maker

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[18] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 227 (1973)

[19] Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 156 (1984) ["Conflict is then a disruption of which must be managed and contained; it implies pathology and deviance"]

[20] William L.F. Felstiner, Richard Abel, And Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming Claiming…,* 15 LAW & SOC'Y REV. 631, (1973)

[21] JANE FISHBURNE COLLIER, LAW AND SOCIAL CHANGE IN ZINCANTAN 65 (Stanford University Press 1973). [stressing that, under certain contexts, individuals are not entirely free to choose how to process a dispute]

[22] Felstiner, for example, understands avoidance as one of the ways in which a dispute can be processed consisting in "a private sanction employed to counter another's significant breach of norms" and considers it different from "avoidance behavior adopted to prevent disputes from arising in the first instance". William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration,* 9 LAW & SOC'Y REV. 695-697 (1975)

[23] Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control* 16 J. LEG. STUD 67, 76 note 24 (1987) [" 'Self-help' literally denotes a person's efforts to square his accounts with others. This same compound word has also rather misleadingly been the traditional legal and sociological label for sanctions administered by friends, relatives, gossips, vigilantes, and other nonhierarchical third party enforcers"].

with authority to decide and enforce his or her ruling, or a mediator capable of assisting the parties in reaching an outcome amenable to both. In some instances, disputants may even appeal to the supernatural[24] hoping that this will help them find a solution to the quarrel.

This is of course, an oversimplification of the different attitudes that individuals may take towards conflict, since the possibilities vary greatly. However, most processing models fall into two major categories depending on the presence or absence of a third party. As a result, a dispute process in which a third neutral party is involved is called *triadic* and, when the contending parties or disputants are the only ones involved in the process we talk about a *dyadic* model.[25]

The course of choosing the appropriate method to handle a dispute often occurs in a sequence that goes from low cost and less formal approaches to more expensive, structured and formal means.[26] In other words, the parties usually start by using methods that are simple, informal, and relatively inexpensive; and whenever these fail, they move towards the more complex and structured ones. However, it is

[24] William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration,* 9 LAW & SOC'Y REV. 695 (1975)

[25] The term *dyadic* initially refers to two contending parties because most disputes usually involve only two sides (either individuals or groups with opposing interests), one asserting and the other one contradicting a claim. However, there are cases in which in spite of the fact that multiple parties have a stake in a dispute (multiparty disputes) we can still refer to these as *dyadic* because there is no third neutral party involved.

[26] David H. Van Veen, Reid D. Kreutzwiser & Rob C. de Loe, *Selecting Appropriate Dispute Resolution Techniques: A Rural Water Management Example,* 23 APPLIED GEOG. 89, 91 (2003).

not uncommon that due to the presence of certain factors, disputants end up selecting several mechanisms simultaneously, in different order, or simply use the same technique throughout the whole process.[27]

The first step usually entails a direct negotiation among the parties (*dyadic stage*); if this fails, the disputants might ask a third party to intervene and assist them in dealing with the conflict (*triadic*). The role of the third party may range from just facilitating the dialogue between the parties (mediator) to make a binding decision and being able to enforce it (adjudicator).

Dispute processing, not necessarily resolution

It is also worth noticing that disputants as well as other participants may have different goals in mind when processing a conflict situation.[28] The general assumption that individuals' main purpose is to actually *solve* the conflict is not always true. Very often people do not intend to find a solution, and the reason why they use a particular process is merely to reshape or renegotiate the status quo, or because it helps them

[27] The selection among dispute processing mechanisms and fora is also influenced, to a certain extent, by the presence of competing fora that use disputes "for their own local political ends". See, Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 882 (1988). In addition, once the parties have chosen a particular mechanism, it often has an effect on other procedural strategies. Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2066 (1987) ["…going to arbitration has a 'chilling effect' on labor negotiations, (and) negotiation itself is intimately linked to a litigation strategy"].

[28] Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker*, 3 L. & HUM. BEHAV. (1979) ["The people who create a dispute-processing institution, the people who staff it, the advocates (if any) who appear in it and the parties who use it may all have very different objectives. Further, all of them may also have very different views as to what would constitute a resolution of the dispute."]

gain something else; some even take advantage of conflict situations and do not desire a solution.[29]

In other cases, it is not possible to discover the parties' objectives, but even when we do, and a formal outcome is achieved (e.g. an adjudicatory ruling, arbitral award, or settlement agreement) it is still very difficult to know if such determination has actually *solved* the conflict.[30] Having this in mind, when we are referring to the way in which disputes are dealt with it seems preferable to use the term *dispute processing* instead of *dispute resolution*;[31] and when we refer to the results achieved by using a given process we may better talk about *outcomes* rather than *resolutions.*[32]

Legal Disputes

Even though disputes arise for many different reasons, a large portion –or at least the portion that has caught the attention of legal scholars- emerge because somebody considers that a norm or standard has been breached, thus giving way to the

[29] For example, for a defendant in a lawsuit or for a party that has little of no chance of prevailing, the status quo could be better than resolving the conflict.

[30] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, n.1 (1974) ["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."]; Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court,* 10 LAW & SOC'Y REV. 339, 343 (1976) ["neither the initiation of a lawsuit nor its termination always puts and end to the trouble which gave rise to the suit. A decision or settlement in one forum may do no more than provide the occasion for moving the conflict into another forum in which the drama of seeking settlement can be repeated."]

[31] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, n.1 (1974)

[32] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 69 n.7 (1974) ["Disputes have outcomes rather than resolutions for the same reasons that they are processed rather than settled"]

potential imposition of a sanction.[33] We call these *normative disputes*[34] in contrast to other situations in which the disagreement relies on other factors.[35] Disputes belonging to the former category –from which legal disputes are a subset-, are governed by rules that are usually expected to be neutral. Rules are employed in determining the outcome, and are also invoked by participants who claim to guide their behavior to its parameters or standards.[36]

The adjective *legal* often evokes the idea of a technical,[37] complex, formal and institutionalized apparatus.[38] It projects the image of a system that "stands in a relation of hierarchic control to other lesser normative orderings".[39] Legal disputes are also believed to be the exclusive business of courts. After all, these are the traditional dispute institutions sponsored by the state and upon which the authority to apply and

[33] Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control* 16 J. LEG. STUD 67, 69 (1987)

[34] The term *normative* in this context, obviously refers to the particular kind of "behavior that people should *mimic* to avoid being punished" and not to the idea of *normality* (behavior that is normal, frequent). See, Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control* 16 J. LEG. STUD 67, 69 (1987) [describing the ambiguity of the word "norm"].

[35] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 234 (1973) [Stressing that some of the factors that dominate non-normative disputes include "policy goals, the immediate result, or the relative strength of a party calculated in terms of social support".]

[36] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 234-35 (1973)

[37] Lawrence M. Friedman and Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 270 (1976) ["As society moves from a rural, face-to-face mode of life, to a technical, urban mode of life, dispute settlement becomes more 'legal'".]

[38] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 229 (1973) ["In every society most of the disputes will fall into a relatively limited number of patterns. We speak of these recurrent patterns for disputing as being institutionalized. What this means, at a minimum, is that the participants occupy roles within the institution that handles the dispute"]

[39] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 17 (1981).

enforce the official law is vested.[40] Consistent with this idea, scholars have paid much more attention to courts and to their role as *official* dispute processing bodies than to any other institutions that perform similar functions in society.[41]

The truth is that courts are just one of the many avenues that disputants have in their catalogue of choices, and even though the judiciary is believed to monopolize the enforcement of legal norms, it is not the only source of normative messages in society.[42] Courts are not even the institutions that handle the majority of legal conflicts and neither occupy the center of legal life[43]. To the contrary, only a minimal fraction of disputes that we can label as *legal* enter the judiciary[44] and from that number is really difficult to know how many are actually resolved. The relationship of courts with conflict is multidimensional. In this respect, aside from their traditional role,

[40] Such *legal centralistic* (and certainly a Hobessian) approach, according to which the state is the sole source of social order, is what informed the main classic scholarship on Law and Economics. Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control* 16 J. LEG. STUD 67, 81 (1987) As we will see (page 54 et seq. *infra*) it is also the same approach that has dominated the *Structural Paradigm* of dispute processing.

[41] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 20-21 (1981).

[42] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 17 (1981); Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 237 (1973). In Ellickson's view the state is just one of the five existing providers (controllers) of rules for social behavior. The others are: "the actor himself, the person acted on, social forces and nongovernmental organizations". See, Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control* 16 J. LEG. STUD 67, 75 (1987)

[43] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 17 (1981).

[44] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 2 (1981) ["Most disputes that under current rules, could be brought to a court are in fact never placed on the agenda of any court…Of those disputes pursued, a large portion are resolved by negotiation between the parties, or by resort to some "forum" that is part of (and embedded within) the social setting within which the dispute arose, including the school principal, the shop steward, the administrator, etc."]

courts also prevent, mobilize, displace and transform disputes,[45] and most of these other activities do not entail the use of trials, the *typical* dispute processing mechanism that takes place within them.

Furthermore, even as the official business of courts is to handle disputes, interestingly, most of the activity that takes place within them does not involve the actual processing of conflicts, but instead, administrative and routine operations.[46] I am not suggesting that courts are unimportant or that their job is irrelevant; Courts are essential tools for social control and play an important role in society,[47] but that doesn't mean that individuals don't consider other institutions.

Forum and Mechanism

Different environments or settings allow individuals to use a variety of methods for processing legal conflicts, which leads us to briefly explain the difference between *forum* and *mechanism.* By the former, we imply the setting *where* the process to handle a dispute takes place. The notion of *forum* not only refers to the facility (e.g.

[45] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 10-11 (1981).

[46] Lawrence M. Friedman and Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties,* 10 LAW & SOC'Y REV. 267, 270 (1976) ["The idea of dispute settlement is strong in the imagery of courts. But courts perform other functions, too. One of these we will call *routine administration*...means the processing or approving of undisputed matters."]; Richard Abel, *Dispute Institutions in Society,* 8 LAW & SOC'Y REV. 219, 228 (1973) ["A significant proportion of the business with which most judicial institutions are concerned does not involve disputes at all but rather the routine administrative processing of uncontested divorces, wages attachments, evictions, default judgments, bankruptcies, and many criminal misdemeanors."].

[47] In this sense, beyond their role of exercising "the coercive power of the state and monopolizing the symbolic power associated with state authority", courts also contribute to "ideologically shape other normative orders and also provide an inescapable framework for their practice". See, Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 879 (1988)

court or arbitration center) but more broadly construed, to the place or environment. On the other hand, by *mechanism* we mean the way in which conflicts are dealt with, the actual method or series of steps that the parties utilize. In other words, it responds to the question of *how* disputes are processed. In this sense, trial, mediation, and arbitration are mechanisms. And while it is true that certain mechanisms can only take place or typically work within particular fora (e.g. trials in courts), it is also possible for some processes to occur in different settings, and likewise for a given forum to host or allow different dispute processing methods.

Institutional, official and non-institutional fora

The ordinary image of a dispute processing forum that we usually have is that of an official institution, a court, an arbitration center; but there are other less structured settings, too. If we were to classify them, dispute processing fora could be placed in a continuum ranging from the most official or institutionalized to the unofficial ones.

An institutionalized forum would be one with a visible structure, usually an organization with clear boundaries and some level of autonomy[48] in which dispute processing –as its main activity- follows certain patterns or rituals, participants have predefined roles and are expected to abide to specific standards. In sum, a place in

[48] W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS 2 (Sage Publications 1994)

which there is a standardized system of controls over activities and actors.[49] A court and a private ADR center would easily fit into this frame. Another characteristic of institutional fora is that they typically host -but not always, as we will see- formal dispute processing mechanisms, which as a result of their repetitive use become *institutionalized.*[50] On the other end of the continuum are the unofficial or non-institutionalized fora, which feature loosely integrated or uncoupled structures,[51] and typically –but again, not exclusively- sponsor informal mechanisms.

The common occurrence is that formal mechanisms are used within institutional or official fora (e.g. trial in court) and that informal ones are used in non-institutional settings (e.g. mediation processes within social networks). However, this is not always the case.

The literature on dispute processing tends to overlook the mechanism/forum distinction by assuming that in general, there is total correspondence between mechanism and forum, and that each mechanism only takes place in a certain forum.

[49] W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS 3 (Sage Publications 1994)

[50] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 229 (1973) ["In every society most of the disputes will fall into a relatively limited number of patterns. We speak of these recurrent patterns for disputing as being institutionalized (Nadel, 1951, Ch 6). What this means, at a minimum, is that the participants occupy roles within the institution that handles the dispute."]. In more general terms, *Institutionalization* can be defined as "the process by which a given set of units and a pattern of activities come to be normatively and cognitively held in place, and practically taken for granted as lawful (whether as a matter of formal law, custom, or knowledge)". W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS 10 (Sage Publications 1994)

[51] W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS 2 (Sage Publications 1994)

Nevertheless, we often see that informal mechanisms are used either within or outside formal institutions (e.g. ADR processes may take place in a variety of settings or fora), and in turn, these not only allow formal means but also give way for informal processes to take place within their boundaries. In sum, the pairing between formal mechanism and institutional setting on one hand, and informal mechanism/non-institutional setting may be typical but it is not necessarily the only possible combination.

Formal and Informal processes.

Formality -a concept that we use to characterize mechanisms- implies the existence of a given structure, a set of pre-organized steps, and most importantly, procedural rules. Informality is obviously the opposite. While formal processes usually take place within institutionalized settings, it is not always the case. Sometimes, very formal processes take place in non-institutional environments (e.g. arbitration in the diamond industry).

FACTORS THAT AFFECT PROCEDURAL CHOICES

Even though "dispute behavior, like other aspects of informal social life, contains aspects of both rational and irrational behavior";[52] when faced with a dispute, individuals usually ponder their procedural choices among an array of mechanisms and fora that are available to them; each one offering different characteristics that,

[52] Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 158 (1984)

depending on the circumstances, may be perceived as advantageous or disadvantageous to its potential users.[53] Scholars have attempted to summarize the factors that individuals take into account when faced with the question of how to process a given dispute,[54] but in general, these fall into the following three categories: factors dealing with the characteristics of the *subjects* involved in the dispute (parties and decision makers alike), factors dealing with the *nature* of the dispute (what kind of dispute?), and factors dealing with the issues of *cost* and *time* (How much? How long?).

[53] However, as Merry and Silbey have pointed out, disputing is not necessarily "a rational, self-interested, choice-making, and fundamentally instrumental behavior". In their view, the "perceptions of disputes and ways of dealing with them derive from habits and customs embedded in social groups and cultures (…) in ways which cannot be described as rational choice-making"] See, Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 157 (1984)

[54] Thibaut and Walker, for example, considered that temporal urgency, the presence or not of a judgmental standard and outcome correspondence to be the most important (See, *infra* notes 113, 114 and 115); Hayden and Anderson, on the other hand, focused on the cost of different procedures, the social environment, and other structural variables that they called specialization, differentiation and bureaucratization.(Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker*, 3 L. HUM. BEHAV. 21, 23 (1979) ["Thibaut and Walker fail to consider such variables as the costs of different procedures. They also do not consider questions as to how different types of institutions are related to different social environments, or how such structural variables as specialization, differentiation, and bureaucratization might affect dispute processing"].). In a study published in 1983, Lissak and Sheppard, focused on factors that "parties actually affected with disputes considered when choosing or evaluating the effectiveness of a dispute resolution procedure." Their database was built from interviews with disputants and observers to real processes, thus allowing the researchers to create a list of sixteen variables. These factors were: airing of problem, speed, fairness, personal control, animosity reduction, cost, minimize disruption, reduce future problems, intervener neutrality, shift responsibility, outsiders' rights, maintain gravity, facts, successful resolution, do-ability, and privacy. See, Robin I. Lissak and Blair H. Sheppard, *Beyond Fairness: The Criterion Problem in Research on Dispute Intervention*, 13 J. APP. SOC. PSYCHOL., 45, 52-53 (1983). Later on, others suggested that individual choices rather focused on the nature of the dispute and the negotiating style of the parties, as well as on culture, gender and status of the participants. Kwok Leung and E. Allan Lind, Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences, 50 J. PERS. & SOC. PSYCHOL. 1134 (1986) [Comparing the effect of culture on procedural preferences of Chinese and American subjects]; Kwok Leung, Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study, 53 J. PERS. & SOC. PSYCHOL. 898 (1987) [suggesting that the revealed preference of Chinese subjects for mediation and bargaining –as opposed to their American counterparts- was influenced by the perception that those processes had a capacity to reduce animosity]

Who's involved in the dispute?

The *role of the participants* in a dispute is a factor that arises concomitantly with the conflict situation itself. The person who voices a disagreement or attributes a grievance to another subject usually becomes the claimant, while his or her counterpart (the purported responsible for the grievous situation) is the defendant. Their respective positions will determine not only the course of action to take, but more importantly, the type of procedure and the forum in which their differences will be handled. Each party will obviously prefer the process that better serves his or her particular interests and aspirations.

Also related to the subjective factors is the problem about *status* (i.e. position within the context where the parties interact). The status of the parties can be directly affected by some of the economic, social or cultural dimensions like access to resources (wealthy litigants have a different status than poor ones[55]) or position in society (leadership, social rank, family hierarchy); it may also be influenced by the previous experience or familiarity of a party with a certain kind of process, forum or dispute type (e.g. repeat players may have a different status from those with no previous experience or exposure to a certain process[56]).

[55] See, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* 9 LAW & SOC'Y REV. 95-160 (1974).

[56] See, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* 9 LAW & SOC'Y REV. 95-160 (1974).

The *relationship between the participants* (outcome correspondence) also defines what treatment individuals give to a dispute situation. When the parties share common interests or are part of a relationship that predates –and will arguably remain after- the quarrel, their attitude is different from those who do not have a corresponding interaction with their counterparts.[57] In the former, conflict is usually weighed against the broader relation between the participants and can either lead to avoidance (e.g. parties do not want to jeopardize relationship with conflict), or to a quick settlement (e.g. parties agree more easily because they know each other well). But, a pre-existing relationship may also complicate dispute processing as emotions also tend to exacerbate conflict behavior. People are more prone to feel "hurt" by the actions of their loved ones than by what strangers do.[58] In contrast, when there is no correspondence between the parties or these are not bound by a long-term relationship, conflict processing tends to be seen simply as a zero-sum game (the gain for one entails a loss for another), since there is no further rapport to preserve.

On the other hand, outcome correspondence occurs at different levels (ranging from close, multiplex and lifelong relationships to occasional or brief social interactions) so its effect upon dispute processing is also variable. To this end, when considering dispute processing alternatives disputants may ponder to which extent a given relationship will be affected by a conflict situation, and focus on selecting the process and forum that has less negative impact upon the relationship.

[57] See, note 115 *infra.*

[58] Think for example, about marital (divorce) and other family disputes, where the parties' actions are usually loaded with intense emotions.

Lastly, *representatives* or *advocates* are also important, clearly more so in the case of legal disputes, which normally entail the intervention of lawyers. The involvement of a representative on behalf of the parties and his or her characteristics also affects the dynamics of dispute processing and the choices that participants make. The presence of a counsel, for instance, may compel the other party to get professional representation of equivalent weight; and many times, representatives are so important that not only the decision about dealing or not with a dispute rests on them, but also the choice of procedure and forum.

The essence of the dispute

Another set of factors that seems to play an important role when individuals ponder their choices is the consideration about the kind of dispute and their own aspirations. The *essence of the dispute* as a determinant of procedural choice does not refer to the subject matter as lawyers ordinarily view it (the distinction between labor, civil, criminal disputes, and so on), nor to the negotiability of the issues in conflict.[59] At its basic level, the *essence* of a dispute refers to the *type* of claims that the parties bring to the process; in other words, what kind of issues are at the core of the conflict? What seems to matter most to the parties? What's the predominant element? It also

[59] In their attempt to list the factors that condition procedural choices, Heuer and Penrod onsidered that participants value the nature of the dispute, that is, if it refers to a negotiable or to a non-negotiable conflict. See, Larry B. Heuer and Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERS. & SOC. PSYCHOL. 700, 701 (1986). However, the problem with this criterion is that it is really difficult to determine what's negotiable and what's not.

refers to the difficult question of what do the participants seek in processing the dispute in a certain way, or said in another way, what are their objectives?

As for the problem of determining what is at the core of a dispute, one important aspect to look at is the importance of the emotional or personal component. Depending on how important this is for the parties, they may prefer a process or a forum that allows them to be "heard" or to express their "voice" about the situation that gave rise to the conflict; they may also ponder about which decisional style (e.g. adjudicatory v. conciliatory) serves them better. The issue of finality or closure is also important, as depending on the type of conflict the parties may also desire a process that brings an end to the dispute or that just helps them modify the status quo without necessarily solving the conflict.

Cost: How much? How long?

Cost is a complex factor that not only refers to the monetary value of a given dispute but also to the direct economic impact of the process upon the parties. To some extent, this also relates to the problem of process duration since this has a clear impact on cost. The monetary value of a dispute is a factor about which parties are always concerned and it is not necessarily easy to determine (think of very complicated, large disputes with multiple issues at stake, like mass tort claims or family disputes over an estate, for example). The importance given to the monetary value issue also depends on how much the dispute represents to the respective party in comparison to other quarrels in which he or she is involved and obviously to his or her

own financial capacity. As for the cost of the process, disputants tend to prefer not necessarily the least expensive but rather the most cost-efficient method.

The time element is also related to the cost in the sense that, in general, the longer the duration of the dispute process the more costly it tends to be. Parties with access to greater resources may not only be able to resist a process for a longer period of time, but may also prefer a costly procedure in order to debilitate their weaker opponents. On the other hand, wealthier parties (with deep pockets) have more exposure to liability and arguably face a higher risk of being subject to claims.

A note about Judgmental standards and normative disputes

When dealing with normative disputes, participants may disagree about which rules apply to their situation, or may have different perspectives on the interpretation of what a specific norm says, or about the extension of their rights; they may also question the authority or legitimacy of the organ that attempts to apply or enforce a rule, or the way in which this is done; but they never seem to question the necessity for the presence of a normative standard (call it official law, social norm or private ordering) as dispute processing is in itself a way of evaluating social behavior in light of a particular normative system.[60] In other words, the distinctiveness of normative – or legal, in more specific terms- disputes is based on their relationship to a system of

[60] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 73 (1974)

standards that regulates the processes through which they are handled and the outcomes obtained from these processes.

In this context, when weighing their procedural choices what seems important to disputants is the perception about fairness (justice) not only for the process but also for the expected outcome or consequence of such process (how just is the decision?). As the procedural justice literature has shown,[61] individuals not only care about the outcome (chances for *winning* or *losing* in a dispute), but also about the presence of fairness during the process used to channel the dispute.

We may add, that they also prefer a process –and a forum- that ensures compliance with the outcome, and when necessary, the existence of a body capable of enforcing the decision or agreement in case somebody offers resistance. This aims for efficiency, which has different meanings for different people. To some, an efficient disputing process is one that offers transparency, expediency and low cost; to others, transparency (at least in respect to the other party) may not be desired. We will elaborate more on this when explaining the use of the judiciary for business disputes in Venezuela, in Chapter Five *infra.*

[61] See, page 42 et seq *infra.*

DIMENSIONS THAT AFFECT DISPUTES

The different dispute processing environments –both institutional and not-, the mechanisms that take place within them, and even the definition of what constitutes a legal dispute, are largely affected by the social, cultural, economic and political dimensions prevailing in each society. Institutions, in general, are influenced both by the societal structure to which they belong and the prevailing cultural values[62], as well as by the economic and political structures in place.

These four dimensions are always present and constantly interact with each other, and their degree of influence upon the existing structures depends on the particular characteristics of society and its members. As a consequence, dispute processing institutions cannot be fully understood without looking at the larger context to which they belong, and to the continued preference of individuals in the processes that take place within those bodies.[63] Paying attention to these dimensions allows us to understand the conditions under which dispute processing occurs or is likely to occur,[64] and facilitates explaining why individuals make certain procedural choices.[65]

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[62] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 267 (1973)

[63] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 267 (1973); William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. , 6264 (1974)

[64] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 62, 63 (1974)

[65] This conceptualization of disputes is precisely what, according to Merry, seems to be absent within the "ADR model"; which in her view, does not describe the way people behave" but instead "views disputes as disembodied events separated from the social world". Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2063 (1987)

In the first place, the *social context* to which individuals belong and within which they interact among themselves, their relations with others, and their affiliation to a certain group, kin, or clan determines how and where disputes are channeled.[66] Conflict arising among participants involved in multiplex relations, for instance, is often influenced by the wider social network[67] in terms of what kind of process will be utilized, in which forum, and what type of remedy the aggrieved party is allowed to seek.

The decision to deal (or not deal) with a dispute in a certain manner may also have an impact on a long-term relationship, on the family-life of the participants, and other social interactions. Peer pressure, a threat of group-imposed sanctions like ostracism, or even gossip,[68] may also determine what kind of treatment individuals give to a conflict situation.

Also, the interest of the larger group (family, clan) may dictate which method or procedural rules shall be used in order to preserve the common welfare, a successful business relation, or simply the group's reputation even if so occurs at the expense of an individual member. These are the situations in which the family, clan or group

[66] Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2061 (1987) ["The way a dispute is handled depends on the structure of the society in which it arises and the social relationship between the disputing parties"].

[67] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 230 (1973)

[68] Richard Danzing and Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 680 (1975)

dominates the social organization[69] and exerts a strong influence on the individual behavior of its members.

On the other hand, parties that do not belong to the same social group and who, as a consequence, are not subject to the same degree of pressure, may still experience the effect of the social environment on their choices as members of a larger setting (society as a whole) but certainly at a different level.[70] In sum, disputants do not usually make their choices "behind a veil of ignorance"[71] but rather, after pondering the specific characteristics of the social context in which they interact.

Secondly, *cultural values* are also very important.[72] After all, we are *homo culturalis*, in the sense that our behavior is shaped in great part by the perceptions and attitudes that we have towards existing social structures.[73] Culture and particularly legal culture is what determines "when and why and where people turn to law or

[69] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 67 (1974)

[70] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 82 (1974) [explaining that in technologically complex rich societies, where kin-related social groups are inexistent or weak, coercion has to occur at a different level since…]

[71] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271 (1973-74)

[72] Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker*, 3 L. & HUM. BEHAV. (1979) ["The preferences, however, remain subjective; their value hinges on the cultural presuppositions of the people whose preferences are being measured. The answers to preference questions, like other normative questions, will depend on the values of the people who are questioned."]

[73] Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2061 (1987) ["Each domain of disputing has its own sequence, its own set of expectations about how one moves from one stage to another along with attached cultural meanings to moving, failing to move, jumping stages, or timing shifts from one stage to another"].

government, or turn away";[74] In some societies, for instance, the mere fact of being sued may be viewed as shameful regardless of the merits or validity of the claim; going to official courts in these instances is deemed as the last recourse before things get out of control, so people develop a tendency to sort out their differences in other fora. In other places, a lawsuit may be perceived as a normal, everyday occurrence, and interaction with courts is viewed as reasonably common.[75]

As a result of cultural differences, social hierarchy in some environments is defined by age or gender. Only men –or women- may be allowed to conduct certain activities or to perform certain roles; elderly citizens may enjoy not only greater respect from other members of society, but also represent more authority. Or it could well be the opposite.

In a deeply religious and homogeneous community, for example, spiritual leaders may be the ones in charge of adjudicating disputes and enforcing rights of a legal nature; in a more secular society, to the contrary, the ruling on a similar dispute may be in the hands of state judges or other public officials. Patent or securities litigation, and highly specialized evidence-gathering techniques may be common in some countries, but virtually non-existent in others.

[74] Lawrence M. Friedman, *Legal Culture and Social Development,* 4 LAW & SOC'Y REV. 29, 34 (1969)

[75] Lawrence M. Friedman, *Legal Culture and Social Development,* 4 LAW & SOC'Y REV. 29, 40 (1969) ["Litigiousness varies from culture to culture; the social meaning of litigation is different in different countries and sometimes in adjoining villages"]

By the same token, some societies may deem important the protection of same-sex rights or the regulation of corporate liability, but in others, awareness about these issues may be minimal or none. These are obviously superficial examples, but they help us convey the idea that dispute institutions and the processes that take place within them are valued differently in different social environments as a result of the cultural values embedded in a given society.[76] Even though some values and attitudes that are present in certain societies may be seen as contrary to a modern, equal rights-minded lifestyle, culture is not necessarily an obstacle to development, but rather a source of strength[77] that helps maintain social equilibrium and guarantees efficient compliance of legitimate norms.

The *economic dimension* is also critical, and it translates in at least, two different aspects: (1) access to resources and (2) the economic impact of a given dispute or process beyond the direct interest of the parties. In a stratified environment those who have control over economic resources will have better access to certain institutions,[78] to more specialized -and arguably better- professional representation or assistance, and they are also capable to devote more time and resources to dispute processing.

[76] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 267 (1973)

[77] Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 41-42 (1969)

[78] Richard Abel, *Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 219, 289 (1973)

Rich litigants are able to spend more money in professional representation, in preparing their arguments, gathering evidence, and overall, seem to have fewer obstacles to engaging in a legal battle for a longer time than their less affluent counterparts. However, it is also true that wealthy parties have more at stake, and that are also subject to litigate against other powerful actors, which may affect their odds considerably.

As for the impact that dispute processing may have on the larger group or on society in general, we must stress that even though many legal disputes appear to affect only the participants directly involved, there are many instances in which they have an effect on a larger group.

Lastly, the *political dimension,* which is inextricably connected to the idea of justice,[79] is responsible for providing citizens with a stable institutional environment in which they can interact among themselves, and guarantee that their rights will be recognized and protected.[80] The political system adopted by each society is what shapes the legal framework, which in turns affects how the different actors perceive their rights and exercise them. The prevailing political system also facilitates or hinders the use of different dispute processing mechanisms.

[79] See, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 180-202 (Harvard University Press, rev. ed., 2001) [Describing how the political framework ensures the stability of justice as fairness.]

[80] See, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 180-202 (Harvard University Press, rev. ed., 2001) [Describing how the political framework ensures the stability of justice as fairness.]

MODERN SOCIETIES, PRIMITIVE SOCIETIES: A REAL DICHOTOMY?

The efforts of socio-legal scholars in understanding how dispute processing systems work and how the social, cultural, economic and political dimensions interact with each other have always focused on two polar opposite types of society, two contrasting realities that are perceived to embody different styles of procedures. On the one hand, there are the underdeveloped and traditional societies. In these, official courts and other *basic* institutions may exist, but the social, economic and political structure is largely dominated by (extended) families, cliques, groups or clans that give way to the rise of strong social networks, which in turn, influence how society operates, reinforce its cultural values, and most importantly, provide the conditions under which social conflict is handled.

The normative system of these less-modern societies is basically defined by indigenous or local norms and their dispute processing institutions tend to be undifferentiated.[81] Also, legal norms are often intertwined with social norms, thus frequently making it difficult to differentiate one from the other.

Compliance and enforcement is usually achieved through several forms of coercion like shaming, gossip, or by threat of social isolation; and political authorities tend to be the same as social ones (elders, wise men, chiefs). Ordinary members of these societies usually know and understand the normative system well enough, so that

[81] Richard Abel, *Dispute Institutions in Society*, LAW & SOC'Y REV. 219, 296 (1973)

legal disputes can be usually handled face-to-face, with direct involvement of the parties and taking into consideration their broader and often multiplex social relationships. As for dispute processing preferences, it is generally believed that individuals from less developed or preliterate societies tend to prefer non-confrontational methods that reinforce social harmony, like mediation.

At the other extreme, there are the modern, affluent and industrially-advanced societies (or in Felstiner's terminology a Technologically Complex Rich Society, or a TCRS[82]) that typically feature well-defined private and public official institutions, as well as specialized, complex and highly technical dispute management processes. The formal normative system in these societies is viewed as part of a modern and sophisticated structure, which also makes it expensive to operate. It is, in other words, more "legal".[83] In order to use this complicated apparatus, ordinary citizens have to abide by formalistic standards and rely on lawyers or other professionals who act as brokers, go-betweens, or intermediaries. The scholarly work dealing with these systems is generally limited to the description of official institutions and the typical adjudicative procedures that take place within them.

[82] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 65 (1974)

[83] Lawrence M. Friedman and Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties,* 10 LAW & SOC'Y REV. 267, 270 (1976)

In recent years, scholars have increasingly focused on informal dispute processing methods within modern societies,[84] thus slightly moving away from the traditional approach of legal centralism.[85] However, these situations are described as if they only pertain to small, closed communities, and are generally portrayed as an exception or rare event within a society that has learned to use -arguably better- more modern and sophisticated forms of handling disputes through its official institutions. In this sense, examples of informality within modern and complex societies are seen as mere "pockets" of indigenousness[86] and not as alternatives that modern citizens consciously choose.

However, not every society can be easily identified as either purely modern and industrialized or entirely traditional. These categories are helpful constructs, but reality does not necessarily (and almost never does) fit into extremes. Along the spectrum, there are, for example, societies that have well-defined public institutions,

[84] See, for example, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 70 (1963); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (Oxford University Press 1983); ROBERT C. ELLICKSON, ORDER WITHOUT LAW (Harvard University Press 1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 117 n. 2 (1992); John McMillan and Christopher Woodruff, *Dispute Prevention without Courts in Vietnam*, 15 J. L. ECON. & ORG. 637 (1999)

[85] This is what Merry has labeled the *new legal pluralism*, a movement characterized for its focus on the complex and interactive relationship between official and unofficial forms of ordering, and the examination of the ways in which social groups and individuals conceive ordering based on their own social relations. This is certainly different from the *classic legal pluralism'* approach, which main goal was to describe "the relations between colonized and colonizer", in light of the idea that "the introduction of European colonial law created a plurality of legal orders". See, Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 873, 889 (1988)

[86] Richard Danzing and Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 677 (1975) ["Though the model of a technologically complex rich society may suggest universally high mobility or the end of the extended family, obviously there are pockets in any actually existing technologically complex rich society where such phenomena do not obtain."]

market-oriented economies, and that could be easily labeled as technologically advanced. But at the same time, their social structure resembles that of the stereotypical traditional community, in the sense that extended families and close-knit groups are prevalent and exert important influence upon most aspects of social life.

As our research will show, even in these societies that contain many features of modernism, the indigenous level often plays an important role. And to adequately understand how their institutions perform we need to look beyond the "apparent" modern/traditional dichotomy that has prevailed in scholarly discourse.

COMPETING PARADIGMS IN THE STUDY OF PROCEDURAL PREFERENCES

The apparent dichotomy according to which societies are encapsulated as either modern and rich or primitive and poor has been somewhat present in the different scholarly approaches (paradigms) to the study of procedural preferences.

The Procedural Justice Paradigm; A contribution from Social Psychology Experimentation

Interest in exploring disputants' behavior is not new.[87] As early as 1939, in a study intended to explore leadership behavior and the dynamics of group life, Lewin,

[87] E. ALLAN LIND AND TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 7, (Plenum Press, 1988) ["Although the origin of the study of procedural justice is associated most strongly with the work of Thibaut and Walker, a number of social psychologists had earlier conducted research on procedural issues."]

Lippit and White[88] shed some light about the conditions under which conflict emerges and to a certain extent, to how individuals cope with it. Their research consisted in observing the behavior of each group of participants in different "social climates"[89] in order to identify the effect of the leadership style on the participants. The researchers found that participants under autocratic leadership had developed a significantly more frequent aggressive and hostile behavior than those under democratic leadership.[90]

However, it was not until several years later that social scientists motivated by the work of John Thibaut, Laurens Walker and other colleagues[91] embarked in a systematic examination of the various dispute processing models integrated into the legal process and the factors that shaped disputants' preferences for different modes of conflict resolution.

Thibaut and Walker are usually regarded among the precursors of the field of "procedural justice",[92] and are also credited with establishing the use of psychological

[88] Kurt Lewis, Ronald Lippit & Ralph K. White, *Patterns of Aggressive Behavior in Experimentally Created "Social Climates"* 10 J. SOC. PSYCHOL. 271-299 (1939).

[89] Kurt Lewis, Ronald Lippit & Ralph K. White, *Patterns of Aggressive Behavior in Experimentally Created "Social Climates"* 10 J. SOC. PSYCHOL. 271-272 (1939).

[90] Kurt Lewis, Ronald Lippit & Ralph K. White, *Patterns of Aggressive Behavior in Experimentally Created "Social Climates"* 10 J. SOC. PSYCHOL. 271-298 (1939).

[91] As Hensler points out, "most of the publications that derive from this research were co-authored by Thibaut and Walker and their students. By convention the research is usually attributed to the former, even when they do not appear as lead authors". Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 84 note 13. (2002)

[92] Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL., PUB. POL'Y & L., 211, 216 (2004); Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 85 (2002); E. ALLAN LIND AND TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 7, (Plenum Press, 1988); Kwok Leung and E. Allan Lind, *Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences*, 50 J. PERS. & SOC. PSYCH. 1134 (1986).

laboratory experimentation for conducting legal research. This approach, they believed, could help scholars to gain insight into the behavior of legal actors,[93] and also to "facilitate comparison of whole systems of conflict resolution as well as the assessment of proposed changes within individual systems".[94]

For a decade, Thibaut, Walker and colleagues conducted a number of experiments geared to understanding the criteria that guided judges and other legal actors to choose among different dispute processing mechanisms. From the theoretical standpoint, Thibaut and Walker's research was influenced by John Rawls' theory of justice.[95]

Their general assumption was that when given a choice of procedure, individuals with no specific aims or interests in a dispute would select the mechanism that provided the most social good.[96] In order to discover this, the researchers asked participants to choose among different procedural alternatives before becoming a disputant on either side.[97] The idea of keeping participants "behind a veil of

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[93] John Thibaut, Laurens Walker, E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking,* 86 HARV. L. REV. 386, 387 (1973)

[94] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 2 (Lawrence Erlbaum Associates Publishers 1975).

[95] JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press, rev. ed., 1999); John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271, 1272 (1973-74)

[96] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 140-141 (Harvard University Press, rev. ed., 2001) [Describing the various ideas of the good embedded in the notion of justice as fairness.]

[97] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271, 1275(1973-74).

ignorance"[98] about their potential position in a legal dispute was intended to test to what extent individuals were capable of choosing the procedure that provided the most social good, that is, the one with the highest degree of justice.[99]

The researchers compared these preferences with the ones made by individuals who already knew their particular role in the dispute (in front of the veil of ignorance), and concluded that participants from both groups showed a preference for the adversarial model and found it to be the fairest.[100] The main difference observed between the two groups was that those behind the veil of ignorance tended to prefer systems that they perceived favorable to the disadvantaged party –even though they did not consider themselves identified with any position in respect to the dispute- and were also inclined to preserve equal access to channels of information and to mechanisms of control.[101] Participants in front of the veil of ignorance reacted

[98] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271 (1973-74). The *veil of ignorance*'s idea was taken from what Rawls called *the original position,* that is, a situation in which "the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range". See, JOHN RAWLS, A THEORY OF JUSTICE 15 (Harvard University Press, rev. ed., 2001)

[99] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271, 1272 (1973-74).

[100] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271, 1288 (1973-74). It is worth to mention that the authors acknowledged that cultural bias could have played a role in the participants' revealed preference for the adversarial process. (Id.)

[101] John Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness,* 26 STAN. L. REV. 1271, 1289 (1973-74).

differently. In sum, the variation in the probability of success led the subjects to prefer different judicial procedures.[102]

The conceptual underpinnings drawn from the *justice as fairness* theory motivated Thibaut and Walker to conduct several other experiments intended to assess which institutionalized procedures for conflict resolution were preferred by individuals because of their ability to promote fairness.[103]

In the process of so doing, Thibaut and Walker explored the factors that led individuals to favor greater or less third-party intervention,[104] the notions of process control and decision control, and -to a limited extent- the influence of social and environmental factors on the parties' individual preferences for dispute processing methods.

Thibaut, Walker and colleagues used the notions of process control and decision control as the basic variables to characterize a procedural system[105] and as

[102] Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL. 319, 325 (1976)

[103] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 4 (Lawrence Erlbaum Associates Publishers 1975)

[104] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 3 (Lawrence Erlbaum Associates Publishers 1975); Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL. 319 (1976)

[105] Thibaut and Walker considered that "the distribution of control among the procedural group participants is the most significant factor in characterizing a procedural system". Within this concept, they distinguished (1) process control, that is, "control over the development and selection of information that will constitute the basis for resolving the dispute"; and (2) decision control, "measured

important determinants of preference for a procedure.[106] According to their view, the varying degrees of process and decision control by the disputants and third-party decision makers gave rise to five different modes of conflict resolution: bilateral bargaining,[107] mediation, moot,[108] arbitration, and autocratic adjudication. Procedures, they believed, could be placed "on a continuum of decreasing third-party control over the decision-making process, from the total control exercised by the autocrat to the total absence of control in bilateral negotiation".[109]

Moreover, when faced with a dispute and given the choice of how to handle it ("choice of procedure"),[110] the parties' individual preferences were influenced by

by the degree to which any one of the participants may unilaterally determine the outcome of the dispute". See, John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546 (1978).

[106] Pauline Houlden, Stephen LaTour, Laurens Walker, and John Thibaut, *Preference for Modes of Dispute Resolution as a Function of Process Control and Decision Control*, 13 J. EXPER. SOC. PSYCHOL., 13 (1978).

[107] That is, bilateral negotiation among the disputants with no third-party intervention. Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL., 319, 320 (1976)

[108] A process in which all the parties were involved in the decision-making and the outcome is decided by unanimous consent. Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL., 319, 320 (1976). However, as Hensler points out, this procedure resembles more the decision-making mechanisms used in international trade disputes, than a process used at the domestic level, at least in the U.S. See, Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 87 at note 21 (2002).

[109] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 7 (Lawrence Erlbaum Associates Publishers 1975) ["One way of ordering the several procedures described above is to place them on a continuum of decreasing third-party control over the decision-making process, from the total control exercised by the autocrat to the total absence of control in bilateral negotiation"].

[110] Not always disputants are able to choose a procedure. In fact, many times they can't or when they do their choices tend to be limited; for example, when the other party is who initiates a process (e.g. lawsuit) the defendant doesn't have a choice (unless he/she decides not to attend the trial and bear the consequences for not appearing in court).

different social and environmental factors.[111] In their experiments, Thibaut, Walker and colleagues focused on three factors: temporal urgency,[112] presence or absence of a judgmental standard,[113] and outcome correspondence.[114] The degree to which each of these factors played out determined which procedure the parties preferred. The results of the study showed that, in general, arbitration was the most preferred mode for conflict resolution "because it was not extremely discrepant on any of the eight dimensions and because it matched subjects' preferences".[115]

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[111] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 7 (Lawrence Erlbaum Associates Publishers 1975); Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL., 319, 320 (1976). However, as we will see *infra* (see, page 52) other researchers have considered additional factors when assessing disputants' choices. See, for example, Robin I. Lissak and Blair H. Sheppard, *Beyond Fairness: The Criterion Problem in Research on Dispute Intervention,* 13 J. APP. SOC. PSYCHOL., 45, 46 (1983); Larry B. Heuer and Steven Penrod, *Procedural Preference as a Function of Conflict Intensity,* 51 J. PERS. & SOC. PSYCHOL. 700, 701 (1986).

[112] Defined as "the pressure to minimize costs associated with delaying the settlement". JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 7 (Lawrence Erlbaum Associates Publishers 1975)

[113] "By 'standards' we mean any test of a claim that demonstrates its validity or invalidity in a way that commands the assent of the participants- a meter stick; an experiment; a logical deduction; or, depending on the customs of the participants, oracularly revealed truth, inherited dogma, and so forth", JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 7 (Lawrence Erlbaum Associates Publishers 1975). Legal disputes are, by definition, situations in which there is always a judgmental standard that guide the parties or the decision-maker in processing a dispute.

[114] "In corresponding relationships the ultimate outcomes of the participants are in harmony; the parties share in any gains or losses that attend their interaction; they experience a common fate. In noncorrespondent relationships the ultimate outcomes of the participants are in conflict; the gains of each party entail losses for the other; their interests are opposed". JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, 8 (Lawrence Erlbaum Associates Publishers 1975)

[115] Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution,* 20 J. CONF. RESOL., 319, 349 (1976)

This preference, the authors believed, reinforced the idea explored in their previous research that the most desired process for conflict resolution matched the adversarial model, that is, a procedural style that allows disputants to make an independent presentation of their case -thus, retaining process control- to a third-party not directly involved in the conflict and whose role is limited to render the final decision.[116]

In addition, the data showed that greater third-party intervention was most desired when disputants wanted to settle quickly (increased temporal urgency), a judgmental standard was present, and the relationship among the parties was *correspondent*.[117] On the other end, less third-party involvement (and thus, more control by the parties) was desired when the relationship was correspondent and there was not time pressure or a standard was not present.[118]

Thibaut and Walker's efforts to describe the functioning of the legal process and the choices made by its users did not go uncontested. Hayden and Anderson, for

[116] Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL., 319, 351 (1976). In follow-up research, Thibaut, Walker and colleagues found that both litigants and third-party subjects' overall preference was to have high third-party decision control given that the parties retained process-control. Or as said in their own words: "one-third of the control should be vested in a third party and two-thirds vested in the disputants". See, Pauline Houlden, Stephen LaTour, Laurens Walker and John Thibaut, *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control,* 14 J. EXPER. SOC. PSYCHOL.,13, 29 (1978).

[117] As we already explained, a *corresponding relationship* is that in which the aspirations of all participants are aligned, and their interests are in harmony. See, note 114 *supra*.

[118] Stephen LaTour, Pauline Houlden, Laurens Walker and John Thibaut, *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONF. RESOL., 319, 350 (1976).

example, questioned the capacity of Thibaut and Walker's methodological approach to answer the question of what procedural model was better[119] and disqualified the general validity of their conclusions as these only portrayed the subjective views of American students;[120] they also criticized Thibaut and Walker for not taking into account the often disparate objectives of the parties and their advocates towards a particular procedure,[121] and also, for not considering the influence of the social environment and other structural variables that affected dispute processing.[122]

In fact, Thibaut and Walker's attention to the influence of social and environmental factors on disputants' preferences was very limited. And, as generally occurs with research based on laboratory experiments, most of their work was de-contextualized, which made it difficult to apply it to a specific social reality. However, a number of subsequent studies using various methodological approaches and

[119] One of the weaknesses of Thibaut and Walker's research, they said, "concerns Thibaut and Walker's assertion that the adversary system is superior on subjective grounds; that is, that it is better because people like it better. We wish to question the suitability of experimental research for dealing with such a normative question", and then added that "The answers to preference questions, like other normative questions, will depend on the values of the people who are questioned". Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker,* 3 L. & HUM. BEHAV. 21, 22 (1979)

[120] Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker,* 3 L. & HUM. BEHAV. 21, 36 (1979) It is important to stress, however, that Thibaut and Walker bore in mind the potential effect of cultural bias, but at the same time dismissed it citing a study conducted in France that, according to them, helped to demonstrate that cultural factors were not the principal determinants of preferences in procedural justice. See, Laurens Walker, Stephen LaTour, E. Allan Lind and John Thibaut, *Reactions of Participants and Observers to Modes of Adjudication,* 4 J. APP. SOC. PSYCHOL. 295, 309 (1974)

[121] Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker,* 3 L. HUM. BEHAV. 21, 23 (1979)

[122] Robert M. Hayden and Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique to Thibaut and Walker,* 3 L. HUM. BEHAV. 21, 23 (1979)

analyzing real-life disputes[123] –as opposed to laboratory simulations- have disproved some of Hayden and Anderson's critiques, therefore confirming Thibaut and Walker's claims in respect to the greater value that disputants give to procedural fairness over perceptions of outcome favorability.[124]

Social Psychologists acknowledged that procedural principles are important to the study of both informal and formal processes,[125] But, most of their research was limited to the assessment of institutionalized methods for dispute processing.[126] After all, the prevailing interest among those interested in dispute resolution has been dominated by research focusing on legalistic, state-centered, and formal processes that take place within official institutions.[127]

[123] See, TOM TYLER AND ALLAN LIND, PROCEDURAL JUSTICE 65, cited by Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 89 at note 29 (2002)

[124] Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 89 (2002)

[125] John Thibaut, Laurens Walker, E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 387 (1973)

[126] JOHN THIBAUT AND LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 1 (Lawrence Erlbaum Associates Publishers 1975)

[127] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 20-21 (1981). ["The mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. The relations between the big (public, national, official) legal system and the lesser normative orderings in society that I have called 'indigenous law' are obscured by the portrayal of the big system as all-encompassing, uniform, exclusive, and controlling".] But see, Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2330 n. 4 (2004) ["There now is a healthy private ordering scholarship, and Galanter's criticism currently holds less force"].

Procedural Preferences in Traditional Societies: the contribution of Legal Anthropologists

At least a decade before Thibaut and Walker's seminal articles on procedural justice were published, legal anthropologists -led in part by Laura Nader and colleagues- devoted their interest to understand and to explain disputant behavior in non-institutionalized environments.[128] The majority of this research involved ethnographic studies of small communities, villages or tribes outside the U.S.[129] usually portrayed as traditional, poor, and very different from the modern and affluent western societies. Through these studies, scholars focused on describing the social conditions under which several forms of dispute processing were likely to occur,[130] and gave special attention to the social organization, the normative system, the

[128] However, as Nader has explained, the interest of the early ethnographers of law "was strongly set in an empirical mode based on the publications of Malinowski (1926), Llewellyn and Hoebel (1941), Gluckman (1955), Bohannan (1957), Pospisil (1958), Moore (1958), Schapera (1959), and Gulliver (1963)". See, LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE, xviii (Stanford Univ. Press 1990)

[129] See, P.H. GULLIVER, SOCIAL CONTROL IN AN AFRICAN SOCIETY 173-302 (Boston U. Press 1963) [describing dispute procedures among the Arusha of Northern Tanganyika, currently Tanzania]; Bernard S. Cohn, *Anthropological Notes on Disputes and Law in India*, in The Ethnography of Law, 67 Am. Anthrop. 82-122 (1965) [reviewing results of research by anthropologists on questions of disputes and law in India]; MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (Manchester U. Press 2nd ed. 1967); J. Van Nelsen, *Procedural Informality, Reconciliation, and False Comparison in Ideas and Procedures, in* AFRICAN CUSTOMARY LAW 137-152 (Max Gluckman ed., 1969); Y.P. Ghai, *Customary Contracts and Transactions in Kenya, in* AFRICAN CUSTOMARY LAW 332-346 (Max Gluckman ed., 1969); THE DISPUTING PROCESS-LAW IN TEN SOCIETIES (LAURA NADER & HARRY F. TODD, JR. ED. 1978).

[130] William L.F. Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 62, 63 (1974)

available dispute processing institutions as well as the different enforcement mechanisms present in each of these environments.[131]

Regardless of their differences, these societies, in general, were characterized by having a similar social structure often dominated by families, clans and other close-knit groups which members were interconnected through multiplex, long-standing social relationships. Even though in the countries to which these villages belonged formal public institutions were present, the social organization of the social environments subject to study still depended on the operation of informal networks, and political authority was entangled with social leadership. The normative system of these traditional societies was largely defined by indigenous norms that often resulted from long traditions and customary practices, as opposed to the highly technical and formal legal framework of modern societies.

Dispute processing institutions that operate in these social contexts were often cataloged as resulting from factors such as, the influence of strong social networks, an expanded family structure, and the absence of a well-defined state apparatus. In addition, the fact that most members of these societies had strong social ties among themselves, led researchers to believe that these environments favored a preference for conciliatory processes over adjudicatory ones. As for the enforcement of rights in

[131] Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2060 (1987) ["Anthropological studies that examine the processes by which law-like tasks are carried out are premised on the concept of the dispute or trouble-case as a social event, embedded within a structure of social relationships and a cultural world of rules, practices of handling conflict, and normative principles within which positions are phrased in the course of disputing"].

these small societies, it was generally reported not to rely on the existence of a superior authority but on a different system in which the notions of reputation and face had great value. "Informal" processes –though, often highly ritualistic and formalistic- were widely used in these settings.

By offering a thick description of real-life situations, the work of legal anthropologists shed light on how the legal system works. In addition, these studies not only brought awareness to American scholars about other societies but also helped understand how social control operated in various contexts[132] and particularly about the ways in which legal disputes were processed under different conditions. This line of research, however, also reinforced the notion of the apparent dichotomial view prevailing among socio legal scholars that labeled societies as either simple, poor and primitive, or complex, rich and modern.

The Structural Paradigm: Exploring Dispute Processing Institutions within the Realm of Institutional Reform.

Since the mid-1980s, the World Bank and other multilateral institutions have led the way in advancing ambitious reform agendas that are focused on the modernization of public institutions and the promotion of the rule of law.

[132] This was, according to Nader, the focus of the Burg Warternstein conference held in Austria in 1966. See, LAURA NADER, LAW IN CULTURE AND SOCIETY, viii (Laura Nader ed., Aldine Publish. Co. 1969)

In general, these efforts have been driven by the idea that "modern" institutions are a contributing factor to the creation of a competitive environment for economic growth and social development;[133] and that law is a "potent tool for modernization in Third World Countries.[134] Also, under this approach, dispute processing is perceived in terms of "instrumental, optimizing decision strategies".[135] As a result, multilateral organizations have invested billions of dollars in assistance programs to help developing countries in modernizing their institutions; and a substantial portion of these resources has been directed to reforming the courts, regulating the legal profession, and improving existing legislation –including the one referred to dispute processing mechanisms.

Reform agendas have stressed the necessity for developing countries to embrace vast institutional changes and to adopt mechanisms that are believed to work well in modern societies. Consequently, the *transplant* of legal institutions and models of institutionalized processes from developed nations to developing ones has become a fairly common ingredient within these programs. This has been the case, for example, with ADR mechanisms, implementation of which has been included as a key ingredient in many of those formulas.

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[133] M. ROWAT, *Competition Policy in Latin America: Legal and Institutional Issues, in* GOOD GOVERNMENT AND LAW 165,188 (J. Faundez ed. McMillan Press, Ltd. 1997)

[134] Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 879 (1988)

[135] Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 157 (1984)

Additionally, most reform plans are prescriptive in the sense that they stress how public institutions ought to be, and what successful experiences should be imitated. On the other hand, they have paid little or no attention to understanding local ideologies, or to assessing the context in which domestic institutions operate.[136] In the view of reform advocates, the reason why developing countries are far behind in the success curve and are unattractive to foreign investors is because of the lack of well-functioning, modern institutions.

Developing countries are also believed to be plagued with corruption and social inequality, which according to this view leads to inefficiency[137] and hinders democracy. In sum, the paradigm that has shaped reform agendas and the scholarly work related to it is based on the assumption that rich and modern countries have better (or at least, better working) institutions, which poor countries need to adopt in order to attract foreign investment and achieve overall economic and social progress.

[136] It is worth mentioning that this structural-functional approach has existed for a long time. In fact, its presence even predates the legal anthropology paradigm that emerged during the 1950s, precisely as a critical response to the structural-functional paradigm. See, Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 159 (1984) ["Early proponents of the case study approach in anthropology, such as Llewellyn and Hoebel (1941), Gluckman (1995), Tuner (1957), Gulliver (1963), and Nader (1965), were rebelling against a static, ahistorical (synchronic), structural-functional paradigm"].

[137]Mark Granovetter, *The Social Construction of Corruption*, at 12 n.9 (2005) ["It seems likely that the nearly universal adherence to such liberal and neoliberal views among economists is one reason for their recent enthusiasm for showing that corruption leads to inefficiency. Such a view is not inevitable for an economist, however, as under some circumstances, it is displaced by a Panglossian view that any existing institutional practice must be serving some efficiency purpose, otherwise it would have been competed away."]

Even though this quest for institutionalization and modernization may have important advantages, its persistent focus on official bodies and the processes that take place within them has overshadowed other important layers of society (i.e. informal sector) that may be perceived to work reasonably well by locals.[138] This "institutional reform" approach has also contributed to reaffirm the modern/traditional dichotomy that, as we stressed before, has pervaded the scholarly literature.

THE SOCIAL NETWORKS' PARADIGM

As social psychologists, legal anthropologists and institutional scholars were developing and testing theories of disputing behavior and the ways to process conflict, a group of scholars from different disciplines were developing the analysis of social networks. As we our research will show, social networks have significant implications for the study of procedural preferences and choices, which have to date been largely ignored by researchers interested in dispute processing, and more specifically by studies of preferences for ADR.

The term *social network*[139] denotes a set or group of individuals who are related or connected to each other by a social relationship based on friendship,

[138] Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 157 (1984) ["yet, this model tends to underestimate the role of cultural norms and values for the substance and process of dispute behavior"]

[139] Social scientists have traditionally used many different words like web and social fabric to refer to small-scale interpersonal exchanges but the use of the term *Social Network* was proposed by J.A. Barnes. Before Barnes, Fortes had talked about web (the Web of Kinship) but according to the former, the term web was limited to express a one-dimensional and not a multidimensional concept. See, J.A. Barnes, *Class and Committees in a Norwegian Parish,* HUMAN RELATIONS 39 (1954).

cognatic kin,[140] professional or work collegiality, economic linkage, religious affiliation, or some other form of affinity.[141] In social network theory, the relationship between two given individuals (*nodes*[142]) is labeled as a *tie*, and its strength depends on the combination of at least four factors: "the amount of time, the emotional intensity, the intimacy (mutual confiding), and the reciprocal services which characterize the tie".[143]

One individual is usually connected to many others, who are in turn also tied to different people by relationships of varied *intensity*.[144] When people are connected by multi-strand, multichannel or *multiplex* relationships,[145]we are in presence of *strong*

[140] ERNEST L. SCHUSKY, MANUAL FOR KINSHIP ANALYSIS 74 (Holt, Rinehart & Winston 1965) ["cognatic kin are relatives by genealogical ties without particular emphasis on either patrilineal or matrilineal connections"].

[141] Another conceptualization of a social network that emphasize both its lack of a *head* and the relative closeness of network participants is the definition proposed by Bowles and Gintis according to which networks are "sets of agents engaged in relatively frequent, non-anonymous interactions structured by high entry and exit costs, but lacking centralized collective decision-making institutions". Samuel Bowles and Herbert Gintis, *Optimal Parochialism; the Dynamics of Trust and Exclusion in Networks* 2 (2000)

[142] The term *node* (from Latin, *nodus*: a knot) alludes to a connecting point where two or more lines come together. It has applications in different disciplines, and is usage in sociological writings has been adopted from graph theory. See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 2-3 (J. Clyde Mitchell, ed. 1969)

[143] Mark. S. Granovetter, *The Strength of Weak Ties*, 78 AM. J, SOCIOLOG. 1360, 1361 (1976)

[144] As Clyde describes it, *intensity* "refers to the degree to which individuals are prepared to honour obligations, or feel free to exercise the rights implied in their link to some other person. The intensity of a person's relationship with a close kinsman is likely to be greater than that with a neighbour, for example. J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 27 (J. Clyde Mitchell, ed. 1969)

[145] The term *multiplex* was initially proposed by Gluckman (1955) to denote a relationship with multiple contents; that is, one in which the participants interact with one another in different contexts at the same time (e.g. two co-workers, who happen to be relatives, share the same religion, and belong to the same social clubs). See, MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (Manchester U. Press, 1955). *Multiplex* relationships are contrasted with *uniplex* or single-

ties, and, the stronger the tie, the more *cohesive* the network.[146] Conversely, *weak ties* result from relationships that are less intense or generally single-stranded.[147] It may also occur that two people related to a third know one another, in which case we talk about a *close-knit* or *high-density network*[148] as opposed to one in which one's friends are not related among themselves (*loose-knit network*).[149]

The fact that, throughout his/her life, an individual interacts with people from different social groups implies that he/she may also belong to different networks.[150] As a result, that same individual will also serve as a *broker* by bridging together the

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stranded ones, "which contain only one focus of interaction". See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 22 (J. Clyde Mitchell, ed. 1969)

[146]Andreas Flache and Michael W. Macy, *The Weakness of Strong Ties: Collective Action Failure in a Highly Cohesive Group, in* EVOLUTION OF SOCIAL NETWORKS, 19, 20 (Patrick Doreian and Frans N. Stokman, eds., 1997) ["small group research, especially studies of work groups, suggests that the more cohesive a group, the higher the level of compliance with group obligations (Seashore, 1954; Festinger, Schachter and Back)"]

[147] The value of *weak ties* has been highlighted by Granovetter, who argued that low-intense social connections are indispensable for mobility opportunity and to facilitate the linkage between members of different small groups. ["When a man changes jobs, he is not only moving from one network of ties to another, but also establishing a link between these. Such a link is often of the same kind which facilitated his own movement."] Mark. S. Granovetter, *The Strength of Weak Ties*, 78 AM. J, SOCIOLOG. 1360, 1373 (1976)

[148] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 18 (J. Clyde Mitchell, ed. 1969) ["The implication here is that where the relationships among a set of persons are dense, that is, where a large proportion know one another, then the network as a whole is relatively compact and relatively few links between the persons need to be used to reach the majority"].

[149] Mark. S. Granovetter, *The Strength of Weak Ties*, 78 AM. J, SOCIOLOG. 1360, 1370 (1976)

[150] The actual delimitation of an entire social network is a topic about which there is little consensus as the external boundaries or a network are difficult to visualize. However, researchers have taken different methodological and conceptual approaches in determining the size of a network, and according to the most recent work, the size of an average human social group based on the relationship between group size and brain size across primates is of about 150 members. See, R.A. Hill and R.I.M. Dunbar, *Social Network Size in Humans,* 14 HUM. NAT. 53, 69 (2003)

networks to which he or she belongs.[151] As the same phenomenon may occur with all members of society, the different chains (*partial networks*[152]) that exist in a given social context can be visualized as the building blocks of the larger social structure that can be considered as a *total network*.[153]

Social networks are present in every society regardless of its level of modernity, economic affluence, political structure or prevailing cultural norms. Nonetheless, the degree of *cohesiveness* among network participants, the network's salience and the ways in which these structures interact with official institutions, differs from one society to another and is conditioned not only by the existing cultural and social norms but also by the presence of institutional and legal constraints that are present in the social settings in which those networks operate.[154]

[151] Conversely, several individuals may belong to the same social network and not necessarily be part or live in the same community. The network may be limited to a certain aspect of their life.

[152] See, J.A. Barnes, *Networks and Political Process*, *in* SOCIAL NETWORKS IN URBAN SITUATIONS 57 (J. Clyde Mitchell, ed. 1969) ["By 'partial network' I mean any extract of the total network based on some criterion applicable throughout the whole network. Thus for example the cognatic web of kinship forms an easily identifiable partial network"].

[153] See, J.A. Barnes, *Networks and Political Process*, *in* SOCIAL NETWORKS IN URBAN SITUATIONS 56 (J. Clyde Mitchell, ed. 1969); Also see, F. HARARI, R. NORMAN & D. CARTWRIGHT, STRUCTURAL MODELS: AN INTRODUCTION TO THE THEORY OF DIRECTED GRAPHS (Wiley, 1965)

[154] As an example, in the U.S. the law severely limits the existence of interlocking directories in private companies. This resulted essentially as a result of the antitrust legislation passed between 1890 and 1934 in order to dissolve the influential capital networks that emerged within the industrial sector and monopolized the American financial markets. See, PAUL WINDOLF, CORPORATE NETWORKS IN THE UNITED STATES AND EUROPE 4, 5 (Oxford U. Press 2002) ["big banks and insurances were not only in control of the American financial markets, but they also used interlocking directorates and capital networks to maintain a dominant position over major industrial corporations and railroad companies (…) Starting with the Sherman Act of 1890 (antitrust law) and followed by the Clayton Act (1914) and the Security Exchange Act (1934), the United States created a system of controls that by the mid-1930s had produced the most regulated financial system existing."]

As a result, there are societies or -clusters within societies- in which interpersonal networking is deemed so important that most -if not all- aspects of ordinary life depend exclusively on the norms that emerge from the group or clan. Many of these social networks have also taken part in the organization of social structures that help monitoring compliance and enforcement of rights, hence becoming a substitute for the official legal order.[155]

The salience of social networks in these environments results from the fact that its members are usually linked through multiplex relationships (e.g. by having kinsmen in common, sharing the same cultural traits, living in the same neighborhood, having attended the same schools, and sharing intergenerational friendships), and the *social distance* between them is usually less than the one among those who live in larger and more complex environments.[156]

[155] The emergence of these private ordering structures is often portrayed as a direct consequence of the failure of official institutions in performing their role (see, John McMillan and Christopher Woodruff, *Private Order under Dysfunctional Public Order,* 98 MICH. L. REV. 2421-2458 (2000)); however, there are circumstances in which social groups have devised their own private ordering regardless of how official institutions operate. See, Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering,* 104 COLUM. L. REV. 2328-2367 (2004).

[156] Mark. S. Granovetter, *The Strength of Weak Ties*, 78 AM. J, SOCIOLOG. 1360, 1366 n. 6 (1976) ["We may define 'social distance' between two individuals in a network as the number of lines in the shortest path from one to another."]. The idea of *social distance* is directly related to the concept of *reachability* that is used to describe the fact that "every specified person can be contacted within a stated number of steps from any given starting point". J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 15 (J. Clyde Mitchell, ed. 1969). This has also direct consequences on the level of network cohesiveness. See, Id. ["if a large proportion of the people in a network can be contacted within a relatively small number of steps then the network is compact in comparison with one in which a smaller proportion may be reached in the same number of steps"].

Also, due to the relatively minimal social and geographical mobility that characterizes small societies, and to the fact that most of its citizens share common cultural values, the ties among them tends to be durable and longstanding, thus giving rise to a higher level of *social cohesion.*[157] In the presence of such strong social networks, insiders (members of the network) distance themselves from outsiders (non-members, strangers), by limiting their loyalty only to friends, relatives and colleagues; and conversely, by excluding and avoiding transactions with those who are not part of their *clique*.

Scholars call this kind of exclusionary behavior *parochialism,*[158] which may be seen as economically inefficient to the extent that it hinders interaction between network insiders and potential outside partners. But on the other hand, parochial practices may also generate efficiency for network participants who, as a result have access to low cost information about their trading partners, and are also allowed to effectively enforce incomplete contracts through different forms of social coercion that are only possible in small group settings.[159]

[157] The notion of social cohesion has been used by sociologists since Durkheim, and numerous –often contradictory- definitions have been proposed. However, in its most basic level, social cohesion can be understood as the ability of a human group to stay together and be connected as a result of the social relations among its members. For an interesting analysis of the notion of social, structural cohesion and embeddedness, see, James Moody and Douglas R. White, *Structural Cohesion and Embeddedness: A Hierarchical Concept of Social Groups*, 68 AM. SOC. REV. 103, 105 (2003)

[158] Samuel Bowles and Herbert Gintis, *Optimal Parochialism; the Dynamics of Trust and Exclusion in Networks*, (2000)

[159] Samuel Bowles and Herbert Gintis, *Optimal Parochialism; the Dynamics of Trust and Exclusion in Networks*, 3 (2000)

In contrast, there is another type of society (generally, larger ones), in which social networks are still important, but their overall influence seems to be less apparent as a result of social, cultural, economic and legal constraints. Members of these large societies tend to interact with many more people than their counterparts from small ones. Their social circles may be larger, too, but their exchanges tend to be also more brief and superficial.[160] The complexity of life in large, and generally urban environments, also generates more social and geographical mobility, which in turn works towards creating less cohesive networks where the difference between insiders and outsiders is more difficult to notice.

Since the 1930s, scholars from different disciplines (most notably, anthropology, sociology and psychology) have systematically explored the intricacies of group dynamics and have worked towards developing an important body of literature pertaining to the study of social networks.[161] Despite the diverging theoretical traits across those disciplines, social scientists interested in the field have

[160] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 48 (J. Clyde Mitchell, ed. 1969).["Many writers (e.g. Gluckman, 1962:8; Barnes, 1954: 44; Frankenberg, 1966: 257 ff.) have indicated that one of the characteristics of large-scale societies is the large number of single-stranded relationships in them. The relative weakness of institutional integration in these societies is directly connected with the paucity of multiplex relationships for there are few circumstances in which people in large-scale industrial communities meet one another constantly in a variety of social settings. Instead their activities in one sphere of life are comparatively isolated from their activities in some other sphere"].

[161] JOHN SCOTT, SOCIAL NETWORK ANALYSIS 7 (Sage Pub. 1991) (2000).["A number of very diverse strands have shaped the development of present-day social network analysis. These strands have intersected with one another in a complex and fascinating history, sometimes fusing and other times diverging on to their separate paths"]

devised a common terminology[162] and a distinctive approach to explore the ways in which small-scale social interactions occur and also how these influence both individual and collective behavior.[163] The social network approach focuses on the attributes of interpersonal relationships by measuring the degree of relatedness among individuals[164]-and usually displaying it in form of a diagram-,[165] instead of just focusing on the qualities of individual actors, the social categories to which they belong[166] or more abstract social structures.[167]

Social network analysis has been used to interpret interpersonal behavior in a variety of social phenomena, and has contributed to understanding the usefulness of

[162] The notion of "network" itself and several other terms used in social network analysis (i.e. intensity, frequency, nodes, ties, links) are taken from graph theory; whereas some others (e.g. multiplexity, intensity, close-knit) are from sociology or anthropology.

[163] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 2 (J. Clyde Mitchell, ed. 1969)

[164] The interest in measuring the social configurations of group interactions was first proposed by Jacob Levy Moreno, a psychotherapist with an interest in exploring, by way of social experimentation, "the possibility of using psychotherapeutic methods to uncover the structure of friendship choices" See, JACOB LEVY MORENO, THE SOCIOMETRY READER, (The Free Press, 1960). Moreno coined the term *sociometry* to define the body of knowledge applied to measuring social relationships. ["The inquiry into the evolution and organization of groups and the position of individuals within them"]. One of Moreno's major contributions was the "'sociogram' as a way of representing the formal properties of social configurations (…) in diagrams analogous to those of spatial geometry". JOHN SCOTT, SOCIAL NETWORK ANALYSIS 9-10 (Sage Pub. 1991) (2000). Modern social network scholars have traced the origins of the contemporary Social Networks Analysis on the fundamental ideas of Sociometry. See, Mark. S. Granovetter, *The Strength of Weak Ties*, 78 AM. J, SOCIOLOG. 1360 (1976)

[165] In which all the relevant nodes and ties are displayed.

[166] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 10 (J. Clyde Mitchell, ed. 1969) ["The categorical order by means of which the behaviour of people in unstructured situations may be interpreted in terms of social stereotypes such as class, race, ethnicity…']

[167] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 4 (J. Clyde Mitchell, ed. 1969) ["The interest in these studies focuses not on the attributes of the people in the network but rather on the characteristics of the linkages in their relationship to one another, as a means of explaining the behaviour of the people involved in them"].

contacts for job-seeking purposes,[168] the way in which organizations are run,[169] how social structure affects economic life,[170] the dissemination of information, rumors or ideas,[171] and the mapping of corruption,[172] terrorist,[173] and other criminal organizations.[174] Social networks have also been the subject of widespread speculation in popular culture,[175] and a notable interest on them has grown exponentially after the expansion of the Internet.[176]

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[168] See, MARK S. GRANOVETTER, GETTING A JOB: A STUDY ABOUT CONTACTS AND CAREERS (U. Chicago Press 1995)

[169] See, Noel M. Tichy. Michael L. Tushman and Charles Fombrun, *Social Network Analysis for Organizations*, 4 ACAD. MANAG. REV. 507 (1979); Reed E. Nelson, *The Strength of Strong Ties: Social Networks and Intergroup Conflict in Organizations*,32 ACAD. MANAG. J. 377-401 (1989); Candance Jones, William S. Hesterly and Stephen P. Borgatti, *A General Theory of Network Governance: Exchange Conditions and Social Mechanisms*, 22 ACAD. MANAG. J. 911-945 (1997);

[170] See, Brian Uzzi, *Social Structure and Competition in Interfirm Networks:The Paradox of Embeddedness* 42 ADM. SCIENCE Q. (1997)

[171] See, James Coleman, Elihu Katz, and Herbert Menzel, *The Diffusion of an Innovation among Physicians* 253-70 XX Sociometry (1957); Also see, Max Gluckman, *Gossip and Scandal*, IV Current Anthropology 307-316 (1963); A. L. Epstein, *Gossip, Norms and Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 4 (J. Clyde Mitchell, ed. 1969)

[172] See, for example, John McMillan and Pablo Zoido, *How to Subvert Democracy: Montesinos in Peru*, 18 J. ECON. PERSP 69 (2004).

[173] MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS (U.Penn Press, 2004); Aparna Basu, *Social Network Analysis of Terrorist Organizations in India* (paper presented at Carnegie Mellon University in 2005) available at: http://www.casos.cs.cmu.edu/events/conferences/2005/2005_proceedings/Basu.pdf. (last visited, Nov. 6, 2006)

[174] Wayne E. Baker and Robert R. Faulkner, *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 58 AM. SOCIOL. REV. 837-860 (1993); Jeffrey Scott McIllwain, *Organized Crime: A Social Network Approach*, 32 CRIME, L. & SOC. CHANGE 301-323 (1999); Nigel Coles, *It's Not What You Know –It's Who You Know That Counts. Analysing Serious Crime Groups as Social Networks* 41 BRITISH J. CRIMIN. 580-594 (2001)

[175] Perhaps the most widely known idea related to social networks is that of *six degrees of* separation, according to which any two people in the world can be connected through no more than five acquaintances. This hypothesis was originally conceived by the Hungarian writer Karinthy Frigyes (1929) in a short story entitled Lánceszemek (chains), but didn't become popular until after 1967, when American psychologist Stanley Milgram conducted his *Small World Problem* experiment intended to test the six degrees hypothesis. See, Stanley Milgram, 1 PSYCHOL. TODAY 60-68 (1967); Also, see, Jeffrey Travers and Stanley Milgram, *An Experimental Study of the Small World Problem* 32 SOCIOMETRY 425-443 (1969). Milgram's methodology was similar to that of a chain letter. He gave

In spite of its growing usage in other disciplines, the social network approach seems to have been overlooked by socio legal scholars. In fact, most of the traditional literature pertaining to social control in legal environments has either focused on individual legal actors and the social categories to which they belong (categorical approach[177]), or on the behavior of these actors depending on the role that they occupy within social institutions (structural approach[178]). We could say, for instance, that these approaches are the ones that have guided the scholarship produced under the Procedural Justice and the Structural Paradigms described earlier, and to a certain extent, have also influenced the legal anthropology paradigm, as well.[179]

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each person in his sample "the name and address of the same target person, a person chosen at random, who lives somewhere in the United States" and asked "each of the participants (…) to move a message toward the target person, using only a chain of friends or acquaintances"; then, the number of intermediaries would be tracked in order to determine how many persons are between the messenger and the target. He concluded that the median of intermediaries was five. See, Stanley Milgram, 1 PSYCHOL. TODAY 64-5 (1967). Since the 1990s, the notion of *Six Degrees* has inspired a broadway play, a movie, several television series (Six Degrees, Host) and at least one online trivia game (Six Degrees of Kevin Bacon). In 1999, a team of sociologists from Columbia University led by Duncan Watts, tried to reproduce Milgram's experiment on a large-scale (http://smallworld.columbia.edu/project.html) and confirmed that "social searches can reach their targets in a median of five to seven steps, depending on the separation of source and target", See, Peter Sheridan Dodds, Roby Muhamand, and Duncan J. Watts, *An Experimental Study of Search in Global Social Networks*, 301 SCIENCE 827-829 (2003) However , Milgram's findings and the Six Degrees hypothesis in general, have been recently criticized. See, Judith Kleinfeld, *Six Degrees of Separation: An Urban Myth?* PSYCHOL. TODAY (2001); also, Judith Kleinfeld, *Could It Be a Big World After All? The Six Degrees of Separation Myth*, SOCIETY (2002)

[176] Since 1995, numerous websites dedicated to promote social networking for a variety of purposes have been launched (e.g. classmates.com; linkedin.com; sixdegrees.com; myspace.com; orkut.com; Yahoo360).

[177] See, *supra* note 166.

[178] See, *supra* note 167.

[179] The procedural justice literature has focused on the behavior of individuals (categorical) and the choices that they make given the existing social institutions (structural); the institutional paradigm has instead focused almost exclusively on the social structure (structural) while paying no attention to the individual. Legal anthropologists have also, to a certain extent, focused on the structure of traditional

The structural and categorical approaches have provided important contributions in different contexts. Nonetheless, as none of these approaches[180] focuses on social interactions and the ways in which individual behavior is affected by the social context, researchers have been able to obtain only a partial view of how institutions and social processes operate.

The social network approach can help obtain a more complete picture by taking context as an important element. To this end, social network analysis may be used as a vehicle to explore the way in which individuals cope with interpersonal conflict within social group settings, to understand the ways in which group norms are effectively enforced in the absence of a centralized formal authority[181](e.g. enforcement of incomplete contracts); but most importantly, to explain the influence of the social context on individual choices for dispute processing mechanisms and fora, in a way that goes beyond the traditional dichotomy that views societies as either

societies and have explored the behavior of individuals according to the position that they occupy in the social system. However, when anthropologists began studying more complex societies, urban communities, "small scale societies which lacked single pervasive structural characteristics in terms of which their morphologies could be depicted (…) they found the structural approach inadequate". See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 9 (J. Clyde Mitchell, ed. 1969) As a result, some sociologists and anthropologists began employing social network tools but most of their research was focused on the analysis of close-knit and homogeneous communities and their preference for processes that were labeled as indigenous or primitive, thus reaffirming the modern/primitive society dichotomy to which we have previously referred.

[180] It could be argued, however, that the *new legal pluralism* paradigm constitutes an exception due to the fact that it not only looks at the social interactions, but also at the "unofficial forms of ordering located in social networks or institutions". Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 873 (1988)

[181] Even though some of its members may have more predominant roles than others, social networks usually don't have a *head* or a leader. See, note 187 *infra*.

traditional or modern.[182] Ultimately, such analysis could also shed light to understanding the role of conflict in the transformation and maintenance of social structures.

But the social network paradigm also poses some challenges. First of all, a *social relationship* itself is not easy to define. In abstract terms, we might say that a relationship is a link, a connection or association between two individuals; but when it comes to operationalize the concept, some difficulties arise. We cannot say, for example, that all social relationships are based on face-to-face contacts, because some people are linked to each other without the need to establish physical contact (think of two "relatives" who have never met in person).

Also, when talking about relationships we assume that there is some degree of closeness and durability, but how close do two people need to be in order to consider that they are bound by a relationship? And, for how long? When can we say that someone has a relationship with us? Also, are all relationships reciprocal? And, even after we have figured out how to define relationship for our specific purposes, there is a second challenge in terms of social network analysis: to determine the *content* of the relationships.

[182] In fact, as Clyde points out, "the use of the notion of social networks in the interpretation of field data…was introduced into British social anthropology in the first instance particularly because the conventional categories of structural/functional analysis did not appear to be adequate when anthropologists began to make studies outside the ordinary run of small-scale, isolated 'tribal' societies." See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 8 (J. Clyde Mitchell, ed. 1969). The weakness of the structural approach is that "involve(s) generalizations about the behaviour of people in terms of the positions they occupy in the social system but that these generalizations based as they are on abstractions ignore individual deviations from the pattern. Id. at 9.

Content refers to the meaning that individuals attribute to their social ties; in other words, the reasons why people feel connected with each other or the purpose that they recognize in their interaction.[183] In this sense, the content can be a familial or kinship obligation, friendship, neighbor reciprocity, business or economic interest, social or professional courtesy, collegiality, and religious cooperation, to name a few.[184] But, the main problem remains that in most cases the content is not directly observable.[185] Instead, its presence can only be inferred after observing how two or more people behave when interacting with each other, and it always depends on the researcher's interpretation of such behavior.[186] Determining the content is important because it allows us to understand why people interact with others, and to figure out the incentives that they have for cooperating with their peers.

A third challenge that we may encounter when using the social network approach is how to determine the networks' boundaries.[187] This problem relates to the questions of how far the links of a network need to be traced? And also, what

[183] Emilio J. Castilla, Hokyu Hwang, Ellen Granovetter, and Mark Granovetter, Social Networks in Silicon Valley 218 , 219 (2005) ["A tie or relation between two actors has both strength and content. The content might include information, advice, or friendship, shared interest or membership, and typically some level of trust"].

[184] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 20 (J. Clyde Mitchell, ed. 1969)

[185] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 22 (J. Clyde Mitchell, ed. 1969)

[186] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 22 (J. Clyde Mitchell, ed. 1969)

[187] J. A. Barnes, *Class and Committees in a Norwegian Island Parish,* HUMAN RELATIONS 39, 48 (1954) ["Characteristically a network has no head and, as I have here used the term, no centre and no boundaries either. It is not a corporate body, but rather a system of social relations through which many individuals carry on certain activities which are only indirectly coordinated with one another"].

determines the size of a social network? As we previously explained,[188] the different social connections that people have can be visualized as forming chains that link one individual with another and vice versa.

Those who know one another form relatively compact clusters within society and the tendency would be to consider them as forming a social network with somewhat clear boundaries (only those who are "friends" with each other). However, those boundaries are relative since it is very likely that one or several of those individuals will also be friends with others (not included in the first network), who are in turn related to more people who can be also considered as friends. As one can assume, the chains could be endless and the network could be expanded until the entire society is included.[189]

The problem of defining the boundaries can be mitigated by looking at the *density* of the ties, and limiting the network to those participants who know one another and have a mutual close-knit interaction.[190] This way, loose-knit relationships would be excluded. A second possibility would be to choose a point of reference (an

[188] See, page 57 *supra.*

[189] Barnes' idea of the *total network* was formulated precisely to convey the notion that the "the whole of social life" can be seen as forming an entire network, given that all its members are connected in one way or another. See, J.A. Barnes, *Class and Committees in a Norwegian Island Parish*, 7 HUMAN RELATIONS 39-58 (1954)

[190] A social network is dense when only "a few links between persons need to be used to reach the majority". J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 18 (J. Clyde Mitchell, ed. 1969)

individual or a group, to be called *ego*[191] or the *primary star*[192]) and consider other individuals depending on their relationship with *ego*. As a result, the network would be only formed by those in direct or close contact with the subject used as a *point of anchorage*.[193] For our particular analysis, we have selected the individuals who are part of the Venezuelan business sector as the point of anchorage.

In spite of the aforementioned difficulties, the social network paradigm still offers a method adequate to assess the behavior of individuals in various social settings, and is particularly suited to understand group interactions within the different groups that form society.

The presence of social networks is a feature common to every society. Virtually every culture in the world considers personal exchange as an essential part of life and the building of social capital through "multiplex, affectual and enduring"[194] interactions is usually linked to the gain of social and economic benefits. Relationships that arise from business exchanges are no different. After all, deal making is a form of

[191] Ego (from Latin), means "self", and is a term commonly used in social network analysis to denote the individual chosen by the researcher as a point of reference to analyze a network (ego's network).

[192] See, J.A. BARNES, *Networks and Political Process, in* SOCIAL NETWORKS IN URBAN SITUATIONS 58 (J. Clyde Mitchell, ed. 1969)

[193] J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 12 (J. Clyde Mitchell, ed. 1969) ["The point of anchorage in a network is usually taken to be some specified individual whose behaviour the observer wishes to interpret. Which individual is taken will turn on the particular problem that the observer is interested in."] Having a point of anchorage, also helps to determine the *range* of a network, this is, the number of people in direct contact with ego. (Id.)

[194] Richard Abel, *Dispute Institutions in Society,* LAW & SOC'Y REV. 219, 294 (1973)

social interface and the repeated interaction within groups of individuals plays an important role in fulfilling social and economic functions.[195]

In light of the fact that social relationships are generally perceived as paramount to business and deal making, the business community offers an ideal set of conditions for the use of social network analysis. And, the importance of this topic is reflected by the amount of scholarly research conducted to illustrate business social networks in Asian,[196] African,[197] American,[198] and European[199] cultures as well.

Many important facets of the business community can be examined through the lens of social networks, but the dimension that seems most relevant for legal

[195] PAUL WINDOLF, CORPORATE NETWORKS IN THE UNITED STATES AND EUROPE 25 (Oxford U. Press 2002) ["Corporate networks perform a number of economic functions: reducing informational asymmetries (e.g. weak ties, Granovetter, 1973); reducing uncertainty (e.g. trust, Uzzi 1996); the supervision of managers by owners; redistributing risk (risk-sharing); diffusion of innovations within an 'organizational field' (DiMaggio and Powell 1983); reducing (mutual) resource dependency (Burt 1982); selecting and recruiting successful managers (screening)"]

[196] See, GARY G. HAMILTON, ASIAN BUSINESS NETWORKS (Walter de Gruyter, 1996); Kwok B. Chan, Migration, Ethnic Relations and Chinese Business (Routledge, 2005); Mark Granovetter, *Business Groups and Social Organization*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 429-450 (Neil J. Smelser & Richard Swedberg, ed. 2005).

[197] Marcel Fafchamps, *The Enforcement of Commercial Contracts in Ghana*, 24 WORLD DEVELOPMENT 427-448 (1996); Marcel Fafchamps, *Networks, Communities, and Markets in Sub-Saharan Africa: Implications for Firm Growth and Investment*, 10 J. AFR. ECON. 109-142 (2001)

[198] Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55-67 (1963); Stewart Macaulay, *Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises*. (U. Madison, 1990); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chic. L. Rev. 133, 136 (1996); R. E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2049 (2005); Emilio J. Castilla, et. al., *Social Networks in Silicon Valley*, *in* The Silicon Valley Edge: A Habitat for Innovation and Entrepreneurship, 218-424 (forthcoming). Available at: http://www.stanford.edu/group/esrg/siliconvalley/papers.htm (last visited, Jun. 16, 2006).

[199] PAUL WINDOLF, CORPORATE NETWORKS IN THE UNITED STATES AND EUROPE (Oxford U. Press 2002)

scholars is the one related to the influence of social interactions on dispute processing behavior. As the salience and influence of social networks depends largely on the unique characteristics of every society, only by looking at the context in which these networks operate we can understand their impact on the ways in which the different normative orderings that coexist within a given society. This is why we now turn to explain the social and cultural environments under which the Venezuelan business sector operates.

CHAPTER FOUR

ALL IN THE FAMILY: SOCIAL STRUCTURE, NETWORKS AND THE VENEZUELAN BUSINESS SECTOR

"Club reunions and birthday parties serve as a time discuss business strategies and board meetings serve as a time to discuss family matters" [200]

In this chapter, we will describe how the salience of social networks in the Venezuelan business sector has resulted from the unique features of the country's socio-economic environment and the peculiar interaction between the private and public sectors. We will pay special attention to the influence that the state-controlled oil industry has exerted in shaping the modern Venezuelan society and its institutions.

The description offered in this chapter, will help understand the context within which the Venezuelan business sector operates, which is crucial to further investigate why and how social networks are relied upon for processing legal disputes.

As the goal of this chapter is to examine the combination of social factors that have contributed to shape the Venezuelan business sector, we have relied on a historical-comparative methodological approach.[201] To this end, most of the data

[200] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 111 (Moises Naim & Joseph L. Tulchin, Eds., 1999).

[201] W. LAWRENCE NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACH, 420 (Pearson, 2006) ["Historical-Comparative research is suited for examining the combinations of social factors that produce a specific outcome (e.g. Civil War) It is also appropriate for comparing entire social systems to see what is common across societies and what is unique, and to study long-term societal change"].

analyzed was in the form of documents obtained directly from archives or private collections in Venezuela during the time of our fieldwork, between the years 2002 and 2005. We also relied on several secondary sources, including newspaper articles, reports, scholarly papers, and some statistical data. Several interviews conducted with scholars and experts in Venezuela, complemented the information obtained from other sources. These conversations –often unstructured and informal- helped me clarify and reconstruct some of the major events to be reported in the narrative.

BLACK GOLD: THE IMPACT OF AN OIL-BASED ECONOMY ON THE VENEZUELAN SOCIETY

During the twentieth century, Venezuela became known as the longest-standing and most stable democracy in Latin America.[202] This reputation resulted mainly from the fact that starting in 1958 and for more than forty years the country was among the very few in the region in which elections were periodically held, a formal separation of powers existed allowing the different branches of the state to be independent, citizen's rights were not only mentioned in the laws but also guaranteed to some extent, and the supremacy of the law (rule of law) was generally accepted.[203] The perception of political and social stability was enhanced by the idea of economic prosperity, and by the 1960s Venezuela became generally regarded as a rich nation, as a result of the massive wealth coming almost exclusively from oil exports, and to a

[202] Almost all other Latin American countries have had long periods of dictatorship and totalitarian regimes, or to a certain extent, have only enjoyed democracy for limited periods of time.

[203] See, FERNANDO CORONIL, THE MAGICAL STATE: NATURE, MONEY AND MODERNITY IN VENEZUELA 367-368 (U. Chic. Press 1997); Howard J. Wiarda & Ieda Siqueira Wiarda, *Government and Politics in* VENEZUELA: A COUNTRY STUDY 133, 135, 154 (Richard Hagerty ed., 4th ed. 2002)

lesser extent from other natural resources (natural gas, bauxite, and iron, among others).

To this day, Venezuela is still the third largest oil producer in the world.[204] For several decades now, it has also been a key player in the global trade of natural resources, as a founding and a very proactive member of OPEC, the international oil cartel created in 1960 that congregates mostly Middle Eastern oil rich nations.[205] Even though the industry only employs less than 2% of the labor workforce, oil revenues have traditionally represented more 90% of the country's exports, and at least one-fifth of Venezuela's gross national product (GNP).

During the nineteenth century, however, Venezuela was a rural country which economy relied on small-scale exports of coffee and cocoa. In fact, when the first important oil reservoirs were discovered in 1914, Venezuela did not have the technology or infrastructure to exploit and commercialize hydrocarbons, and as a result, the government had no other option but to let foreign oil corporations (FOC) handle the business.[206]

[204] Monthly Oil Market Report (International Energy Agency), May 12, 2006 at 6, available at http://omrpublic.iea.org/tablearchivesearchres.asp?select5=2006&Submit222=Submit (last visited, Jun. 15, 2006).

[205] OPEC current members are: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. See, http://www.opec.org/aboutus/ (last visited, Jun. 15, 2006)

[206] Guillermo Rodríguez Eraso, *Evolución de la Industria Petrolera en Venezuela, in* SEMBRANDO EL PETRÓLEO 33, 35 (Fundación Venezuela Positiva, 2001)

Major oil companies –mainly from the U.S. and Western Europe- were at the time among the most influential corporate actors in the world.[207] The fact that these companies were completely owned and managed by foreigners contributed to create the perception among Venezuelans that these entities represented some form of alien domination.[208] In addition, the market's presence of these financially powerful and technologically advanced actors and the contrast that they represented with respect to the local economic players "created the sense that the country was dominated by an uncontrollable power totally stranger to the Venezuelan society and to its possibilities, and which could defy the laws of Venezuela and even its sovereignty".[209]

During the 1960s, the Venezuelan government reacted against the potential foreign threat by devising protectionist strategies which it then implemented through import substitution policies, extensive price controls, fixed interest rates, and thorough legislation that required government permits and authorizations for almost every aspect of business life.[210] These policies were enacted not only to impede the threats of foreign competition, but also to hinder local rivalry. For businesspeople, the only way to navigate successfully through the complicated web of administrative processes and the immense bureaucracy that emerged from it was by relying on their personal

[207] Standard Oil Co. (Creole Petroleum Co.) and Shell were the two dominant players in the Venezuelan market during more than fifty years, until the government's decision to nationalize the industry in 1975.

[208] Arturo Uslar Pietri, EL UNIVERSAL, May 27, 1991, at D6.

[209] Arturo Uslar Pietri, EL UNIVERSAL, May 27, 1991, at D6.

[210] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 98 (Moises Naim & Joseph L. Tulchin, Eds., 1999).

connections with government officials. This did not prove to be an obstacle for domestic businesspeople, given that most of them -as part of the local social elite- were already familiar with the benefit of using personal connections for their own advantage. Social networks may not have emerged as an effect of this economic boom, but this certainly made them stronger and more important.

In 1975, the oil industry was nationalized, thus enabling the Venezuelan state to formally become the sole ruler of its own wealth. The new legislation provided that all hydrocarbons and mining reservoirs were of public interest and therefore belonged to the state.[211]

[211] See, LEY QUE RESERVA AL ESTADO LA INDUSTRIA Y EL COMERCIO DE LOS HIDROCARBUROS (LDH) [*Hydrocarbons Act*] (Venez.). Also see, CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRPBV] [*Constitution of the Bolivarian Republic of Venezuela*] art. 12 (Venez.). "Hydrocarbon and mining reservoirs existing in the national territory, whatever their nature may be, including those under the territorial seabed, in the continental platform, in the exclusive economic zone and within national boundaries, belong to the Republic, are public domain assets and, therefore, are inalienable and may not be subject to adverse possession. Marine coasts are public domain assets". A similar text is contained in article 3 of the Organic Law of Hydrocarbons. LEY ORGÁNICA DE HIDROCARBUROS [LOH] [*Hydrocarbons' Organic Act*] art. 3 (Venez.). "Hydrocarbon reservoirs existing in the national territory, whatever their nature may be, including those under the territorial seabed, in the continental platform, in the exclusive economic zone and within national boundaries, belong to the Republic, are public domain assets and, therefore, are inalienable and may not be subject to adverse possession". Furthermore, pursuant to article 1 of the Organic Law of Gaseous Hydrocarbons: "Gaseous hydrocarbon reservoirs existing in the national territory in the bed of territorial waters, of the adjacent maritime zone, and in the continental platform belong to the Republic, are of public domain and, therefore, untransferable and not subject to prescription." It is important to stress, however, that even though the reservoirs are public property, once hydrocarbons are processed and extracted from the wells in some cases the product might belong to private persons or entities. Nonetheless, in the case of liquid hydrocarbons and its associated natural gas, these can be only produced by state-owned or state-controlled companies, and commercialized by PDVSA, the state oil company. Non-associated natural gas may be produced and commercialized by private companies. LEY ORGÁNICA DE HIDROCARBUROS GASEOSOS [LOHG] [*Gaseous Hydrocarbons' Organic Act*] art. 1 (Venez.).

By being blessed (or cursed)[212] with such a significant source of wealth from oil and other natural resources the different administrations that ruled the country during the second half of the twentieth century found themselves in the position of playing a major role in shaping the economy. Resulting from the fiscal bonanza created by the oil revenues, the state became the owner and sponsor of many economic activities and turned itself into a key player in most areas of the industrial and business sectors. The government was not only the richest investor but also an important benefactor, which in turn "imposed on the private sector the necessity for organizing and mobilizing politically so it can be first in line to benefit from rent distribution".[213] In addition, members of the business community were expected to pledge allegiance to the ruling political party as it usually occured in relationships based on *clientelism.*[214]

With a need to invest and diversify its income, the state became involved in almost every important economic activity ranging from the obvious investments in oil, steel and other heavy -and arguably more essential and basic- industries, to other areas in which liberal governments rarely participate, like airlines, hotels, telephone

[212] See, FERNANDO CORONIL, THE MAGICAL STATE: NATURE, MONEY AND MODERNITY IN VENEZUELA 353-356 (U. Chic. Press 1997); TERRY LYNN KARL, THE PARADOX OF PLENTY, OIL BOOMS AND PETRO-STATES 71-188 (Univ. California P. 1997).

[213] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 111 (Moises Naim & Joseph L. Tulchin, Eds., 1999).

[214] The term *clientelism* is usually referred to "a relationship based on political subordination in exchange for material rewards" See, Jonathan Fox, *The Difficult Transition from Clientelism to Citizenship: Lessons from Mexico*, 46 World Politics, 151, 153 (1994). In this manner, "politicians intervene, on behalf of voters, in the administrative process, and, in return, voters reward politicians with votes". See, Lee Komito, *Voters, Politicians and Clientelism: a Dublin Survey*, 37 ADMINISTRATION 171-196 (1989).

companies, and mass media, to name a few. Such *interventionism* led to an expansion of the government's presence to virtually every aspect of the economy and helped strengthen the links between the public and the private sectors.[215]

FRIENDS GO FIRST: THE IMPORTANCE OF THE KNOW-WHO OVER THE KNOW-HOW[216]

As the state apparatus grew exponentially and started intervening in most areas of the economy, it became paramount to those who wanted to succeed in business to cultivate the "proper" connections. Obviously, certain groups achieved more power than others, and as a result were more successful in their business activities, many times at the expense of others.

Venezuela has a racially-mixed population[217] that resulted from the different waves of immigration received mainly from Western Europe since the late 19th century.[218] The country has now more than 25 million inhabitants, but society is still

[215] Manuel A. Gomez, The Use of Institutional Mediation by Venezuelan Business Lawyers (2001) (unpublished J.S.M. thesis, Stanford University) (on file with the Stanford Law School Library).

[216] "He might have an MBA from Harvard or another important university; he might be an accomplished individual but he's not clearly one of us, so when we are deciding who to hire or who to do business with, we need to give preference to those who have our same beliefs, philosophy, and who are close of our group of friends. Even if they don't have all the credentials, we can always trust them more than the strangers. After all, *friends go first*, you know…" Interview with Venezuelan executive. Caracas, May, 2006.

[217] The racial mixture can be traced as back as colonial times when the Spaniards colonized America and a significant amount interracial bondage occurred with members of the local indigenous tribes. The import of African slaves that started between 1501 and 1510 also became an important factor in the population growth, even though black African slaves were a minority racial group concentrated in the coastal region. For a detailed account about the impact of black slaves in the population growth of Venezuela, see, CHRIS TANNER, VENEZUELAN MIGRATION (Verlag Ruegger, 1980)

[218]During the19th century Venezuela received an important influx of immigrants from Germany, Italy and France (Corsica), many of whom became successful businesspeople and prominent members of the Venezuelan society. Another important group of immigrants was that of Europeans from the Iberian

visibly stratified. The general population may have grown exponentially during the last decades, but the key players in the business community are members of the same groups that have dominated the social and economic scene for years and maintained an advantageous position in society by excluding *outsiders*.[219]

Some areas within the business sector still appear to be controlled by groups of common ethnic origin, but yet the larger community forms a relatively cohesive group of people bound by multiplex social relationships as their families are members of the same social clubs, their children attend the same private schools and even travel for vacation to the same places.[220] Social networks have had influence over most aspects of business life, and the processing of disputes is not an exception.

Whenever legal conflicts arise, the first move on each side is usually to resort to the network. As business relationships are so intertwined with personal ones, it is

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Peninsula (Italy, Spain and Portugal) who came to Venezuela just after the World War II. Most of them entered the country as agricultural workers but rather became successful businessmen mainly in the construction, textile, and food service industries. For a comprehensive history of the European immigration in Venezuela, see, NICOLAS MILLE, 20 AÑOS DE MUSIUES: ASPECTOS HISTÓRICOS, SOCIOLÓGICOS Y JURÍDICOS DE LA INMIGRACIÓN EUROPEA DE VENEZUELA (Edit. Sucre, 1965); CHI-YI CHEN, MOVIMIENTOS MIGRATORIOS EN VENEZUELA (Edit. Arte, 1968); ERMILA TROCONIS DE VERACOECHEA, EL PROCESO DE INMIGRACIÓN EN VENEZUELA (Academia Nacional de la Historia, Caracas, 1986); ADELA PELLEGRINO, HISTORIA DE LA INMIGRACIÓN EN VENEZUELA SIGLOS XIX Y XX (Academia Nacional de Ciencias Económicas, Caracas, 1989); Mauro Bafile, *La Inmigración Europea de la Postguerra*, *in* LA INMIGRACIÓN EN VENEZUELA (Isbelia Sequera Tamayo & Rafael Jose Crazut eds. 1992).

[219] The notion of *exclusionary social closure* was first introduced by Max Weber and further developed by Parkin, who explained it as "the process by which social collectivities seek to maximize rewards by restricting access to resources and opportunities to a limited circle of eligibles. This entails the singling out of certain social or physical attributes as the justificatory basis for exclusion". See, FRANK PARKIN, MARXISM AND CLASS THEORY: A BOURGEOIS CRITIQUE, 58 (Columbia U. Press, 1979). This notion is also related to the concept of *parochialism* in social network theory described *supra.* See, page 61.

[220] One distinctive feature of these social circles is the high degree of cohesiveness among its members, which often extends to more than one generation, thus creating a close-knit network.

common for disputants to sort out their differences with the intervention of other members of their social group, which in many cases are also family. When conflicts get out of hand, the contending parties are not members of the same social group, or the intervention of official institutions is deemed necessary for any other reason, disputants utilize the official fora, but still through their social networks.[221] In this sense, lawyers have become important players within the business sector as they are the ones who usually interact with official institutions, and serve as liaison with other social groups.[222]

Family-owned businesses are still very common in the Venezuelan private sector.[223] Most large and medium-sized companies are still owned or controlled by members of the same families, which has facilitated the strengthening of social business networks.[224] As a result, social hierarchies have extended to business relationships, and often play an important role in shaping the way in which dealings are conducted and disputes are dealt with. Conversely, business issues are in turn mixed with family life and social relationships. As Jatar has eloquently pointed out,

[221] Manuel A. Gomez, *Los Abogados de Negocios en Venezuela,* 125 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS DE LA UNIVERSIDAD CENTRAL DE VENEZUELA 23, 43 (2003).

[222] See, Manuel A. Gomez, *Los Abogados de Negocios en Venezuela,* 125 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS DE LA UNIVERSIDAD CENTRAL DE VENEZUELA 23-50 (2003).

[223] Interestingly, this also seems to be the case of corporate ownership around the world, as families dominate most firms both in developing and advanced economies. See, Mark Granovetter, *Business Groups in Social Organization in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 433 (Princeton U. Press, 2005).

[224] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 111 (*Moises* Naim & Joseph L. Tulchin, Eds., 1999).

"club reunions and birthday parties serve as a time discuss business strategies and board meetings serve as a time to discuss family matters".[225]

To an outsider, the Venezuelan business sector appears to enjoy a level of modernity typically found in industrialized and affluent societies.[226] But after a closer look, this modernity reveals itself to be only apparent, for two reasons; first, because family and social relationships still have more weight than individual merits and, second, because the success of most corporations and individual businesspeople depends more on their political and/or social connections than on their capacity to compete and innovate. In other words, the *know-who* is much more important than the *know-how*.[227]

In sum, while social networks had been important in Venezuela for many years, the particular features of the modern state and the socio-economic reality that emerged as a result of the oil boom made them even more relevant not only for the success of business activities but also for dealing with disputes that arose among business actors. As we shall see in the following chapters, social networks have permeated private and public institutions and the individual decisions of

[225] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 111 (Moises Naim & Joseph L. Tulchin, Eds., 1999.

[226] Moisés Naim, LAS EMPRESAS VENEZOLANAS: SU GERENCIA, 10, Ediciones IESA (1989)

[227] Moisés Naim, LAS EMPRESAS VENEZOLANAS: SU GERENCIA, 11, Ediciones IESA (1989)

businesspeople to use the different kinds of dispute processes heavily depends on them.

CHAPTER FIVE

FROM THE TRIBES TO THE JUDICIAL REVOLUTION:

THE PERSISTENT INFLUENCE OF SOCIAL NETWORKS IN THE VENEZUELAN COURTS

"Mas vale tener media vara de Juez que una vara de Justicia"
(It is better to have a judge's short yardstick than a long one of justice)[228]

This chapter describes how the Venezuelan judiciary has been traditionally permeated by powerful networks of lawyers, public officials and political actors, and how this has defined the way in which business disputants use the court system, and how judges behave. We will also describe the reform efforts led by the Venezuelan government and several multilateral organizations during the last twenty years to modernize the judicial sector. As we will see, members of the business sector, in general, have important incentives to manipulate the courts and preserve the status quo, in spite of the idea –among institutional reform advocates- that the institutions do not function well and that its users are dissatisfied.

Most of the data used for the preparation of this chapter was obtained from secondary sources. To this end, we consulted a significant number of scholarly papers, reports, legislation, administrative data and official statistics pertaining to the Venezuelan Judiciary. We also explored historical documents and other archival materials in order to assemble an accurate description of the institutional changes that affected the Venezuelan judiciary during the last fifty years.

[228] Venezuelan saying commonly employed by lawyers to express that it is better to have (the favor of) a judge on our side than the favor of justice.

In addition, to better understand the social and institutional context within which legal actors interact, we also conducted a series of interviews with at least thirty-nine individuals, in order to gain insight about their perceptions of the system and about the way in which judicial networks are organized. Our sample population included Venezuelan business lawyers from different areas of practice, representatives from some of their corporate clients (business executives from different companies, domestic and foreign), several trial and appellate judges from Caracas, and other court officials.

In order to gain insights into the judicial reform process and to complement the information obtained from the reports and other archival data, we also interviewed some officials involved in judicial reform projects, from multilateral organizations and the Venezuelan government.

The selection of our interviewees was based on a non-random purposive sample technique,[229] as we were mainly interested in selecting respondents with first-hand experience and knowledge about the functioning of the Venezuelan judiciary, from varied perspectives. Even though the majority of our interviewees were identified and selected at the outset of our study, at least five were contacted after being identified and referred to us by other interviewees. This is sometimes termed as snowball sampling technique.

[229] See, LEONARD BICKMAN AND DEBRA J. ROG, HANDBOOK OF APPLIED SOCIAL RESEARCH METHODS 105 (Sage 1997)

Lawyers (a group of twenty-three in total) were the largest group of respondents in our study. Although, at the time of the interviews, most of them (fifteen) practiced in medium-sized or large law firms (both local and international), some were solo practitioners (mainly litigators), or members of small (boutique) firms, who devote their practice to advising business clients. We also interviewed at least three in-house counsel or heads of internal legal departments in some large corporations. The professional experience of our respondents varied greatly, from those who were usually involved in important, high-profile cases, to those mainly involved in small business matters.

The group of respondents from the business community composed of at least eight high-level executives, from corporations representing different sectors (industrial, retail, banking) and origin (domestic, foreign). This group of interviewees was also selected based on their direct involvement in their companies' dispute processing activities and legal matters. Some of them had previous legal training but none were currently practicing law or offering legal advice.

We also interviewed five judges from different courts that decide business-related matters, all based in Caracas. Our respondents were both experienced judges and recently-appointed ones. Some of our respondents invited other personnel of the court to join our conversation when specific information needed to be clarified.

Finally, we had the opportunity to interview at least three individuals involved in the judicial reform process, both from the government's side and representatives of multilateral organizations (The World Bank) as well. These conversations allowed us to confirm and clarify (*triangulate*[230]) some of the data obtained from other sources.

Most of the interviews were semi-structured or semi-standardized.[231] Protocols including open-ended questions were prepared in advanced to guide the conversations, which lasted an average of two hours each. At all times, we guaranteed confidentiality to our respondents, who were also informed about the scope of this study. The interviews were conducted in Caracas, Venezuela at different times over a period of three years from 2002 to 2005. Some people agreed to meet several times over the length of the field research, so we could assess changes in their perceptions and could ask follow-up or clarifying questions, which turned out to be particularly valuable.

Even though most of our conversations were geared to obtain a description of the general characteristics the court system and the ways in which business disputants use it, sometimes the interviews focused on concrete examples or specific cases that served to illustrate a particular point.

THE STRUCTURE OF THE VENEZUELAN JUDICIARY

[230] *Data triangulation* is a process by which a researcher obtains the same information from different angles or viewpoints in a way that helps him or her to obtain a more accurate portrait than if the data were obtained only from a single source. See, W. LAWRENCE NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES 149 (Pearson 2006)

[231] See, UWE FLICK, AN INTRODUCTION TO QUALITATIVE RESEARCH 155-156 (Sage 1998, 2006)

The Venezuelan judicial system is similar to that of most contemporary political regimes. Since 1811, the Constitution has traditionally recognized the existence of three[232] functionally independent government branches –executive, legislative and judiciary- based on the doctrine of the separation of powers.[233] At the same time, sovereignty and allocation of public authority has been divided among three different territorial levels (national, state and municipal),[234] each of which have certain independence from the others as commonly occurs in systems based on federalism.[235] However, because of the vast control retained by the central government in general, the political structure can be better described as a *centralized federalism.*[236]

[232] However, the recent constitutional reform of 1999, added two new branches at the national level –citizen and electoral- in addition to the three traditional ones that already existed. See, CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 136 (Venez)

[233]CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 136 (Venez) ["The Public Power is distributed in the Municipal Power, the State Power and the National Power. The National Power is divided in Legislative, Executive, Judiciary, Citizen and Electoral. Each of the Public Power Branches has its own functions, but the agencies involved in its activities shall collaborate in the fulfillment of the ends of the State"].

[234] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 136 (Venez)

[235] Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 424 (Friedman and Perez-Perdomo eds. 2003). ["Venezuela had formally been a federal country since 1863, the year in which federalists (whose opponents were the conservatives) won the war. In practice, Venezuela was so fragmented during the nineteenth century that it could scarcely considered a nation-state. During the first half of the twentieth century, a very centralized system was constructed, although –for historical reasons- it kept the form of a federal state. In 1958, when democracy was reestablished in Venezuela, the centralist character was accentuated because the political parties were centrally organized under the strong leadership of their founders"].

[236] Notwithstanding, the Venezuelan constitution declares that the form of government is rather a *decentralized federalism.* See, CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 4 (Venez)

Each territorial level features both an executive and a legislative branch, but the judiciary is only structured at the national (federal) level.[237] As in many other countries, the Venezuelan judiciary is organized like a pyramid, the apex of which is the Supreme Tribunal of Justice,[238] which not only represents the highest court of law in the country but also the body in charge of the administration and governance of the court system.[239] However, until 1999, this managerial role was in the hands of the Judicial Council (*Consejo de la Judicatura*), an autonomous agency whose members had the specific duty to "reassure the independence, efficiency, discipline and high moral standards of the courts and to guarantee career-related benefits to the judges".[240] Formally, council members were jointly designated by Congress (Legislative), by the President (Executive) and by the Justices of the Supreme Court (Judiciary). However, in reality, decisions about appointments were made by the leaders of the dominant political parties,[241] who also played an important role in the emergence of powerful

[237] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 253 (Venez). Differently from what occurs in the U.S. and other countries that have adopted a federal system of government, in Venezuela there is only one type of courts at the national level, but their jurisdiction is distributed according to territorial criteria.

[238]CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 254 (Venez). ["The Judicial Branch is independent and the Supreme Tribunal of Justice will have financial, operational and administrative autonomy"].

[239] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 254 (Venez); LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 1 (2004) (Venez)

[240] LEY ORGÁNICA DEL CONSEJO DE LA JUDICATURA [LOCJ] art. 2 (1998) (Venez). Also see, CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA 1961[Constitution] art. 217 (Venez)

[241] A detailed recount of the circumstances surrounding the creation of the Judiciary Council in 1969 and about the influence that political parties had in its functioning can be read in, Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 450 (Friedman and Perez-Perdomo eds. 2003). See, also, Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 137 (Sieder, Schjolden and Angell ed. 2005) ["The magistrates of the Judicial Council , although appointed by the Supreme

networks of influence that ruled the Venezuelan judiciary during the last three decades of the twentieth century.[242] In sum, the Judicial Council became an instrument of political control as well as the axis of the entire judicial clientele network.[243]

Corruption scandals and the fight for power among the leading political parties during the late-eighties,[244] led to the idea of suppressing the Judicial Council and to expanding the authority of the Supreme Tribunal to the administration and governance of the entire judicial system.[245] This, reform advocates believed, would insulate the judiciary from the influence of other branches. Also, by giving it the power to prepare its own budget, to appoint and dismiss the judges, and to decide on the allocation of resources, would arguably make the administration of the court system more efficient and transparent.

Court, the president of the republic and congress, were also appointed by political parties as part of an overt bargaining process. Judges were effectively appointed according to the quota of political power wielded by each of the parties involved in the nomination"]; Also, Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 9 (forthcoming, 2006). ["For example, in 1998, the recently elected President of the Council told the press that the conformation of the Council was fairly balanced, since two of its members were from COPEI, two from Acción Democrática, and he was a member of the MAS party"].

[242] Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 137 (Sieder, Schjolden and Angell ed. 2005); See, also, Rogelio Perez-Perdomo, *Politicas Judiciales en Venezuela* (IESA, 1995)

[243] Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 9 (forthcoming, 2006).

[244] Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 135 (Sieder, Schjolden and Angell ed. 2005)

[245] Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 137 (Sieder, Schjolden and Angell ed. 2005)

However, this vision did not take into account that the Supreme Tribunal itself could become –as actually happened- a target for political pressure and manipulation;[246] and that, whoever gained political control over the Supreme Tribunal would, in fact, be able to influence the entire court system without any checks and balances.[247]

The Supreme Tribunal of Justice is currently formed by a total of thirty-two justices (*magistrados*)[248] who are assigned to six different chambers in groups of seven or five justices depending on the chamber.[249] The chambers are: Constitutional Chamber, Electoral Chamber, Contentious-Administrative Chamber, Civil Chamber, Social Chamber, and Penal Chamber. The justices altogether form the Plenary Chamber (*Sala Plena*) which hears and decides very specific and limited kinds of cases such as the impeachment of the President and the Vice-President.[250]

[246] For a detailed description of a number of recent cases that show the politization of the Venezuelan Supreme Tribunal, see, Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 138-154 (Sieder, Schjolden and Angell ed. 2005)

[247] International Bar Association. "Venezuela: Un Informe sobre la Situación del Sistema de Justicia," (March 7, 2003) http://www.ibanet.org/pdf/HRIVenezuelaReport_0303.pdf (last visited, March 10, 2003)

[248] Traditionally, the Supreme Court was formed by 15 justices. See, LEY ORGÁNICA DE LA CORTE SUPREMA DE JUSTICIA [LOCSJ] art 24 (1976) (Venez). However, the number of justices –and chambers- was increased to 20 during the transitional regime established in 1999. Finally, in 2004, when the new Organic Law of the Supreme Tribunal of Justice was passed the number was increased to 32. See, LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] (2004) (Venez). According to Perez-Perdomo, by increasing the number of justices and allowing their appointment to take place by simple majority, the president's political party guaranteed itself control of the judiciary. See, Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 149 (Sieder, Schjolden and Angell ed. 2005)

[249] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 2 (2004) (Venez)

[250] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 3, art 5 (2004) (Venez)

Regarding its role as an adjudicatory body, the Supreme Tribunal serves as a constitutional court –through the Constitutional Chamber[251]- as a court of appeals[252] –through the Electoral and Contentious Administrative chambers-, and as a *cour de cassation*[253] –through the Civil, Social and Penal chambers. As for the latter, it is in charge of reviewing issues of law -as opposed to issues of fact- in specific cases that have been previously decided by appellate courts (*Juzgados Superiores*).[254]

Appellate and lower courts are divided according to the subject matter, value of the claims, and territorial jurisdiction. Regarding the latter, each state –as a federal political entity- is considered to form a different jurisdiction (*Circunscripción Judicial*) which in general features trial and appellate courts for each subject matter.[255] In this regard, the courts are divided in: criminal, children and adolescents, contentious administrative, tax, labor, banking[256] and civil, commercial and traffic matters.

The following chart shows the general structure of the judiciary.

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[251] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 5, 22 (2004) (Venez)

[252] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 5, 20, 28, 44 (2004) (Venez)

[253] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 5, 39, 41, 43 (2004) (Venez)

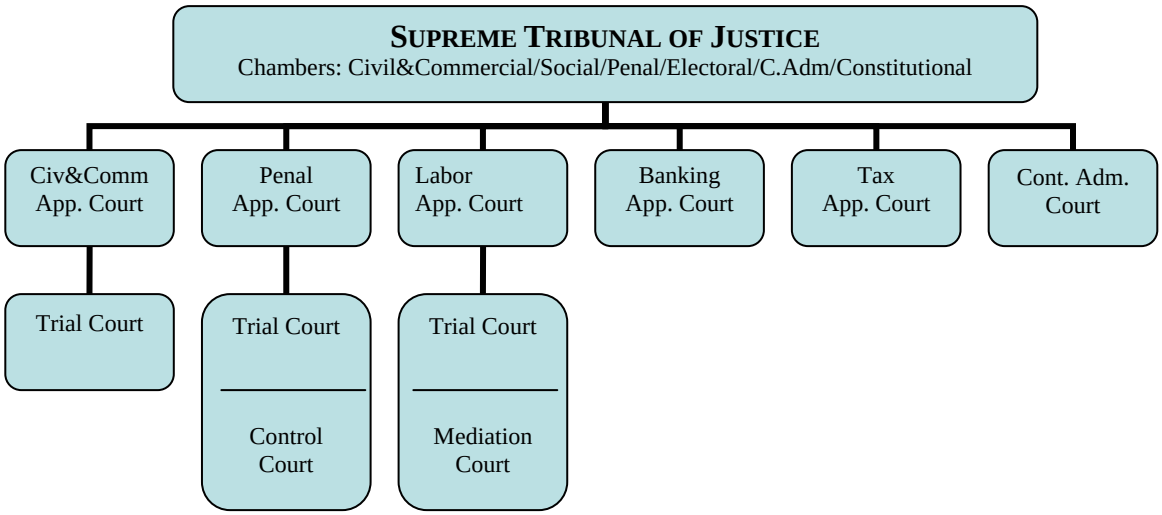
[254] LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA [LOTSJ] art 5 (2004) (Venez); CÓDIGO DE PROCEDIMIENTO CIVIL VENEZOLANO [CPC] art 312 (Venez)

[255] However, Banking courts, which are sitting in Caracas, have territorial jurisdiction over the entire country in financial-related disputes.

[256] The banking courts, created in 1995 as a result of the crisis that affected the Venezuelan financial sector, are in charge of handling all disputes in which at least one of the parties is a bank or a financial institution. See, Council of the Judicature, Resolution Nº. 147 of February 21, 1995, Official Gazzette of the Republic of Venezuela Nº. 35.659. February 22, 1995 (Venez).

Table 1

ORGANIZATIONAL STRUCTURE OF THE VENEZUELAN JUDICIARY



Business disputes are typically channeled through the banking as well as the civil, commercial and traffic courts, whose jurisdictional power has been defined by the Commerce Code.[257] However, to some extent, tax and labor courts are also relevant to business disputants.

The Courts of First Instance (*Juzgados de Primera Instancia*) are the ones that hear and decide cases at the lower level. These courts are directed by individual judges and a secretary (*secretario*), with the assistance of several clerks (*escribientes*) who

[257] CÓDIGO DE COMERCIO [CC] art. 1090 (Venez).

are usually upper-level law students[258] and a bailiff (*alguacil*). Appeals and extraordinary reviews are decided by Appellate courts (*Juzgados Superiores*), whose rulings are in turn reviewed by the Civil, Commercial and Transit Chamber of the Supreme Tribunal, only when certain criteria are met.[259]

As in many other countries that follow the Civil Law Tradition,[260] non-criminal trials in Venezuela are predominantly written, even though certain proceedings may take place in an oral form.[261] The Code of Civil Procedure contains most of the rules that govern non-criminal processes,[262] even though special legislation applies to certain cases.[263]

Traditionally, access to justice has been understood as a basic right in Venezuela,[264] but it was not until the recent Constitutional reform of 1999 that the administration of justice became expressly considered as a public service, and as such,

[258] Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 450 (Friedman and Perez-Perdomo eds. 2003) ["The number of auxiliary personnel can vary greatly from one court to another. Some courts with low workload have none. In those that manage a large volume of cases, auxiliary personnel can amount to as many as twenty people".]

[259] CÓDIGO DE PROCEDIMIENTO CIVIL [CPC] art. 312 (Venez)

[260] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 112 (2d ed. 1985) (1969)

[261] CÓDIGO DE PROCEDIMIENTO CIVIL [CPC] art. 589 et. seq. (Venez)

[262] CÓDIGO DE PROCEDIMIENTO CIVIL [CPC] art. 1 (Venez)

[263] Bankruptcy and maritime transportation procedures, for example, are regulated by the Commerce Code. See, CÓDIGO DE COMERCIO [CC] art. 612-626, art. 898-1081 (Venez).

[264] CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA 1961 [Constitution] art. 68 (Venez)

that the state shall guarantee the use of courts free of charge. This means that no fees, charges or tariffs can be imposed on those who use the system.[265]

Nevertheless, the service is not really free as there are several concealed costs associated with the use of courts. These range from the most innocuous ones like the expenses which the parties have to incur in order to provide the courts with basic office supplies like paper, printer cartridges, staples or notepads; to others clearly questionable like the gratifications that lawyers commonly offer to law clerks and other court employees as an incentive for working on their cases, or bribes to a judge or secretary in order to achieve a certain outcome. In general, our interviewees did not consider these private costs to be an obstacle to access and, in many cases, they thought these to be reasonable, with very few exceptions.[266]

Judicial reformers have argued that these and several other problems that affect the courts are caused by the fact that the percentage of the national annual budget allocated to the judiciary is too low and courts don't receive enough money to operate or to even cover their most basic needs. As a result, the recent constitutional reform

[265] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 254 (Venez)

[266] Interestingly, there seem to be some parameters that lawyers use as a reference to gratify court officials. Several interviewees agreed on similar amounts under certain circumstances, as if there was a price list. For example, people would say that they usually give clerks between VB 20,000 and VB 50,000 (US$10 to US$25) to do ordinary work on their cases (prepare a notification, draft a short procedural decision, and issue certified copies, for example); or even more (VB 200,000) for more complicated work like drafting an opinion, or taking notes during a long hearing. Law clerks usually don't ask for money, but take it as a given that lawyers will gratify them. In very few cases, some interviewees recalled being expressly asked for gratifications or having a disagreement with a particular clerk who became greedy. In those circumstances, the most common solution was to simply ask the court's secretary to reassign their case to another clerk. None of my interviewees ever reported having filed a complaint or accused a law clerk of corruption.

increased the allocation of resources to the judiciary from 0.5%[267] to 2% of the total national budget.[268] However, as a practical matter, the National Assembly has never approved an allotment of more than 1.7% for the entire judiciary in any fiscal year[269]and the courts have received only around 70% of the amount approved in the budget, thus making the situation only somewhat better than to what occurred prior to the constitutional reform.[270]

But even though the real allocation of resources to the judiciary has been less than the minimum established by the constitution, the significant investments made under the umbrella of the judicial reform process during the last decade have provided the courts with an extraordinary source of funding.

THE ROAD TO JUDICIAL REFORM

The conventional wisdom about the Venezuelan judiciary –as is the case of many other Latin American countries- is that the courts in general are highly corrupt,

[267] According to Perez-Perdomo, this reveals the lack of importance that the judiciary has had in respect to the other branches in Venezuela. Rogelio Pérez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 14 (forthcoming, 2006).

[268] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 254 (Venez)

[269] SUPREME TRIBUNAL OF JUSTICE, EXECUTIVE DIRECTION OF THE MAGISTRATURE, COORDINATING UNIT FOR THE JUDICIAL MODERNIZATION PROJECT, Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela [Project to Improve the Administration of Justice in the Context of Conflict Resolution in Venezuela], at 25 (2004); See also, Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 24 (forthcoming, 2006).

[270] Laura Louza, La Independencia del Poder Judicial en Venezuela a Partir de la Nueva Constitución [The Independence of the Venezuelan Judiciary after the New Constitution] 12 (2005) (unpublished manuscript) (on file with the author).

inefficient and tremendously congested. For many years, the media have consistently reported how poorly the Venezuelan courts perform, how trials take many years to be decided, and how expensive, corrupt and politicized the system is. Allegations of judicial malfunction and poor court performance in Venezuela can be traced as early as 1965,[271] but it was not until almost twenty years later that scholars, politicians, journalists and other members of the Venezuelan civil society turned their attention to (always criticize) the judiciary.[272]

The judicialization of politics was probably one of the leading factors for the emergence of this concern,[273] as judges began processing disputes that resulted from political conflicts that the traditional parties could not handle anymore due to their loss of power within the Venezuelan society.[274] Most of these were corruption cases and the scandals that emerged from their quick dismissals on purely formalistic grounds became the center of media attention.[275] This led to the perception that the system was

[271] See, RENÉ LEPERVANCHE PAPARCEN, EL PODER JUDICIAL ANTE LA OPINIÓN PÚBLICA (1965).

[272] See, Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 454-455 (Friedman and Perez-Perdomo eds. 2003).

[273] Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 135 (Sieder, Schjolden and Angell ed. 2005) ["Once the parties lost internal cohesion and became –effectively- federations of warring groups, the political system lost its capacity to regulate social, political, and economic conflicts. Judicial intervention was required, but judges were not prepared for this new role"].

[274] Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 14 (forthcoming, 2006).

[275] The public manifesto known as the *Carta de los Notables*, through which many members of the Venezuelan intellectual elite called for the comprehensive reform of the state is considered as one of the most symbolic signs of the general dissatisfaction with public institutions during that era. Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 468 (Friedman and Perez-Perdomo eds. 2003).

completely corroded.[276] The image of disputants being forced to bribe public officials in order to get anything done[277] or falling victims of a complicated web of uncertain and dangerous steps[278] as well as having to rely on political connections just to access the courts, became common place among those who criticized the system. To any outsider, the picture was Kafkaesque, to say the least.

In the particular case of business disputants, it has been said that they avoid using the courts at all costs, in great part because of the lack of legal and judicial certainty.[279] This has also led to the idea that business parties prefer channeling their conflicts through other mechanisms and this is traditionally pointed to as the main reason for the promotion of institutionalized commercial ADR.[280]

At a broader level, it is believed that investors –both domestic and foreign- avoid countries with *malfunctioning* courts and that this ultimately affects national

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[276] José Brito González, *Consideraciones Acerca de la Idea y Concreción del Consejo de la Judicatura en el Marco del Estado Contemporáneo* 7 POLITEIA (1978); Jose G. Andueza, *La Corrupción Judicial, in* LA CORRUPCIÓN EN VENEZUELA (1985); MARIOLGA QUINTERO, JUSTICIA Y REALIDAD (1985); JOSÉ VICENTE RANGEL, EL PODER DE JUZGAR EN VENEZUELA. JUECES, MORAL Y DEMOCRACIA (1985); Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 135-137 (Sieder, Schjolden and Angell ed. 2005)

[277] William Ojeda, ¿CUANTO VALE UN JUEZ? (Vadell Hnos eds. 1995)

[278] Moisés Naim & Ramón Piñango, *El Caso Venezuela: Una Ilusión de Armonía in* EL CASO VENEZUELA UNA ILUSIÓN DE ARMONÍA 538, 576 (1984)

[279] Moises Naim, *Viejas Costumbres y Nuevas Realidades en la Gerencia Venezolana in* Las Empresas Venezolanas: Su Gerencia 493, 511 (Moises Naim ed. 1989); Rogelio Pérez-Perdomo & Maria E. Boza, Seguridad Jurídica y Competitividad (IESA, 1996)

[280] We will delve into this notion in the next chapter.

economic performance and countries' transition towards stability and development.[281] The rationale for this assertion resides in the idea that "efficient and transparent legal systems reduce transaction costs for economic actors, including foreign investors. Since transaction costs increase the cost of direct investment, foreign investors should be adverse to investing in countries with such higher costs, and thus, will gravitate toward states with more 'effective' or 'efficient' legal regimes".[282]

The perception that an *impaired* judiciary affected democracy and economic development[283] and the belief that legal and judicial change were "the main pillars of the Comprehensive Development Framework",[284] were the driving forces that led multilateral development banks,[285] bilateral aid agencies[286] and non-governmental aid

[281] MARIA DAKOLIAS & JAVIER SAID, WORLD BANK, JUDICIAL REFORM: A PROCESS OF CHANGE THROUGH PILOT COURTS 1 (1999) [stressing that judicial reform is "a necessary precondition for encouraging new investment"]; Eduardo Buscaglia & Maria Dakolias, World Bank, Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account 1 (1999) ["There is a growing awareness that a judiciary able to resolve cases in a fair and timely manner is an important prerequisite for economic development"]; Amartya Sen, Keynote Speech at the Comprehensive Legal and Judicial Development Conference organized by the World Bank (Jun. 5, 2000) available at: http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Sen.pdf. (last visited, Mar. 27, 2006) ["The claim here is not so much that, say, legal development causally influences development tout court but rather that development as a whole cannot be considered separately from legal development".].

[282] John Hewko, Foreign Direct Investment: Does Rule of Law Matter? 26 Working Papers-Rule of Law Series 3 (April 2002)

[283] The importance of this trend towards judicial reform initiatives has been rarely questioned, but at the same time little seem to be known about the impact of the judicial system on economic performance. See, Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues* 14 THE WORLD BANK RESEARCH OBSERVER 1 (1999)

[284] The World Bank, *Initiatives in Legal and Judicial Reform* 1 (2001)

[285] Among the most prominent participants it is important to mention the World Bank, a multilateral organization which main goals are: (a) to assist the reconstruction and development of its members, (b) to promote private foreign investment, (c) to promote the long-range balanced growth of international trade, (d) to arrange loans and (e) to conduct operations with regard to the effect of international investment on business conditions in its members' territories. See, International Bank for

organizations to become interested in participating in the initiatives to promote institutional reform in the hemisphere.[287] To this date, these entities altogether have invested more than US$ 700 million in the promotion of judicial reform in several Latin American countries.

In the particular case of Venezuela, during the early 1990s, the country received the first free-standing loan that the World Bank had ever given to any nation in the world to strengthen its judicial infrastructure.[288] This agreement –identified as 3514-VE-, for a total amount of US$60 million was geared to assist in the institutional reform of the Judicial Council, the modernization of the courts and the implementation of a software platform to manage the docket, the improvement of judicial training and

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Reconstruction and Development, Articles of Agreement art. 1, Feb. 16, 1989. In addition, the World Bank may be considered as "one of the world's largest sources of development assistance. Only in fiscal year 2002, the institution provided US$ 19.5 billion in loans to its client countries. See,http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:43912~piPK:36602,00.html (last visited, Jan. 23, 2002)

[286] Namely, the U.S. Agency for International Development (USAID)

[287] However, this is not the first time that international and foreign agencies became involved in assisting other countries in the achievement of institutional development. During the 1960s, for example, a number of organizations, namely the USAID, the Ford Foundation as well as other private American donors, embarked in an effort to reform judicial and legal systems throughout the world. Asia, Africa and Latin America were the main focus of attention of what became known as the Law and Development movement. See, John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977). For various reasons, these initiatives were generally considered as a failure. See, David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV.1062-1102 (1974); Elliot M. Burg, *Law and Development: A Review of the Literature and A Critique of "Scholars in Self-Estrangement"* 25 AM. J. COMP. L. 492 (1977).

[288] This project "was the first operation where the World Bank made a loan exclusively for the purpose of judicial reform...It was (also the first) free-standing loan for judicial reform as a self-contained project". See, Ibrahim Shihata, *Judicial Reform in Developing Countries and the Role of the World Bank, in* JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN, 219-33 (Malcolm Rowat, Waled Malik & Maria Dakolias eds. 1995)

the modernization of the school of the judicature, and the improvement of court facilities and infrastructure. The political instability that Venezuela experienced during this decade[289] had a negative impact during the implementation phase of the project, which in June 2001 was closed with mixed results after an unsuccessful attempt from the Venezuelan government to extend it.

More recently, in 1997, the World Bank gave Venezuela an additional US$7.3 million[290] to modernize the Supreme Court in a project known as 4270-VE. Differently from the 3514-VE, this project was considered successful and as a result, the World Bank awarded a special recognition to the Venezuelan government for its completion on February of 2002.[291]

In the year 2000, the World Bank donated an additional amount of US$190,000 to the Venezuelan government (IDF-Grant 27327) to be invested in

[289] Since the late 1980s the country had become a breeding ground for political and economic tensions. In 1990, several political scandals involving former government officials were brought to the Supreme Court, thus putting to test the authority of the highest court of justice and revealing its vulnerability to political pressure. In December of 1991, the major newspapers published an open letter signed by prominent members of Venezuela's intellectual elite denouncing the widespread impunity and corruption. Just a few months later, on February 27, 1992, the Venezuelan government suffered an attempt of a *coup d'etat* which was successfully aborted, but another rebellion would occur in nine months later. These events were followed by the impeachment of the President in early 1993, and by the emergency appointment of two interim presidents in less than six months. Finally, on December of 1993, new presidential elections were held but a general banking crisis shook the economy during the following year. See, Rogelio Perez-Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 130, 136 (Sieder, Schjolden and Angell ed. 2005); see also, Rogelio Perez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy in Legal Culture in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 414, 468 (Friedman and Perez-Perdomo eds. 2003).

[290] US$4,7 millions from external sources and the remaining US$2,6 millions from domestic sources.

[291] Proyecto de Modernización del Poder Judicial [Judicial Modernization Project] http://www.tsj.gov.ve/proyecto/index2.html (last visited, Mar. 23, 2006)

various research projects and in different initiatives to promote the protection of human rights.[292] Finally, during 2001, the Venezuelan government signed an agreement with the Inter American Development Bank (IADB) for the amount of US$132 millions to restructure the Office of the Public Prosecutor (Ministerio Público) and the Ministry of Interior and Justice (Ministerio de Interior y Justicia).[293]

Table 2

LOANS RECEIVED FROM MULTILATERAL ORGANIZATIONS (1990-2001)

Source	Date	Project	Amount (US$)
World Bank	1992	3514-VE-Modernization of Judiciary	$60,000,000
World Bank	1997	4270-VE Supreme Court	$7,300,000
World Bank	2000	IDF-Grant 27327 Human Rights	$190,000
Inter American Development Bank	2001	Restructure Public Prosecutor and Justice Ministry	$132,000,000
Totals			$199,490,000

Source: Supreme Tribunal of Justice, Executive Direction of the Magistrature, Coordinating Unit for the Judicial Modernization Project (2004)

Reform advocates acted under the assumption that by strengthening these areas a positive outcome would be achieved in a relatively short term. However, reality showed that this was far from the truth. The significant amount of resources invested

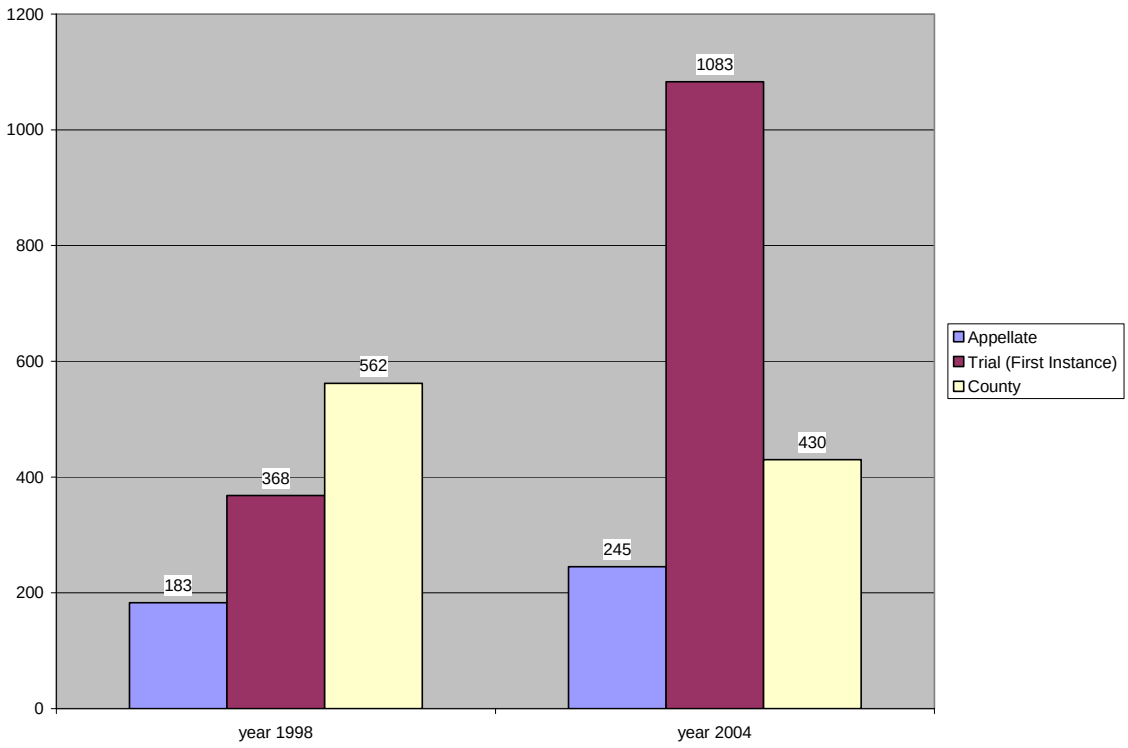
[292] SUPREME TRIBUNAL OF JUSTICE, EXECUTIVE DIRECTION OF THE MAGISTRATURE, COORDINATING UNIT FOR THE JUDICIAL MODERNIZATION PROJECT, Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela [Project to Improve the Administration of Justice in the Context of Conflict Resolution in Venezuela], at 12 (2004)

[293] SUPREME TRIBUNAL OF JUSTICE, EXECUTIVE DIRECTION OF THE MAGISTRATURE, COORDINATING UNIT FOR THE JUDICIAL MODERNIZATION PROJECT, Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela [Project to Improve the Administration of Justice in the Context of Conflict Resolution in Venezuela], at 12 (2004)

during the last ten years in Venezuela has yielded much less benefit than what reform advocates originally expected. The only improvements seem to be limited to three specific aspects. First, the number of judges and courts has been increased as one of the alleged bases for congestion was that there were not enough courts or judges to cope with a growing amount of disputes. Nevertheless, as the judiciary doesn't gather systematic information about court usage, it is really hard –if not impossible- to assess if this has made a real difference. The following table shows the increase in the number of judges by category between 1998 and 2004:

Table 3

NUMBER OF JUDGES (1998-2004)



Source: Rogelio Perez-Perdomo, *La Reforma Judicial en la Venezuela Revolucionaria* (2006)

Secondly, it is also true that courts have now superior and more modern facilities and are better-equipped to handle some of the modern proceedings implemented by the new legislation (e.g. oral proceedings). There is also a new software platform (Juris 2000) being used at a pilot level in several courts throughout the country to manage the docket,[294] and the results are apparently positive.[295]

Additionally, the Supreme Tribunal has also embraced modernity; it does not only enjoy a state-of-the-art building and modern offices that are equipped with computers, videoconferencing capabilities, and other novel improvements; but it also allows its users to access important information about their cases on-line and enables the general public to check judicial decisions from all its chambers and other important information on the web.[296] The decisions are uploaded to the website of the Supreme Tribunal in a daily manner as soon as they are rendered, so the online database is up to date.[297] This may look insignificant to anybody familiar with the United States judiciary where these and other technological features have been available to the courts for a long time; but it is certainly meaningful, if we take into account that merely a decade ago, most of the courts in Venezuela still used old

[294] Rogelio Pérez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 27 (forthcoming, 2006).

[295] However, the preliminary evaluation conducted by the Executive Direction of the Magistrature, does not offer any information about the population, the sampling selection process, or about the time considered for the study; so its results are hardly reliable. See, Rogelio Pérez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 27 (forthcoming, 2006).

[296] See, http://www.tsj.gov.ve/ (last visited, Mar. 30, 2006).

[297] In 2001, he Supreme Tribunal's webpage has awarded the first prize as the best site for a public/governmental agency in Venezuela, and it was clearly among the most visited and used sites. See, http://www.tsj.gov.ve/informacion/notasprensa/2001/141101-5.htm (last visited, Mar 30, 2006)

mechanical typewriters, kept their files manually and had to maintain a daily journal with handwritten entries; and some functioned in old buildings under very precarious conditions.[298]

Aside from these localized improvements, the Venezuelan judiciary seems to continue performing in a very similar way to how it did fifteen years ago before the judicial reform process began.[299] Unfortunately, none of the actors involved in the reform process seemed to be interested in collecting data in a -systematic- way that would enable us to have an accurate assessment of possible changes thus making it difficult to measure the real impact of reform processes. However, if the ability to change the state of affairs is an important factor –and I believe it is- for measuring the success of reform agendas, then it could be said that judicial reform, in general, has been a failure in Venezuela.

Other reform efforts throughout the region seem to have experienced a similar fate. In fact, several years after the majority of these initiatives began some experts have seriously questioned the efficacy of judicial agendas claiming that the absence of solid empirical evidence posed an important obstacle to the effectiveness of the process. And we may add that the lack of data also prevented reform advocates from

[298] ROGELIO PÉREZ-PERDOMO, POLÍTICAS JUDICIALES EN VENEZUELA, 12 (1995)

[299] At least, that is our perception drawn from multiple interviews with different actors who belong to the business sector.

understanding if there was really a need for change, at least in the terms laid out by governments and aid agencies.

Most of the proposed solutions did not emerge from a needs assessment or from a diagnosis based on robust empirical data. To the contrary, they derived either from a series of unproven facts or from anecdotes documented with the appearance of systematic evidence[300] and no attention whatsoever was given to the perception of the main stakeholders, namely, disputants and their lawyers.

Reform agendas have been predominantly prescriptive in nature by focusing on how institutions *should work* and by proposing what they call "solutions", while paying little or no attention to the ways in which legal institutions *actually work.* Reform advocates, in general, have expressed no interest in exploring which incentives are in place to make people behave the way they do, or to make institutions perform in a certain manner. Whenever people or institutions behave in a way that differs from the model proposed by reformers, it has been considered to be deviant and in need for change.

[300] For an explanation about the lack of empirical foundations in the World Bank reform agendas, see, Manuel A. Gómez, Shooting First, and Finding out Later: ADR in the World Bank Judicial Reform Agendas (2002), (unpublished manuscript) (on file with author).

An illustrative example about this is offered by the notion of court efficiency and the contrast between how it is understood from an institutional reform perspective and from the viewpoint of disputants.

DEMYSTIFYING JUDICIAL INEFFICIENCY

One of the most common labels given to the judiciary in Latin America is that they are inefficient, and Venezuelan courts are not the exception. The common perception is that courts are unable to deliver just and equitable resolution of disputes in a timely manner. Processes are believed to be slow, the backlog is thought to be enormous and the costs for using the justice system are believed to be prohibitive for many disputants, especially for the poor.[301]

In general terms, efficiency implies achieving desired results by maximizing the use of available resources.[302] In plain words, we could say that efficiency refers to the idea of doing more by spending less and still being able to reach an optimal outcome. Efficiency is usually measured through objective parameters like cost, which refers not only to the obvious monetary dimension,[303] but also to other aspects as the time or duration of a process before an expected result is achieved.[304]

[301] Jose Alberto Ramirez León, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model* 2005 J. DISP. RESOL. 399, 400, 403 (2005)
[302] PETER H. ROSSI ET AL., EVALUATION: A SYSTEMATIC APPROACH 332 (7th ed. 2004)

[303] The notion of cost not only refers to "direct expenditures but also indirect and intangible costs". See, CAROL H. WEISS, EVALUATION 244 (2d ed. 1998).

[304] Efficiency analysis (cost-effectiveness analysis) offers a possibility of assessing resource allocation by comparing benefits to costs in non-commensurable terms. See, PETER H. ROSSI ET AL., EVALUATION:

In the case of courts, for example, the issue of cost refers both to the direct monetary value to the parties, and also to how much society in general -or the government, in more concrete terms- needs to invest in order to make the system work.[305] And time, is logically attributed to the duration of trials. It addresses the question of how long does it take from the moment when a complaint is filed to the moment when the decision or final ruling is rendered.

From a subjective standpoint, users' satisfaction is taken into account as another evaluation parameter. It responds to the question of how pleased people are with the system, and how they perceive it to address their needs or aspirations.

However, at least in Venezuela, the government has traditionally viewed the activity of the courts as an extension of the state's omnipotent power and not as a public service[306] that should be geared to respond to citizens in a manner that satisfies them and fulfill their needs. Hence, the real perception of users is not deemed important and this might explain why there has been little or no concern about what citizens in general think about the judiciary.

A SYSTEMATIC APPROACH 366 (7th ed. 2004); For a description about the uses of cost-efficiency analysis for program evaluation, see, CAROL H. WEISS, EVALUATION 244 (2d ed. 1998).

[305] ROGELIO PÉREZ-PERDOMO, POLÍTICAS JUDICIALES EN VENEZUELA, 15 (1995)

[306] ROGELIO PÉREZ-PERDOMO, POLÍTICAS JUDICIALES EN VENEZUELA, 16 (1995).

Notwithstanding, as judicial reform agendas emerged, it became important –at least in appearance- to pay attention to disputants' perceptions about the system. One of the best selling points used to justify the need for reform in the judiciary was precisely to highlight the idea that citizens have a negative opinion about the court system; and to give credibility to this claim, reform advocates have usually seasoned their assertions with data from opinion polls and with anecdotal recounts of unusual and atypical cases.[307] Scholars also seem to endorse the belief that people in general avoid the courts because of their perceived inefficiency.[308]

But an interesting aspect here –often overlooked by reform advocates- is that efficiency has different meanings to different groups of stakeholders. From the institutional standpoint, for example, efficient courts are those that are deemed capable of delivering a just resolution of disputes in an expeditious manner, at a relatively low cost to both disputants and the state,[309] and that contribute to preserving the common

[307] Deborah R. Hensler, The Contribution of Judicial Reform to the Rule of Law, Address at the Conference on New Approaches for Meeting the Demand of Justice (May 10-12, 2001), at 7. Stressing that exceptional cases (outliers), and not the common ones, are usually considered as typical and extrapolated to describe the system as a whole "forgetting that what attracted our attention in the first place was the fact that these were exceptional cases".

[308] ROGELIO PÉREZ-PERDOMO, POLÍTICAS JUDICIALES EN VENEZUELA, 16 (1995) ["in spite of the lack of data and the complexity of the evaluation, as a hypothesis we could state that the satisfaction of Venezuelans with their justice system is low and that one of the signs for this is the relatively scarce use of the courts when citizens are able to avoid using it"]; see, also, Rogelio Pérez-Perdomo, *De la Justicia y Otros Demonios*, *in* SEGURIDAD JURÍDICA Y COMPETITIVIDAD 117, 126 (Boza and Perez-Perdomo ed. 1996); Moises Naim, *Viejas Costumbres y Nuevas Realidades en la Gerencia Venezolana in* Las Empresas Venezolanas: Su Gerencia 493, 511 (Moises Naim ed. 1989)

[309] Deborah R. Hensler, The Contribution of Judicial Reform to the Rule of Law, Address at the Conference on New Approaches for Meeting the Demand of Justice (May 10-12, 2001), at 1. ["Delays in delivering just resolution of criminal cases and equitable outcomes of civil disputes create pressure to evade the judicial system or to seek special privileges from its officers. High costs create barriers to access to the courts for all and particularly for those with the least resources"].

welfare. This is also deemed very important within the idea of promoting the rule of law.[310]

To individual disputants or certain groups of disputants, efficiency may be perceived very differently. Their understanding of an efficient court may be that of an institution that allows them to achieve a favorable resolution to their specific dispute regardless of the positive or negative impact that it might have upon the interest of society in general. Speedy trials may be desirable for plaintiffs but not for defendants; and low cost dispute-processing may be an aspiration of poor litigants but not of wealthy ones who may even find it advantageous to engage in a costly trial, particularly if it represents a burden to their poorer counterpart.

This gap between the views of private citizens and that of the state can be explained by the fact that "the private incentive of disputants to use the legal system is different than the social incentive to use it. Disputants give importance to their own costs and not to the cost of the other party and of the state".[311] While the political system seeks to consolidate democracy, make the legal system transparent, responsible to social needs, and accessible to the disadvantaged, private disputants may only want to use the system to solve their particular disputes, vindicate their rights, or simply

[310] Deborah R. Hensler, The Contribution of Judicial Reform to the Rule of Law, Address at the Conference on New Approaches for Meeting the Demand of Justice (May 10-12, 2001), at 1.

[311] Steven Shavell, *The Fundamental Motive between the Private and the Social Motive to Use the Legal System*, 26 J.LEGAL STUD. (1997)

renegotiate with the other party. The data obtained from interviews with current and potential business disputants in Venezuela seem to confirm this assertion.

In principle, the majority of our interviewees seemed to agree with the idea that the judiciary is corrupt and that it works unequally; but at the same time, they expressed a preference for using it and -to a large extent- considered it to fulfill their needs; in other words, they generally viewed the system as efficient in spite of the conventional wisdom.

The efficiency of "malfunctioning" courts

At a first glance, members of the Venezuelan business community seem to agree with the criticism that we often see portrayed in media reports. We started most of our interviews by asking people about their perception of the judiciary, and the majority of our respondents echoed similar complaints about the bad situation of the courts in general. Many people spent time commenting about the poor conditions of the court buildings, the lack of modern equipments and the frequent strikes by court employees protesting that their salaries were not paid on time.

Lawyers, naturally, emphasized on the problems of access to the court facilities since they are the ones who are supposed to use them on a daily basis.[312] We were left

[312] However, in the case of medium-size and large firms, it is the paralegals or the associates who usually go to the courts on a daily basis to check if there's anything new in the docket. According to the Venezuelan law, the courts are supposed to give notice to the parties about important events, but it is a custom among Venezuelan lawyers to personally appear before the court and review the file at least

to imagine how burdensome it is for a lawyer in Caracas to stand in line for at least a half-hour just to get into the elevators to enter the court building; then, to form another line at the doors of the archives just to get access to the docket containing the documents filed in their case; and then another long wait to speak with the clerk, to file a brief, or to request a copy of a court record. In principle, this entire process may take hours and, arguably, lawyers have to go through it several times a week.

Their clients, instead, usually talked about the strikes or about more general problems, and interestingly, most of the time their knowledge about it did not seem to come from first hand experience but rather, from media reports or simply from rumors.[313] Our respondents, in general, commented that it would be desirable if the government spent more resources in improving the courts, but also acknowledged that the current situation does not create a real barrier that prevents them or their clients from using the system.

After hearing all these complaints about the system, we naturally expected people to report that they avoided using the courts most of the time. However, when our conversations with business lawyers turned to the specifics about their practice,

three times a week. This is a time consuming activity but it is the only way of keeping reliable information up to date.

[313] Even though it is true that a number of years ago, it was very common for court employees to go on strike very often; these kinds of protests have not occurred anymore during the last five years, but people still make comments about the "problem of judicial employees going on strike".

most of them revealed a preference for choosing the business courts.[314] At the outset, almost no one admitted to the fact that the bulk of their cases that are not negotiated or –informally- mediated are processed through courts. Lawyers seemed inclined to say that "the court system is a mess, only with a few exceptions", but it turned out that these exceptions looked more like the rules. During my interviews with business lawyers I could confirm that, in spite of the negative connotations that emerge from the conventional image of the Venezuelan judiciary, they still consider the courts as one of the possible options for their clients, and also, seem to be generally satisfied with their experience with these fora.

During our interviews with business lawyers we learned that the aforementioned obstacles to physical access are easily circumvented. Prominent lawyers go to courts only when their presence is absolutely necessary; the rest of the time their paralegals are the ones who attend the courts on a daily basis, and not even they need to stand in line and wait long hours to check the status of their cases. Lawyers from mid-size and large firms –the ones that usually represent business parties- have close connections with court employees, some of whom are in their "payroll"; and depending on the degree of trust and loyalty that exists between the lawyer and the court official, the former might not need to monitor the docket so closely, since the inside contact would usually alert him or her when any event affecting the case is about to occur. However, as one interviewee mentioned, "there is

[314] Naturally, we were not interested in the cases in which the parties are compelled to use the courts, either because they have been brought as defendants or because the law requires a judicial ruling in order to recognize a legal status. Our interest remained in the cases in which the parties –or at least, one of them- voluntarily chose to use the courts.

trust but to a certain extent, and one has always the need to keep an eye on how these people work because they might be also helping the counterpart". Having the right contacts is important even to have access to the security guards at the gates of the court building who usually let their "friends" cut in line in order to access the elevators or allow them to use the back doors to enter into the building.

But obviously, the connections that really matter are not the ones that allow lawyers and their paralegals to have physical access to the court buildings. The important incentive to use the courts rests on the connections that are developed at higher levels, with the judges and their clerks. Most of the lawyers that we interviewed agreed that even though the judicial system is said to be widely unproductive, there are some "competent" judges who, in their view, run very efficient courts. These are, obviously, the judges with whom they have developed a patron-client relationship, or who belong to an informal network that overlaps with the network that exist among business lawyers.[315]

Interestingly, the majority of the relationships between lawyers (private actors) and judges (public officials) are not reciprocal,[316] in the sense that only one party (the public official) is expected to act upon the influence of the other one (the private

[315] To a certain extent, this network overlap between private and public actors resembles the "todai-yakkai-zaikai complex" described by Taira and Wada (1987) and reported by Granovetter. See, Mark Granovetter, *Business Groups in Social Organization in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 429, 443 (Princeton U. Press 2005)

[316] For a description about the issue of *reciprocity* in social networks settings, see, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 25 (J. Clyde Mitchell, ed. 1969).

actor), whose main duty is to offer a compensation (bribe, political favor) in exchange for a favor.[317] Furthermore, most business lawyers in Venezuela don't consider themselves as being *socially equal* with judges, even if they graduated from the same law school or have other interests in common.[318] There is often a steep social gradient, a distance among them, but the relationship still works efficiently, as each party clearly understands their social differences and has no aspirations to join the other one's social group.[319]

When we asked our respondents about the special qualifications that these judges might have, we quickly learned that the perception about their competence was not based on their credentials or intellectual background. It was rather based on how often they favorably decided cases in which those lawyers had a vested interest. We

[317] This is the typical situation of an *action-set network*, that is, one in which "the linkages are used for the flow of goods and services rather than the flow of information". One of the ways in which this occurs is through *patronage* where "the support is bartered for some specific promise: the resources had to be husbanded and awarded to influential people who would" do something on behalf of the other party. See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 38 (J. Clyde Mitchell, ed. 1969).

[318] For a description about *stratification* in social networks' settings, see, J.A. Barnes, *Class and Committees in a Norwegian Parish*, HUMAN RELATIONS 39, 44 (1954) ["In some societies close kinsmen and affines are not necessarily social equals, and in that case the network of kinship ties may have a steep social gradient. Similarly, in our own society, in a street with property ranging gradually from mansions at one end to tenements at the other, we can speak of a network of ties between neighbours who do not regard themselves as equal in social status"].

[319] When analyzing the social construction of corruption, Granovetter describes an interesting example portrayed by Lomnitz (1971: 194; 1998: 46) in a case study about corruption networks in Chile where, like in Venezuela, "business was dominated by a socially-defined upper class and the government bureaucracy by a middle-class". In trying to explain the social interaction occurring in Chile, Lomnitz's study found that "The social distance between business interests and bureaucracy facilitated graft as a form of well understood market exchange, in which bureaucrats willingly accepted cash or material payments in return for favors to businessmen, since the social inferiority that this implied was already well understood". See, Mark Granovetter, *The Social Construction of Corruption* 6 (2005)

will revisit this notion when explaining the social networks that operate within the courts.

In sum, we learned that business disputants do not seem particularly averse to the courts as the conventional perception dictates. To a certain extent, they see courts as efficient bodies and use them selectively.[320] And as we now turn to explain, their allegiance to social networks plays an important role in this.

DISPUTE PROCESSING, NETWORKS AND THE COURTS: FROM THE TRIBES TO THE JUDICIAL REVOLUTION OF THE 21ST CENTURY

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 opened to gratify court employees for "being diligent". Judges regarded as friendly to the business community are usually labeled by executives as "decent" and "competent", even if their diligence is clearly tilted in favor of one side.[321]

Also, business lawyers have been traditionally regarded not only for "what they know" (their particular legal skills) but more importantly, for "who they know"

[320] Jose Alberto Ramirez León, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model* 2005 J. DISP. RESOL. 399, 412 (2005) ["An inefficient and corrupt judiciary has become, over the years, a vast resource of power for certain players within the system"].

[321] Granovetter has called *neutralization* the phenomenon by which an individual "acknowledges the causal connection between a payment and a service, or that items have been appropriated as the result of a position held, but implies that *given the particular circumstances*, no moral violation has occurred". See, Mark Granovetter, *The Social Construction of Corruption* 3 (2005)

(their social connections); as a result, legal professionals have become brokers in the real sense.[322] The stereotypical image of a network within the Venezuelan legal environment is that of a group of lawyers with political power and influence who together with some judges and other public officials form close-knit chains known as "judicial tribes" (*tribus judiciales*). These networks became popular approximately fifty years ago, portray an extreme form of judicial clientelism[323] and have largely influenced the way in which the courts operate in Venezuela.

The origin of these judicial tribes can be traced back to the early 1960s, when the national government took direct action to suppress the flourishing leftists' guerrilla movements that were seen as a threat to the young Venezuelan democracy.[324] The government's reaction to the growing activity of these rebel groups was to prosecute them in military courts as these fora were easily controlled by the executive. However, as some cases had to be tried in ordinary criminal courts, the executive decided to expand its sphere of influence and moved in order to expand its political control over those as well.

Prominent political leaders who were also lawyers, and therefore familiar with the court system, were entrusted with the task of assuring government control over the

[322] *Brokerage* is another form of relationship that occurs in action-set networks (see, note 317 *supra*) and that occurs when one individual acts as a go-between between two networks, by bridging them together.

[323] Rogelio Perez-Perdomo, *Politicas Judiciales en Venezuela* 36 (IESA, 1995)

[324] Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 6 (forthcoming, 2006).

judiciary. David Morales Bello, a well known lawyer and politician, became widely recognized for his vast control over a number of judges and for leading the first clan-like group that would be later known as David's Tribe (*la tribu de David*).[325] Another famous tribe that controlled a large portion of the courts was the Borsalino Clan, which took its name after the type of hat worn by one of its key leaders.[326]

Even though the purpose of the government in controlling the judiciary was apparently limited to assuring institutional stability and preventing the leftist movements from spreading all over the country, politicians rapidly saw it as a window of opportunity to expand their influence, and the main political parties became increasingly involved in exerting influence on how judges were appointed and how the judiciary worked. Before many people even realized it, the leading political parties literally divided the country into areas of influence, thus each retaining control over certain number of jurisdictions or courts. This became more evident, and to a certain extent "institutionalized" after 1969 when the Judicial Council was created.[327] Early on, the Council became, at no surprise, controlled by members of the political party

[325] FERNANDO CORONIL, THE MAGICAL STATE: NATURE, MONEY AND MODERNITY IN VENEZUELA 342-343 (U. Chic. Press 1997); Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 6 (forthcoming, 2006).

[326] The presence of a leader shows that these *tribes* are slightly different from most social networks in the traditional sense. Networks don't usually have a *head* or a hierarchically superior authority; and the decision making process within them occurs as a result of consensus among the participants in the absence of a centralized entity. See, note 141 *supra*. However, the Venezuelan judicial tribes have a clear leader who is considered the central figure and who is also regarded as hierarchically superior in relationship with the other members, and as such is the one in charge of coordinating the activities of the network.

[327] Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 9 (forthcoming, 2006).

who had the majority of seats in Congress and in the Administrative Chamber of the Supreme Court, which obviously gave it a lot of leverage. For years to come, the judiciary was populated by judges that were chosen more because of their political allegiance than their legal competence or merits.

The process of appointing judges was one of intense negotiations among political actors. It was an unwritten rule that those who wanted to enter into the judicature needed a political sponsor (*padrino*), which obviously produced a relationship of subordination between the candidate and his or her supporter in the case the first got appointed.[328] Among the usual backers there were influential politicians, some of which happened to be connected with lawyers who in turn were key members of the *judicial tribes*. Leaders of the business community were to a certain extent, members of these networks of power; which translated into clear benefits for them.

The tribes were clan-like structures led by private lawyers who had been involved in politics, or were fundraisers for political campaigns and therefore had connections with important political parties or with the government; some tribes were actually led by retired judges who after leaving the bench decided to go back to private practice and kept their influence upon some courts.[329] Some of these groups had

[328] As a result, the judicial career became a sort of social network in itself, reserved to those bound by common political affiliations, and the need for a sponsor became an entry-barrier as typically occurs in close-knit networks.

[329] Rogelio Perez-Perdomo, *Políticas Judiciales en Venezuela* 36 (IESA, 1995)

spheres of influence in particular areas (e.g. criminal courts) or levels (e.g. trial courts, Superior Courts, or the Supreme Court itself) while others were known for having control over a certain jurisdiction.

Active judges, public defenders, and prosecutors were also part of the tribes. Even though these groups worked informally and very cautiously, their involvement in notorious cases and subsequent scandals during the early 1990s led to wide media coverage about their existence, structure, and members.[330]

The main purpose of these networks was to manipulate the courts in order to get favorable decisions for their clients, speed the handling of judicial processes, or simply counteract the negative influence of another clan favoring the other side. Each of these tribes would have a law firm as a facade. The firm would offer its clients the guarantee of a speedy trial, with favorable decisions, and would often assure results on possible appeals and, if necessary, even at the Supreme Court level. The lawyers of the firm would usually set their fees very high since they had to include the "work" of others.[331]

The firm served also as a hub to all members of the network, and a small group of lawyers (brokers) centralized the communication with judges, clerks, and other public officials. Some active judges were permanently tied to particular tribes,

[330] Rogelio Perez-Perdomo, *Politicas Judiciales en Venezuela* 36 (IESA, 1995)

[331] Rogelio Perez-Perdomo, *Politicas Judiciales en Venezuela* 36 (IESA, 1995)

while others were known to act "free lance" in collaborating with several groups on a case by case basis. Business lawyers were obviously part of these webs –even though many of them with a very low profile-,[332] and their reputation as effective professionals largely depended on how close they were to the heart of the network.[333] Lawyers did not only use the networks to process cases in courts, but also for getting help in bypassing regulatory processes, dealing with government authorities and to negotiate disputes outside the formal system.

The mid-1990s witnessed a crisis among the traditional political parties who lost legitimacy and therefore their traditional power and influence within the political arena. After the two failed coup d'etat of 1992, the Venezuelan political elite became increasingly fragile, which also affected their spheres of influence on the judiciary. About the same time, high profile corruption cases involving judicial networks were denounced by the media,[334] which made the judicial tribes weaker and eventually led to their demise.[335] The pacts according to which the leading political parties had shared their control over the courts slowly eroded, so remaining members were left on their own. A number of retired judges who had amassed some power during the

[332] Socially, it was seen as undesirable for upper-class lawyers and business executives to be seen interacting with low-class court officials, so the former tended to act in a covert manner or through intermediaries.

[333] In other terms, depending on their social distance to *ego* (individual regarded as the center of the network).

[334] Rogelio Pérez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 15 (forthcoming, 2006).

[335] In spite of the tribes' notorious influence and power, most of its members were tied only through uniplex relationships, and once these relationships were affected or one of the most salient members (the leader) was disabled, it had a negative impact of large proportions on the entire network.

previous years became leaders of their own small-scale corruption rings, thus becoming judicial entrepreneurs of a sort.[336] These judges were only capable of cutting deals involving cases being tried in their own former courts or in others with which they still had connections. Clearly, the network-based system became less efficient, due to the fact that participants were only tied by one-dimensional and relatively weak relationships.

Differently from what occurred during the climax of the judicial tribes' time, the facade of these new groups were not law firms but the individual judges themselves, or their clerks. The situation turned more complicated for business disputants and their lawyers who were now forced to establish new connections. But these difficulties did not last for long.

With the advent of the "Bolivarian Revolution" that started in 1998, the existing political structures suffered an important change. The new President Hugo Chavez, a former leader of the first 1992 *coup* attempt vowed to undertake a complete overhaul of the state institutions plus a deep legal reform process, including the drafting of a new Constitution. As part of this process, a Judicial Emergency decree was issued in 1999 with the general purpose of cleaning up the judicial system.[337] This emergency legislation vested Congress with ample powers to restructure the judiciary,

[336] This system resembles the Japanese example of *amakudari* (descent from heaven) described by Granovetter to depict "the movement of retired government officials to positions in industry from which they activate their social networks in the state bureaucracy to help coordinate state-business interactions". Mark Granovetter, *Business Groups in Social Organization in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 429, 443 (Princeton U. Press 2005)

[337] Official Gazzette of the Republic of Venezuela Nº. 36,772 August 25, 1999 (Venez).

including the removal and appointment of judges, decisions on the judicial budget, the creation of a Commission for Judicial Reform, and in general, control over all matters related to the functioning of the court system.

After a highly controversial decision (8 to 7 vote), the Supreme Court backed the government's initiative and authorized one of the justices to join the Emergency Commission.[338] Several justices wrote dissenting opinions highlighting that the powers given to the Commission contradicted the authority of the Supreme Court, and that the Emergency legislation posed a clear threat to the independence of the judiciary. The resignation of the Chief Justice followed, after an emotional speech in which she said that by bowing to the government's initiative, the Supreme Court had committed suicide just before being murdered.[339]

One of the first actions taken by the Emergency Commission was the dismissal or suspension of a large number of judges under charges of corruption or unjustified delay in deciding the cases brought before them. During the following months of the same year, 340 judges were summarily dismissed.[340]

From the outset, it was not hard to realize that these actions were mainly motivated by political retaliation to the traditional political establishment and not by an altruistic interest on part of the government to get rid of corrupt judges and to

[338] http://www.tsj.gov.ve/informacion/acuerdos/acp-23081999.html (last visited, Apr. 4, 2006)

[339] http://www.analitica.com/vas/1999.08.4/nacional/25.htm (last visited, Apr. 4, 2006)

[340] This number represents about a third of the total number of existing judges by that time. See, Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 20 (forthcoming, 2006).

improve the system. As a clear signal of this, many of the dismissed judges were replaced by militants of President Chavez's political party, and to guarantee their unconditional loyalty to the regime, their appointment was temporary so they could be easily dismissed when necessary. By the year 2001 these accounted for more than 80% of the total number of judges.[341] Traditional judicial cartels did in fact disappear, but the irony is that the new structure created a breeding ground for an even more politicized judiciary in which not only a group but all judges are expected to pay unconditional loyalty and be aligned with the official party or face a summary dismissal.[342] This seems to be the true face of the "judicial revolution" in Venezuela.[343]

Almost six years after the judicial emergency was declared, Venezuela now has an overtly politicized judiciary in which new cartels have emerged under the shadow of the president's political project. The big difference now is that only those who have connections within the ruling political party can take advantage of the influential cartels that have permeated the courts.[344] The system is more loyalty-based than in the past and business disputants are still able to find their way around.

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[341] Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 21 (forthcoming, 2006).

[342] An interesting description of the tactics used by the Venezuelan government to dismiss judges without cause can be read in Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 22 (forthcoming, 2006).

[343] Very often, representatives from the government refer to the restructuring of the court system as the "judicial revolution", just to be consistent with the label that President Chavez uses for his regime, which he usually refer to as the Bolivarian Revolution (*la revolución Bolivariana*).

[344] At the time of concluding this chapter (June 2006), a big corruption scandal has caught the attention of the local media in Venezuela. A group of lawyers and judges are believed to be linked to corruption scandals, for rendering favorable decisions to criminal networks and extorting citizens. This group has

As we discussed in the previous chapter, the Venezuelan private sector evolved in an environment in which the government was a prominent player. As a result, even the most ordinary actors learned to deal with political influence at all levels. Some have criticized these patterns of behavior as to colliding with the ideals of democracy, free competition, equality, and economic freedom,[345] and whereas this might be true, it is also certain that many people -and particularly those from the business sector- have benefited from this circumstance. In the recent years, the country has certainly experienced many changes as a result of the "Bolivarian Revolution", and to a certain extent, this has reshaped many of the traditional structures that were in place. Venezuela is also more populated now that how it was thirty or forty years ago. However, society seems to continue working under the same basic social norms, and the heavy reliance on networks is one of them. More than ever, the "know-who" (having the right connections) makes a big difference in allowing people to be successful in many activities, and the processing of legal disputes is one of them.

It is true that the traditional networks and the so-called judicial tribes are long gone, but it is also true that new groups with a similar structure have emerged. Over the years in which we conducted the field research for this investigation, we found it

been labeled as *la banda de los enanos* (the band of the dwarfs) and is said to be formed of at least 15 judges in Caracas and 400 nationwide, and it is believed to have adopted a similar structure to the judicial tribes of the 1970s and 1980s.

[345] Ana Julia Jatar, *Competition Policy in Venezuela: The Promotion of Social Change, in* COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 95, 98 (Moises Naim & Joseph L. Tulchin, Eds., 1999).

interesting to witness how business disputants have adapted to the changes and how they have positioned themselves successfully in light of the current conditions. When I first interviewed people for this project at the dawn of the political transition (2001 and 2002), many seemed to be worried about the political changes that were underway and expected to face numerous difficulties. It was frequent to hear lawyers complaining about having lost their contacts in certain courts, and commenting how difficult it was becoming to litigate in an environment that in their view, offered no room for predictability.

Uncertainty to them meant having to use the courts without the help of their social connections. Their ideal scenario was one in which they could still rely on their contacts to manipulate the system. This obviously seems like a contradiction, when we realize that the quest for institutional reform has been geared precisely to eradicate the predominant role of corrupt networks and replace them with transparent and neutral institutions.

During many of the follow-up interviews that I was able to conduct during 2003, 2004 and 2005, it was interesting to observe how some of the people who were initially hopeless, had found their way around the system. “It was a matter of time” one prominent lawyer declared, making clear reference to the process of getting accustomed to work with the new networks, establishing new ties and reconnecting old ones; and whenever we asked about how different is the situation now compared to the old way of dealing, we were generally told that “we are the same people,

governments may change and some other things will vary, but the people are still the same; so after all, things are working in a similar way to that in the past. Of course, the players are in different positions but we are all the same (...) it is, if I may say, the Venezuelan way of dealing with things" and then, concluded with a common Venezuelan saying that goes: "God may squeeze but never chokes (*Dios aprieta pero no ahorca*)".

While it is true that judicial tribes and other forms of corruption networks have existed and played a salient role in Venezuela, it cannot be said that every single dispute has to go through a network in order to be decided. Ordinary citizens can certainly use the courts without needing to have connections, "but knowing which specific key to play makes things a lot easier", and certainly, in the business community that seems to be the right way to proceed.

CHAPTER SIX

THANKS BUT NO THANKS: THE MODEST ACCEPTANCE OF ADR PROVIDING ORGANIZATIONS IN VENEZUELA

This chapter illustrates how the members of the Venezuelan business sector have continued to use mediation within their social networks' environment, even after the institutionalization of ADR processes in Venezuela. As our narrative will show, the implementation of mediation and arbitration gained support throughout Latin America as a result of judicial reform agendas sponsored by multilateral organizations and governments alike.

In order to justify their formulas, reform advocates stressed that the implementation of ADR mechanisms was a necessity given the chaotic condition of the court system and the need to provide disputants with modern and efficient processes. As a result, enormous resources were spent on the promotion of institutionalized arbitration and mediation, but ironically, business disputants continued addressing their grievances in the informal way with which they were familiar.

This chapter contains a further elaboration of a previous research project through which I explored why business lawyers stay away from the newly created arbitration and mediation centers, and use informal processes instead.[346]

From the methodological standpoint, as in the previous chapter, the data on which we relied to write this section were obtained from qualitative interviews and secondary sources. Approximately forty interviews were conducted with members of the Venezuelan business community, including fifteen executives from several national and foreign corporations, and five representatives from the leading chambers of commerce. We also interviewed representatives from the three functioning ADR centers in Venezuela, and some lawyers who have served as arbitrators or mediators. Finally, we also spoke with seventeen business lawyers who practice in different organizations from medium-sized and large law firms, to solo-practitioners. Five in-house counsel were included in this group.

Our initial set of respondents was selected through a non-random purposive sample technique, and some others were included as a result of a snowball sampling technique. The main reason for choosing these respondents was because of their first-hand experience and knowledge in using mediation and arbitration to process business disputes.

[346] See, Manuel A. Gomez, The Use of Institutional Mediation by Venezuelan Business Lawyers (2001) (unpublished J.S.M. thesis, Stanford University) (in file with the Stanford Law School Library).

Most interviews were semi-structured and the content was generally based on a protocol prepared beforehand. All our informants agreed to participate in our study with no restrictions and were promised confidentiality to promote candor in their responses. Most interviews were conducted face-to-face in Caracas, Venezuela at different times over a period of four years from 2001 to 2005. However, at least two were conducted via telephone as the respondents were in other countries at the moment of the interview. Some informants were particularly helpful in agreeing to be interviewed more than once, which we used to discuss follow-up issues and clarifications.

In addition to the interviews, we also relied on numerous scholarly articles, administrative reports, legislative materials, administrative data and the only available statistical data on usage of ADR in Venezuela. Some of the documents were of particular relevance for understanding the judicial reform process in Venezuela.

FROM PEACE AND HARMONY TO MANY DOORS

Some of the processes that we currently know as ADR have been utilized for centuries in many societies. Scholars have pointed to numerous examples of primitive or indigenous conciliatory and adjudicatory processes that easily fit in what we currently label as ADR. Even though many of these indigenous dispute processing forms seem to occur more frequently in primitive societies, some are widely used within modern ones, but often remain eclipsed by the notoriety of official courts and other state institutions. Certain non-adjudicatory dispute processing mechanisms have

been the main –and sometimes the only- way of dealing with disputes in particular settings, but as their role in our society appears to be less predominant –at least, in respect to the courts- we tend to consider them as *alternatives*.

It was not until the mid 1960s that the interest on dispute processing mechanisms processes began to gain popular attention and the promotion and further institutionalization of ADR became a trend in western societies. The modern history of ADR is in great part, the history of how these processes were understood in the United States, where the current trend was originated and continues to grow at a higher pace than in other countries.

Many different factors might have contributed to the growth of the popular interest about alternative processes in the United States and to its influence upon the legal system,[347] but it seems clear that the community justice movement was among the most influential forces.[348] Leaders of this movement were driven by their interest in the exaltation of harmonious community relations and the empowerment of those groups of citizens that had been traditionally oppressed by elites. Formal institutions were portrayed as promoters of conflict, and also as fora that employed mechanisms

[347] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170 (2003) ["The modern history of alternative dispute resolution in the law has multiple strands, which have been woven together in a complex fashion over the past several decades".]

[348] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170 (2003)

through which dominant groups maintained their power.[349] The solution was not confrontation, but rather the promotion of peace and harmony.

One possible way for achieving these goals was the creation of grassroots institutions through which ordinary citizens could govern their own communities and handle their disputes in a non-confrontational way,[350] mainly through mediation.[351] As a result, local justice centers emerged throughout the country, being the San Francisco Community Board Program founded in 1977, one of the most emblematic.[352]

In spite of the fact that community justice centers were initially viewed as the antithesis of official courts and their existence was precisely inspired by the rejection of state institutions, the courts ended up being a valuable resource for community centers, which early on realized that citizens were less interested in their services than their administrators had originally anticipated.[353] As a result, community centers

[349] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170 (2003)

[350] Laura Nader, *Coercive Harmony: The Political Economy of Legal Models*, *in* ESSAYS ON CONTROLLING PROCESSES, 1-13 (Laura Nader ed. 1996)

[351] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 171 (2003)

[352] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 171 (2003). Also, prior to the San Francisco Community Center initiative, similar had emerged in other places throughout the country. We can mention some examples, like the Rochester AAA Community Dispute Services Project (1973) and the Boston (Dorchester) Urban Court Program (1975).

[353] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 172 (2003)

turned to the courts for referrals, and, conversely, the judges began sending cases to the community centers as a way to clear their dockets.[354]

About the same time, U.S. judges had been consistently encouraging settlements and had developed some experience in implementing alternatives to trials.[355] At first, there were court-annexed arbitration programs;[356] then followed mediation and, later on, early neutral evaluation programs[357] as well as other similar processes.[358]

Professor Frank Sanders' speech at the 1976 Pound Conference during which he introduced the idea of a multi-door courtroom and suggested that the courts should

[354] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 178 (2003)

[355] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 179 (2003)

[356] See, Elizabeth S. Plapinger et al., *ADR and Settlement in the Federal District Courts : A Sourcebook for Judges & Lawyers* (Federal Judicial Center, 1996).

[357] http://www.cpradr.org/adrcourt.htm (last visited: May 7th, 2002) Like mediation, early neutral evaluation (ENE) is applicable to many types of civil cases, including complex disputes. In ENE, a neutral evaluator a private attorney expert in the substance of the dispute holds a several-hour confidential session with parties and counsel early in the litigation to hear both sides of the case. Afterwards, the evaluator identifies strengths and weaknesses of the parties' positions, flags areas of agreement and disputes, and issues a non-binding assessment of the merits of the case. Developed during the mid-1980's in the San Francisco federal court, ENE is now used in 18 federal district courts and several state courts. Usually, attorneys trained by the court serve as evaluators; in some courts, including the Southern District of California, magistrate judges conduct ENE sessions. Originally designed to make both case management and settlement more efficient, ENE has evolved into a pure settlement device in some courts. Used this way, ENE resembles evaluative mediation, in which the mediator uses case evaluation as a settlement tool.

[358] Other ADR programs include case valuation (Michigan Mediation), court mini-trials, Judge-Hosted settlement conferences and summary jury trials. For a comprehensive description of these programs and their development in the U.S. Judiciary until 1996, See, Elizabeth S. Plapinger et al., *ADR and Settlement in the Federal District Courts : A Sourcebook for Judges & Lawyers* (Federal Judicial Center, 1996).

become *dispute settlement centers*,[359] is often portrayed as an important event in the modern history of ADR in the U.S. Sanders' valuable contribution was to give a common label to a variety of techniques employed to process disputes outside the ordinary trial. From then on, these processes were collectively known as alternative dispute resolution (ADR) mechanisms.[360]

ADR GOES MAINSTREAM

Once the idea of addressing efficiency problems of the courts by using alternative mechanisms for resolving disputes arose, mediation, arbitration and other similar mechanisms captured the attention of federal and state governments. In 1990, the Administrative Dispute Resolution Act was passed.[361] This legislation ordered federal agencies to consider and encourage the use of alternative mechanisms and to devote important resources for developing training programs. In the following years, the federal government actively participated in promoting ADR at all levels,[362] to the

[359] Frank Sanders, speech given at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, (1976)

[360] LAURA NADER, ESSAYS ON CONTROLLING PROCESSES, (Laura Nader ed. 1996); Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR* 44 UCLA L. REV. 1613 (1997)

[361] Pub. L. 101-152, 104 Stat. 2736 at 5 U.S.C. §§571-583. The Administrative Alternative Dispute Resolution Act, was reformed in 1996. See, Pub. L. 104-320, 110 Stat. 3870 at 5 U.S.C. §§571-583

[362] Remarks By Associate Attorney General Jay B. Stephens Alternative Dispute Resolution In Procurement Awards Office Of Management And Budget/Executive Office Of The President Indian Treaty Room, April 16, 2002. http://www.usdoj.gov/adr/aag041602.htm ["Many Boards of Contract Appeals are requiring the use of ADR as well. Thanks to all of these factors, the government ADR effort is substantial and growing. Overall, federal executive agencies now dedicate over 400 full-time positions and 40 million dollars each year to ADR. All agencies have a senior official designated as their dispute resolution specialist, typically at the senior executive service level or higher."] (last visited May 8th, 2002).

extent that today every major federal agency in the U.S. has an ADR program in place.[363]

At the judicial level, various legislative initiatives have played an important role in the growth of ADR. Worth mentioning are, the Judicial Improvement and Access to Justice Act (JIAJA)[364] "which authorized arbitration programs in twenty districts",[365] the Civil Justice Reform Act of 1990 (CJRA),[366] "which required local experimentation in ADR and case management by the 94 federal district courts",[367] as well as the Federal ADR Act of 1998,[368] that authorized the use of alternative dispute resolution (ADR) in federal courts and mandated the organization at least one ADR process in each district court[369] that should be devised and implemented according to the court's own rules.[370] It also required litigants in civil cases to consider ADR at an appropriate stage in their respective cases.[371]

ADR AND JUDICIAL REFORM AGENDAS: SHOOTING FIRST…

[363] See, Janet Reno, *Report to the President on the Inter-Agency ADR Working Group*, (DOJ, 2000).

[364] Pub. L. 100-702, §901 (a), 102 Stat. 4642, 4659-63 (1988) and amended in 1993 1994 and 1997.

[365] See, Robert J. Niemic et al., *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center, 2001).

[366] Pub. L. 101-650, 104 Stat. 5089.

[367] See, http://www.cpradr.org/ (last visited May 8th, 2002).

[368] Pub. L. 105-315, 112 Stat. 2993.

[369] § 652(a)

[370] § 651(b)

[371] § 652(a)

Court-connected ADR has been promoted in the United States mainly as a way for speeding civil case resolution and reducing litigations costs.[372] The perceived attribute as "clearing-docket devices"[373] is what made these processes so attractive not only to American judges, but also to multinational organizations and foreign governments, who during the mid-eighties began including judicially-sponsored ADR in their plans to revamp the courts and achieve structural changes to public institutions. Soon, the implementation of ADR mechanisms became one of the key elements of both domestic and internationally-sponsored judicial reform agendas throughout Latin America.[374]

However, what reform advocates from elsewhere did not realize is that court-connected ADR were devised in the United States for fine-tuning the judiciary, and not for rethinking it.[375] Also, they did not take into consideration that the success of court-connected ADR in the United States was more a desire than a proven fact.[376]

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[372] Deborah R. Hensler, The Contribution of Judicial Reform to the Rule of Law, Address at the Conference on New Approaches for Meeting the Demand of Justice (May 10-12, 2001); See, also, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 185 (2003).

[373] Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Justice Systems? Repeat Players in ADR*, 15 OHIO ST. J. DISP. RES. 19 (1999)

[374] SHAHID JAVED BURKI, WORLD BANK, JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN. TECHNICAL PAPER NUMBER 280 11-12 (1995).

[375] Deborah R. Hensler, *Empirical Research on ADR Programs* 2 (World Bank, 2000)

[376] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 178, 194, 195 (2003) ["researchers who conducted empirical studies of court arbitration beginning in the 1980s found that the programs were achieving something rather different from what the courts had anticipated. In most instances, the programs did not save time or money (…) There is little evidence that alternative dispute resolution procedures within courts have reduced the average time to dispose of civil lawsuits, or the average public or private expense to litigate cases in a system that has long relied on settlement rather than

Based on the perceptions that alternative mechanisms are widely used by disputants in affluent and developed societies[377] –namely the U.S.- because of their potential for offering an efficient way to handle disputes, reform advocates at different levels have proposed them as a way to achieve a wide array of objectives, from facilitating access to justice and helping decongest the courts to encouraging foreign investment and thus, aiding in the achievement economic development.[378]

Reform advocates in Latin America have stressed that the true demand for alternative mechanisms at the domestic level is high, but the lack of a modern legal framework has acted as a barrier,[379] thus confining disputants to conform themselves with the alleged malfunctioning courts. This had led to the belief that the implementation of modern ADR legislation, the investment of resources in training and the sponsorship of institutional providers, can contribute to meet such need.[380]

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adjudication to resolve most cases. There is also little evidence that alternative dispute resolution procedures outside of courts have reduced the transaction costs of resolving conflicts that would never have gone to trial anyway."]

[377] This approach is what we called the "Structural Paradigm", and as we explained earlier, it contributed to reaffirm the apparent dichotomy of modern/primitive societies so frequently depicted in studies about the functioning of legal institutions.

[378] Enrique Iglesias, President, Inter American Development Bank, Keynote Address at the Conference "Commercial Alternative Dispute Resolution (ADR) in the XXI Century: The road ahead for Latin America and the Caribbean" (Oct. 26, 2000). ["By the end of the 1980s decade, with the growth of new criteria of commerce and development, the abandonment of protectionist policies, the rise of economic blocs and the economic opening of the region, the need for adapting the different legal instruments in favor of business and private investors arose. ADR became relevant and important in domestic commerce as in international commerce and also useful to foster foreign investment"]

[379] Adriana Polania, Los ADR en Latino America, paper presented at the conference "Commercial ADR in the XXI Century" (Washington, D.C. Oct. 26, 2000)

[380] Jose Alberto Ramirez León, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model* 2005 J. DISP. RESOL. 399, 414-417 (2005)

Following this idea, both the Venezuelan government and the private sector embarked on a crusade to advocate the promotion of ADR mechanisms, also believing that it would help decongest the ill-functioning courts, in addition to allowing citizens to address their legal disputes in an expeditious, inexpensive, and efficient manner. This, advocates believe, is the trend in modern nations where ADR mechanisms have become very popular and have also proved to be efficient tools for solving many problems related to the administration of justice.[381]

A strong governmental support to ADR became evident with the passage of several laws providing for the use of mediation and arbitration in different areas such as labor,[382] consumer rights,[383] insurance,[384] and family law.[385] As a corollary, the

[381] It is important to stress, however, that the loan given to Venezuela by the World Bank didn't specifically mention the promotion of ADR mechanisms as part of the agenda. The loan document addressed other general areas that the Bank deemed critical. However, future judicial reform loans given by the Bank to other countries in the region would include express mention to ADR mechanisms. On the other hand, the funds given to Venezuela by the IADB did include the promotion of ADR as an important component.

[382] Its latest reform was passed in June 17, 1997 and published in Official Gazette No. 5,152 (Extra.). It allows a Labor Inspector to mediate between the parties to a dispute.

[383] Establishes a previous conciliation stage in suits filed by consumers and users of goods and services.

[384] Passed on 05/17/95 and published in Official Gazette No. 4,898 (Extra.)Creates the role of arbitrator for the Insurance Superintendent.

[385] The Organic Law for the Protection of Children and Adolescents passed in 1998 and published in Official Gazette No. 5,266 (Extra.). It provides for auxiliary bodies called the "Public Defender of Children and Adolescents", who may act as mediators according to the stipulations of Article 308 of that Law.

Constitution approved in 1999, made the promotion of alternative mechanisms part of a state policy.[386]

In 1998, the Commercial Arbitration Act (CAA) was passed.[387] Shortly thereafter, the two main chambers of commerce sponsored private arbitration centers. In addition, conferences and other academic events that focused on the perceived advantages of alternative mechanisms were organized, law schools began including ADR-related courses in their curricula, and several private institutions began offering workshops to inform lawyers and citizens in general about the benefits of these alternative mechanisms. By the year 2000, an extensive ADR machinery was already in place and its supporters claimed that the users of the legal system would embrace this panacea almost overnight.[388]

ADR AND THE PRIVATE SECTOR

As also happened in most other countries with institutional reform plans, the Venezuelan business sector became the focus of special attention, mainly because of the idea among reform advocates that promoting ADR would help foster legal certainty and confidence in institutions. It is believed that a stable institutional environment would attract foreign investors to the region, who otherwise, would not

[386] The article 258 of the Venezuelan Constitution establishes that: "The law will promote arbitration, conciliation, mediation and any other alternative dispute resolution mechanisms."

[387] LEY DE ARBITRAJE COMERCIAL (VENEZ.)

[388] http://noticias.eluniversal.com/2001/03/12/12202CC.shtml (last visited, November 13, 2002)

conduct business in countries with such weak legal systems.[389] An increase in the amount of foreign investments would in turn, help the country to achieve its desired economic development.[390]

A common idea,[391] nowadays, is that ADR and particularly mediation are among the most preferred methods for business disputants.[392] The perception is that these mechanisms not only allow the parties to gain both control over the process and

[389] "Approval of the Law of Commercial Arbitration constitutes a step forward in the country's modernization and improvement of legal certainty, which is indispensable if we want to attract foreign investors." (Statements made by Simon Garcia, Venezuelan Minister of State for Parliamentary Relations, in El Universal, October 15th, 1996) See, http://www.eluniversal.com/1996/10/15/C15PRO.shtml#xml=http://manduca5.micron.net:80/xmlread.jsp?k2dockey=H:\home\eud\www\1996\10\15\C15PRO.shtml@Universal&querytext=arbitraje (Feb. 2nd, 2002) "CONAPRI expects considerably fewer commercial disputes with the application of arbitration and this will allow Venezuela to compete at an international level." (El Universal, May 4th, 1998) See, http://www.eluniversal.com/1998/05/04/04102DD.shtml (last visited, Feb 2, 2002)

[390] However, according to some studies, "there is no clear evidence of the economic costs of weak legal systems (since) research conducted on the economic costs of a badly working legal system is mostly anecdotal or in the form of individual case studies", see, Beatrice Weder, *Legal Systems and Economic Performance: The Empirical Evidence, in* Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference. World Bank Technical Paper, No. 280 21-26. (1995)

[391] Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 83 (2002) ["The notion that civil litigants with money damage disputes prefer mediation to adversarial litigation and adjudication is so ingrained in contemporary legal culture that it is rarely questioned. One source of this notion may be the intuition that humans generally prefer peace to war, harmony to conflict. That people *ought* to strive for such goal is a central tenet of many religions".]

[392] However, as Hensler points out "Because there are no comprehensive statistics on cases that use alternative dispute resolution mechanisms in the private sector, the relative popularity of arbitration and mediation is currently unknown". See, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 183 n. 76 (2003). Notwithstanding, some studies have reported an increasing use of ADR for business disputes. See, Deloite and Touche Litigations Services Division, (1993) [summarizing the results of a survey among the Fortune 1,000 corporations and showing that 68% favored the use of mediation]; David B. Lipsky and Ronald L. Seeber, *Patterns of ADR in Corporate Disputes*, 54 DISP. RESOL. J. 66 (1999) [concluding that the shift from traditional litigation toward the use of ADR is one of the foremost important trends in corporate America in the 1990s. 87% of the surveyed population reported having used mediation and 80% having used arbitration at least once in the past three years.]

the outcome,[393] but are also cheaper and faster than ordinary litigation,[394] even though there is no robust empirical evidence to support such assertions.[395] Conversely, executives are believed to dislike litigation because of the perceived risk and uncertainty generally associated to it.[396] But the notions of arbitration and mediation are, by no means, new to members of the business sector.

In the United States, for example, business disputants were familiar with binding arbitration long before ADR became a fashionable idea.[397] Businesspeople used arbitration to process their grievances in a way that "assured that their shared customs,

[393] David B. Lipsky and Ronald L. Seeber, *Top General Counsels Support ADR* 8 BUS. L. TODAY 24 (1999)

[394] David B. Lipsky and Ronald L. Seeber, *Patterns of ADR in Corporate Disputes*, 54 DISP. RESOL. J. 66 (1999)

[395] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 178 (2003) ["No one actually had done any empirical research on the outcomes of binding arbitration (outside the labor management field), so no one was certain if and when arbitration was beneficial *vis-à-vis* court resolution"]. Also, see, Deborah R. Hensler, *Suppose it's Not True: Challenging Mediation Ideology*, 2002, J. DISP. RES. 81, 85 (2002) ["In sum, on closer look, the notion that Americans who believe they have a legal claim prefer to resolve such claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts."]

[396] David B. Lipsky and Ronald L. Seeber, *Top General Counsels Support ADR* 8 BUS. L. TODAY 24 (1999). But, also see, John Lande, *Failing the Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*,3 HARV. NEGOT. L. REV. 69 (1998)

[397] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 181 (2003); See, also, Howard, 1993 ["Although far from clear, it appears that executory arbitration contracts were used in England by 14th century merchant and craft guilds and in maritime contracts. It has been suggested that these could be traced from the seventh century ecclesiastical courts or even from Roman law, which itself was influenced by Greek law. There are limited references in the case journals to arbitrations as they were viewed as private matters deriving their authority directly from the parties in which courts were reluctant to become involved. However, in the early 16th century a statute was enacted prohibiting agreements that barred lawsuits. This trend was perpetuated by Vynior's Case which established that arbitration agreements were revocable by either party at any time prior to the award based on the concept that the arbitrator was the agent of both whose authority could be revoked at any time".]

however idiosyncratic, would be respected".[398] Decisions were made by a third party, usually selected from among members of the community, and were often based on special business norms rather than official state law.[399] A similar phenomenon has occurred in other western societies.

Almost a hundred years ago, a sustained pressure from the American business community[400] made arbitration become formally accepted within the legal system. The first steps were taken by the New York Chamber of Commerce and the New York Bar Association, and resulted in the passage of the first arbitration act in the United States.[401] The federal government quickly followed this movement and enacted the Federal Arbitration Act (FAA) in 1925, which is still in force to this date.

Over the years, the popularity of arbitration provoked the launching of several provider organizations, and also motivated professionals from different disciplines to specialize themselves and to offer their services as neutrals on a permanent basis. With the increased popularity of alternative mechanisms and the growing interest in

[398] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (Oxford University Press 1983)

[399] The fact that the arbitrators were also members of the community ensured that their determinations were in line with the social norms with which the arbitrators were familiar. In addition, the enforcement of the arbitrators' decisions were supported by informal controls that only work well in close-knit communities (threats of exclusion, ostracism or some other form of social retaliation against those who violated community norms).

[400] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (Oxford University Press 1983)

[401] KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 311 (Foundation Press, 2000) ["In 1919, the New York Chamber of Commerce joined with the New York Bar Association to draft a Statute for the New York legislature changing the common law rule. The statute, drafted by Julius Cohen, was patterned on the English Arbitration Law of 1898."]

negotiation and problem solving skills during recent years, many of the centers have expanded their activities to mediation and other similar models.[402]

In the particular case of Venezuela, we can trace legislation that expressly allowed the use of conciliation and arbitration for civil and commercial disputes as far as 1830.[403] As initially regulated in the Code of Civil Procedure, arbitration and mediation were formally appended to the judicial process, which allowed for an extensive judicial control to take place. In general, the law provided that the arbitrators could be appointed by the judges, had to decide following legal rules and their awards could be reviewed by the courts in numerous circumstances. This made arbitration to be perceived by some as a very impractical process[404] and gave rise to frequent criticism.[405]

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[402] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 183 (2003)

[403] CONSTITUCIÓN DEL ESTADO DE VENEZUELA 1830 [Constitution] art. 190 (Venez) ["The Venezuelans are free to solve their differences through arbitration, even if the trial has been initiated"]. In the case of mediation (conciliation) it was originally regulated in the Venezuelan Code of Civil Procedure of 1836. In other Latin American countries, the experience is similar.

[404] See, Centro Empresarial de Conciliación y Arbitraje [CEDCA], *Rules of Conciliation and Arbitration, Foreword.* Available at: http://www.cedca.org.ve/cedca-ingles/rules.htm (last visited, Apr. 17, 2006) ["During the reign of the Code of Civil Procedure of 1916, which was in effect for over 70 years, the arbitration clause had a relative [low] value. If the summoned party refused to formalize the commitment, the end of the arbitral process was ordered. Even after respondents had signed a clause stating their willingness to submit to arbitration, they could retract and cancel the process. A big step forward came with the Code of Civil Procedure of 1987, which recognized the binding effects of the clause. However, the parties still had to go through the courts"]

[405] However, the business community didn't seem to be affected by these limitations. In spite of the critiques, commercial arbitration was used outside the courts perhaps with the same frequency as it is today, after modern ADR legislation has been implemented, thus arguably lifting the legal obstacles that, according to critics, prevented business disputants from using it in the past. Unfortunately, there are no trend statistics for the use of arbitration in Venezuela. Neither the arbitration centers nor the lawyers have an accurate estimate of the number of cases that go to arbitration every year. However, from our interviews with lawyers who are frequently involved in arbitration proceedings, and also with

The 1998 CAA -modeled after the United Nations Commission on International Trade Law (UNCITRAL) guidelines- addressed and overcame the apparent obstacles imposed by the Code of Civil Procedure. Among its innovations, the CAA expressly recognized the importance of providing organizations whose main role was to administer arbitration and mediation procedures, to devise and apply standards and to maintain a roster of neutrals to serve the business community.

Some ADR centers[406] were already in place before the passing of the CAA, but had no activity until after this legislation enter into effect.[407] The CAA triggered the interest of chambers of commerce in sponsoring institutional providers, two of which began to operate in Caracas: the Business Center for Conciliation and Arbitration (CEDCA) sponsored by the Venezuelan-American Chamber of Commerce (VENAMCHAM);[408] and the Arbitration Center of the Caracas Chamber of Commerce (CACCC).[409] The other ADR center, the Arbitration Center of the

some individuals who often serve as neutrals, the impression that we got is that the number of cases has not increased after the passing of the new law eight years ago.

[406] I am referring to the Iberian-American Maritime Arbitration Center (CEAMAR) organized in 1991 with the purpose of administering arbitration procedures within the maritime industry, and the Arbitration Center of the Caracas Chamber of Commerce (CACCC) which was created in 1989 to serve the general business community, but did not start its activities until after the passing of the CAA in 1998. See, http://www.arbitrajeccc.org/info_general.html (last visited, Apr. 17, 2006)

[407] Interviews with Luis Cova Arria and Diana Droulers in Caracas, Venezuela (August, 2001)

[408] CEDCA was created in 1999, but started to operate in 2001. See, http://noticias.eluniversal.com/2001/03/12/12202CC.shtml (last consulted, Nov. 16, 2002)

[409] The CACCC started its activities in 1998, and the first case was decided on that same year. See, http://www.arbitrajeccc.org/info_general.html (last visited, Apr. 17, 2006)

Maracaibo's Chamber of Commerce (CCM), opened its doors in the city of Maracaibo, the second most important business hub in the country.

All three centers have more or less the same structure and are similarly sponsored by business associations (chambers of commerce), which not only provide financial support but also the facilities and necessary equipment. All centers offer arbitration and mediation (conciliation) services, but appear to be more focused on the former. CEDCA and CACCC have adopted procedural rules and ethical standards for mediators and arbitrators. Each center has also permanent staff members, a budget to operate, and maintain a permanent roster of neutrals.

There are 64 neutrals in CEDCA's list all of whom are advertised as arbitrators. However, during our interviews with the center's administrators, we were told that some of them also serve as mediators.[410] All, except for three, hold a law degree and most are affiliated with midsize or large law firms. On the other hand, the CACCC has a list of 125 arbitrators and 9 mediators. Many lawyers appear in the list of both centers, which is regarded as prestigious within the business community. Inclusion in the arbitrator's list seems to be driven more by the idea of social contacts than by the candidate's skills or previous experience with ADR.[411]

[410] Interview with Bernardo Galavis in Caracas, Venezuela (August, 2002)

[411] According to CEDCA's rules, for instance, In order to be included in the list of neutrals, the aspirants have to be "invited" by the Board to submit a written request accompanied by two references, and his or her resume (Rule 3) It is expressly indicated that the Board will take into consideration "the reputation, experience, interest and availability to serve". The rules also indicate that "an application may be rejected even though the candidate enjoys a recognized professional career", which gives certain leeway to reject those who are not members of the network.

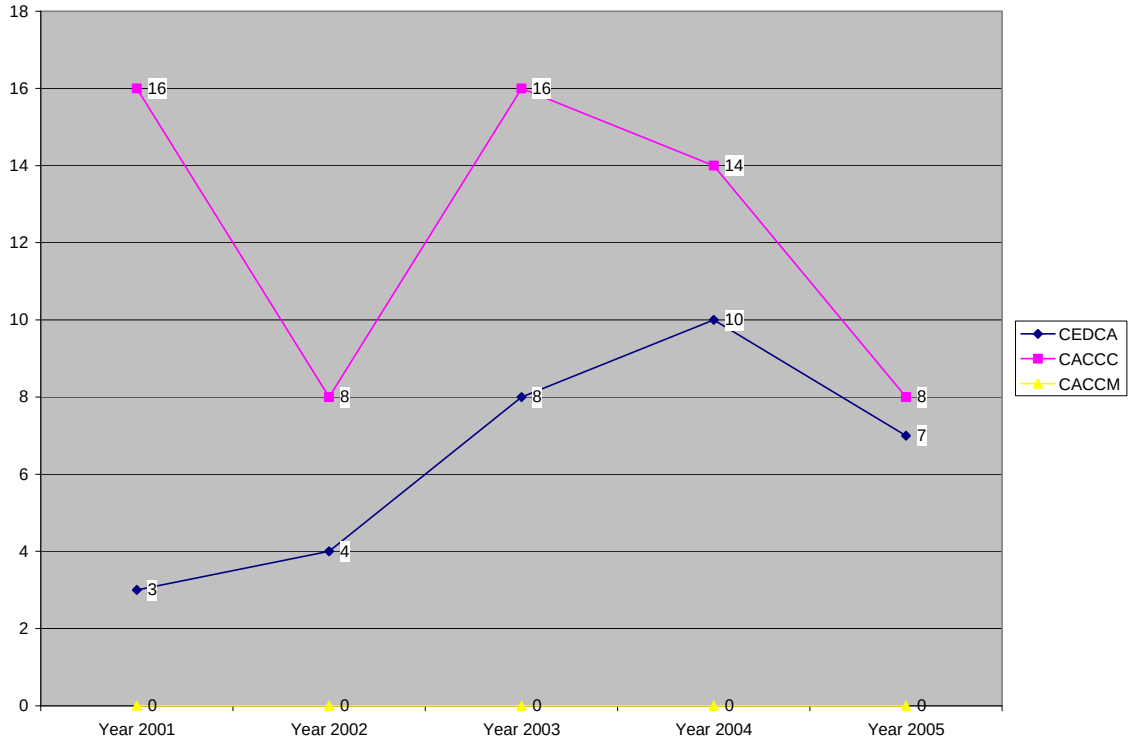
One might think that the fact that most –if not all- roster members are currently practicing attorneys instead of full-time neutrals would create conflicts of interest in the relatively small Venezuelan business community; nonetheless, it is rather viewed as an advantage,[412] as the connections and social status of the arbitrators within the lawyers' community are precisely what makes them valuable in the eyes of local businesspeople.

In general terms, these private centers are viewed as positive within the business community. Most of our interviewees agreed that both CEDCA and CACCC were well received, and are still widely supported. However, very few actually use their services as we can see in the following table that shows the usage rate (decided arbitration cases) for the three main centers during the last five years:

[412] CEDCA, Code of Ethics, Preamble.

Table 4

Use of Private Institutionalized ADR in Venezuela (2001-2005)



Sources: CACCC, CEDCA, http://www.arbitrajeccc.org/info_general.html (last visited, Jun. 20, 2006)

Even though we don't know the actual number of business disputes that would go to arbitration or mediation in the first place,[413] it is still fair to say that ADR private

[413] One parameter to predict the amount of legal disputes that could go to arbitration or mediation is by determining the number of disputes that reach the courts. However, not even the official statistics collected by the Judicial council since 1953 can offer an accurate amount of business disputes. The main problem is that the variable that is taken into account to measure the workload of the courts is that of "filed cases". Unfortunately, this category include all matters submitted before the court, including but not limited to, petitions to obtain certified copies, affidavits, injunctions, and many other non-contentious matters. This way, is really difficult to distinguish how many "cases" or actual disputes are brought into the system. See, Rogelio Perez-Perdomo, *Medio Siglo de Historia Judicial en Venezuela (1952-2005)*, 1 DERECHO Y DEMOCRACIA 20 (forthcoming, 2006).

institutions handle very few cases. The actual usage is not even consistent with the estimate of the centers' representatives, who initially predicted that in a relatively short-term, ADR institutions would resolve 85% of the controversies among corporate parties, and also that disputants would widely use the centers in order to avoid the corrupt, slow and costly courts.

THANKS, BUT NO THANKS

Notwithstanding the enormous efforts and resources invested, and the apparent positive image that ADR centers have among members of the business community, these institutions have not been truly embraced by its potential beneficiaries. Instead, disputants continued -and have continued to this date- to prefer processing their conflicts in the same traditional ways that have been always available to them,[414] and the new ADR centers are still among the least used paths.

With very few exceptions, the executives and corporate lawyers that we interviewed had a positive image of mediation and arbitration, and were generally in favor of its promotion. Indeed, the private sector has offered financial and institutional support to the new arbitration centers. At the time of our interviews, many business executives –mainly from multinational corporations- were also familiar with ADR processes and had been also trained in negotiation and problem solving techniques. Business lawyers, on the other hand, were not only acquainted with the legal

[414] This is not difficult to foresee given the distinctive features of the Venezuelan society in general, and the business sector in particular, where is very common for participants to be mutually bound by multiplex relationships and be part of a relatively dense social network.

framework of arbitration and mediation but in many cases had attended ADR workshops, were knowledgeable about the leading literature in the field. Interestingly, they also reported using mediation very often.

However, the mediation that most of these lawyers and executives employ is not the one offered by the ADR centers in an institutionalized form. What they reported using often takes place after golf or tennis matches at the local country club, during dinner parties, weddings and other social engagements. The ones that play the role of *neutrals* are usually prominent lawyers whom both parties respect and know well.[415] These lawyers are practicing attorneys from the leading law firms, and as such also belong to networks that give them access to certain spheres of influence within the business sector. Their names are always included in the rosters of the ADR centers, but interestingly, is not through these institutions that they get referrals.

Even though businesspeople have shown support to the new ADR providing institutions, it seems obvious that they have little incentives to use their services.[416]

[415] The fact that these mediators are members of the same community to which the parties belong, and therefore have a *corresponding relationship* with them, is what determines their greater intervention (process and decision control). See, page 49 *supra.* In addition, they are chosen to intervene as third parties to a dispute because of their perceived higher social status, but most importantly, because others to trust in them. For a detailed study about trust and its effect on social structures, see, KAREN S. COOK, RUSSEL HARDIN AND MARGARET LEVI, COOPERATION WITHOUT TRUST? 2 (Russell Sage Foundation 2005) However, the trade-off is that these mediators are not really neutral in the sense that, as members of the same community, they are subject to its social norms and may also have an interest that collides with one (or both) of the parties. Most of our interviewees seemed to acknowledge this tension and generally considered it to be outweighed by the fact that disputes were dealt within the community "among people like them". See, interviewee #45 (business executive).

[416] The scant use of voluntary ADR processes has also been explored by Engle Merry and Silbey (1984), who in turn suggested that, in general, "citizens do not use alternatives voluntarily to the extent hoped for by proponents of ADRMs because by the time a conflict is serious enough to warrant an

As one business lawyer said to us: "Why would I recommend my clients to use CEDCA and pay an expensive administrative fee if I can simply reach the same arbitrators or mediators through another way? I know most of these guys (arbitrators) since law school days, we are members of the same social clubs, our kids go to the same schools and even our firms are relatively close to each other; I can just call them anytime and sort things out without the hassle and the cost of going through the centers". This opinion seemed to be shared by several others who operate in the same social circles.

As we previously explained, the Venezuelan business sector is a relatively small and cohesive community in which many of its members know each other and are bound together by multiplex relationships. Aside from the typical economic or business interest that characterizes the links that exist between members of this community, many of them are also tied together by kinship, or lifelong friendships. As a result, when disputes arise among community members who are bound by multiplex, and permanent social ties, the parties will prefer to use processes that not only help them resolve the issue at hand, but that also contribute to preserve their social bonds

outsider's intervention, disputants do not want what alternatives have to offer (…) At this point they conceptualize their problem as a principled grievance for which they seek an authoritative and binding solution, not as a conflict of interest in which they have limited and negotiable goals". Sally Engle Merry and Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute* 9 JUST. SYST. J.151, 154 (1984).

and have the least negative impact on their environment. And, intra-group conciliatory mechanisms (non-institutionalized mediation) fit easily into that category.[417]

Mediation seems to be a preferred mechanism among business disputants in Venezuela, but only when used in an environment that preserves the participants' social values and their identity as a group. And this is only possible when done within the realm of their social networks, and therefore, outside the formal institutions (ADR centers).

ADR centers were originally promoted by reform advocates with the idea of offering efficient alternatives to the courts, which in their view were unattractive to business disputants. The vision was to make institutionalized ADR processes available to the entire business community, but they did not take into account that these centers would not fulfill any need. As we already described, business lawyers and their clients are already satisfied with their traditional way of processing disputes and even if they think that ADR centers are a good idea, at least for now, they have chosen to kindly decline using it.

[417] As we explained when describing the subjective factors that shape disputants' choices in general, the strength of the ties between the parties has an impact on the type of process and fora in which disputes are channeled. See, page 28 *supra.*

CHAPTER SEVEN

MAZAL U' BRACHA: DISPUTE PROCESSING AND THE VENEZUELAN DIAMOND INDUSTRY

"Today, as in the past, handshakes, Yiddish, and trust still close the multimillion dollar deals"[418]

This chapter deals with the notion of private ordering, which basically refers to "how parties enforce contracts without relying on public courts".[419] We are particularly interested in exploring how individuals who belong to close-knit communities channel their contractual disputes through the use of formal processes within a non-institutionalized environment, and the disputes arising from dealings among diamond brokers offers an ideal example. A study of the diamond sector also enables us to describe how the social linkages that bind community members facilitate the intra-group flow of information about trading partners, and how this plays an important role in assisting the enforcement of contractual obligations.

The methodological approach that we selected for this part is that of a case study, as we were interested in obtaining a deep and contextualized description of diamond brokers and the environment in which they process their disputes in its real-life context.[420] To this end, our research involved the use of a variety of methods

[418] Renée Rose Shield, Diamond Stories 2002: 1

[419] Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328-2367 (2004)

[420] ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 13 (Sage 1994) ["A case study is an empirical inquiry that investigates a contemporary phenomenon within its real life context, especially when the boundaries between phenomenon and context are not clearly evident"].

(interviews, and analysis of secondary sources), which enabled us to enter into direct contact with the subjects and to focus on the key elements (how and why diamond disputants choose private arbitration) in which we were interested

Our fieldwork was conducted in Venezuela during the summers of 2003 and 2004. We conducted a total of five interviews with members of the diamond community, of different backgrounds.[421] These interviews were generally unstructured, even though a brief protocol with general issues was prepared in advance. The duration of the interviews varied greatly. For example, the first two lasted around six hours each, and the rest varied between forty five minutes and two hours. All respondents were guaranteed absolute confidentiality.

The information to which we gained access during our interviews allowed us to understand in detail how private arbitration works in the diamond sector, and how the members of this community view their relationship with the official courts. The case of the diamond community may not be statistically representative of private ordering, but its sociological importance is vital for us to understand how individual choices of procedure are affected by the specific context in which disputants interact.[422]

[421] For example, even though the diamond community is known for being heavily dominated by Jewish members, only 3 of our interviewees were Jewish whereas the remaining two were not and did not even have Jewish heritage. It was interesting, though, to observe how non-Jewish members were fully aware of the Jewish customs and religious norms that permeate the diamond community, and how they felt identified with its normative values.

[422] Hamel stresses that when selecting a case for study we should pay attention to the sociological representativeness of our topic and not necessarily to its statistical representativeness. ["The selected

Our analysis was complemented by the use of secondary sources including, technical reports with statistical information, and other documents that covered different topics concerning the diamond industry. We also examined the scholarly literature that has described dispute processing within the diamond community, and the role of social norms in different private fora.

THE VENEZUELAN DIAMOND SECTOR AND ITS PEOPLE

For many years, the petroleum sector has dominated Venezuela's economic activity. It currently represents 26.4% of the gross domestic product, and 76.5% of exports of goods and services.[423] Oil production is also the largest source of revenue for the government,[424] and has also positioned the country at an important level in the world market as the fourth leading crude oil supplier to the United States,[425] and one of the largest exporters worldwide.

case is not representative because of the observed frequency at which a social issue or phenomenon occurs. It is representative in terms of an initial sociological theory, which represents it as the selected observation point for an object of study"]. See, JACQUES HAMEL ET. AL., CASE STUDY METHODS 44 (Sage, 1993).

[423] United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 1 (2003)

[424] United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 1 (1997)

[425] United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 15.3 (2003) [By 2003, "the United States received slightly more than 11% of its import requirements from Venezuela. This was, however, a decrease from 1997 when Venezuela was the leading U.S. import source of crude and refinery products at the time providing more than 17% of total U.S. imports (U.S. Energy Information Administration, 2004§"].

To a lesser extent, the Venezuelan non-fuel mineral industry also makes an important contribution to the economy through the production of bauxite, alumina, iron ore, phosphate rock, cement, steel, and to a lesser extent, diamond and other precious stones. The country is among the ten largest producers of bauxite and alumina in the hemisphere.[426]

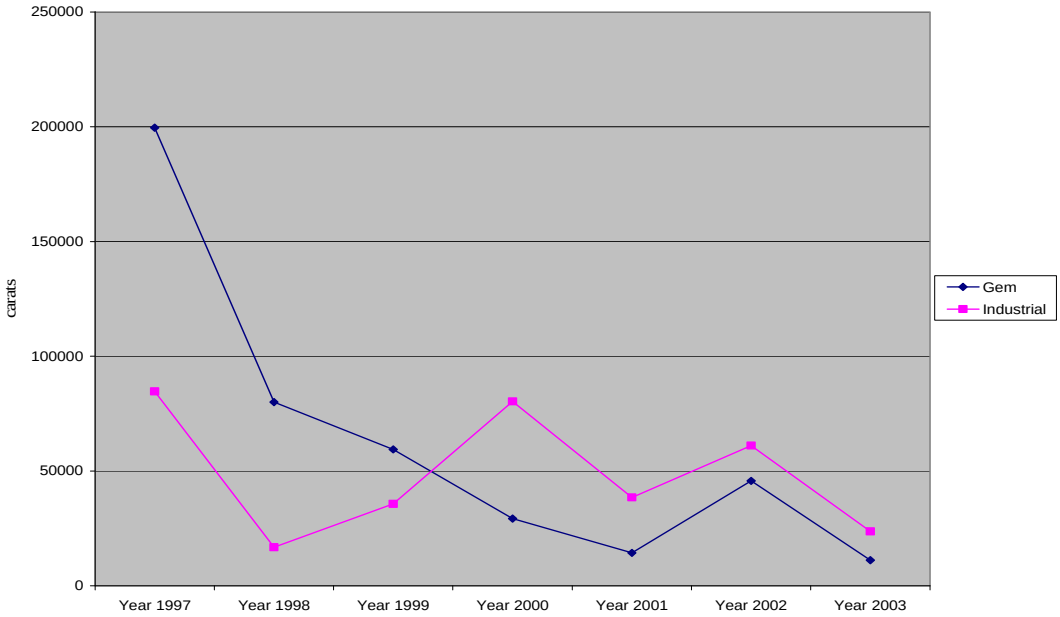
In comparison to other mineral commodities, the diamond sector is small, and its current production –according to official statistics- is approximately of 11,000 carats per year. This represents an important decrease since 1997 when according to official reports, the production reached 158,269 carats. The following table shows the official estimate of the diamond production in Venezuela during the 1997-2003 periods:[427]

[426] United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 15.2 (2003) ["In the Americas, Venezuela was the third leading producer of bauxite (after Brazil and Jamaica) and phosphate rock (after the United States and Brazil), the fourth leading producer of primary aluminum (after the United States, Canada and Brazil) and iron ore (after Brazil, the United States and Canada) and the fifth leading producer of alumina (after the United States, Brazil, Jamaica and Suriname)"].

[427] Notwithstanding, over the years, there has been an important proportion of illegal mineral exploitation, which is unaccounted for in the official statistics. According to government estimates, the real diamond production could be twice the amount reported. See, Barbara Rodriguez, paper presented at the preliminary workshop of the Annual Conference of Mining Ministries in Caracas, at 52 (2000)

Table 5

VENEZUELAN DIAMOND'S OUTPUT 1997-2003



Source: United States Geological Service (2003)

Most of the Venezuelan diamond production is for export. Unlike what occurs in some other parts of the World,[428] in Venezuela, diamonds have been traditionally extracted by small-scale miners either through cooperatives[429] or through joint

[428] Traditionally, a vast number of diamond mines around the world have been owned by large cartels, like the DeBeers, which still controls at least 50% of the world's diamonds. See, Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York,* 11 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[429] Even thought the extraction of diamond has been done through cooperatives for a long time, it was not until 1999 that the Mining Law "established the mining cooperative and regulated the artisanal mining sector for the first time. It defines the small mining sector in reference to the production of diamond and gold as areas that are not to exceed 10 ha and not to be worked by more than 30 individuals with a nonrenewable permit unless transferred to a social fund to form a mining cooperative. The maximum production period is 10 years". See, United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 1 (2003); LEY DE MINERIA (Mining Law) Art.64 (Venez.)

operations with the Corporacion Venezolana de Guayana (CVG)[430] a state-owned holding of companies that produce and commercialize non-fuel minerals.

Venezuelan diamond miners usually run modest operations and employ their own –often rudimentary- machinery to extract the precious stones. The miners trade their rough, unpolished stones through different intermediaries and local brokers, who in turn sell the diamonds to international dealers who participate in different diamond bourses around the world.[431]

Once in international markets, the stones may be traded numerous times before reaching jewelry manufacturers or final consumers. The cutting and polishing may also occur at different times during the trading process. Sometimes, local traders are also versed in cutting and polishing, while others prefer to arrange for cutting in other places.

The diamond distribution chain can be long and complicated, as participants tend to be in different locations and most transactions consist of time-inconsistent exchanges (as opposed to simultaneous exchange). However, the networks of merchants –both at the domestic and international levels- are well organized and operate very efficiently, as we will see *infra.*

[430] United States Geological Service, Ivette E. Torres, The Mineral Industry of Venezuela at 1 (2001)

[431] The most important diamond centers are those of Antwerp, New York, Mumbai, Hong Kong and Israel.

According to official accounts, the Venezuelan diamond sector provides direct employment to approximately 2,000 people and to roughly 8,000 in an indirect way.[432] Local intermediaries are a much smaller group (less than 100 people), and finally, international dealers who operate in Venezuela are about ten, some of who work exclusively for large multinational diamond companies or other important wholesale merchants, whereas the rest are independent. Local diamond cutters and jewelry manufacturers are also considered to be part of the industry. We do not know their exact number but our estimate is that they are a smaller group than local intermediaries.

The average profit margin in the diamond trade is only around 5% in each phase of the trade route, but the return of the investment is quick, which makes it a very attractive business. A single stone usually undergo through multiple transactions, generating profit for many intermediaries along the way and easily multiplying its value before it reaches the final consumer.[433]

Miners extract the diamonds using their own resources and usually have to bear the entire direct costs and risks of their operation. Those who work legally – through a government's concession- also have to pay a 4% surface tax, but official

[432] Barbara Rodriguez, paper presented at the preliminary workshop of the Annual Conference of Mining Ministries in Caracas, at 50 (2000)

[433] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 117 n. 2 (1992) ["the markup from mine to consumer is estimated to be between 200 and 400 percent"].

monitoring is generally inefficient and only a few comply with it.[434] Even though miners usually transact with the same buyers (local brokers), most of their dealings take place through simultaneous exchange, that is, their sales are in cash, many times in U.S. currency which according to some of our informants, is a way for protecting themselves from the fluctuation and devaluation of the local currency.

Local brokers, on the other hand, act as middlemen between miners and dealers. They also face important risks since the transportation of the money and stones to and from the remote areas where the mines are located is very dangerous. In general, each broker works almost exclusively for the same dealer, who is also their connection with the outside market. Some local brokers also have expertise in cutting and polishing, so dealers employ them occasionally for these tasks as well.

Diamond dealers, in turn, are generally perceived to be on the safer side, since they almost never deal directly with the miners and don't need to travel to dangerous places in order to conduct transactions, but they still face some risks. One side of their business is mainly done with local brokers, who are well-known and trusted within the local diamond community.[435] But dealers also have to face local authorities, like the National Guard, whose officers often "confiscate" diamonds and other precious minerals with the argument that taxes were not duly paid by the miners, or that a

[434] The inefficient governmental control on the mining process is actually viewed as positive by miners since it allows them to run their operations without anyone overseeing it, and they don't have to worry about complying with environmental or technical regulations.

[435] Usually brokers are members of close-knit communities and are simultaneously tied with relationships of different content (common religious affiliation, kinship or long life friendships).

particular stone has been extracted illegally. Also, in occasions, dealers help finance miners and local intermediaries by giving them cash advances. And very frequently they offer incentives to some miners in order to maintain exclusiveness over a particular mine or production.

Most dealers work on their own or as part of a family operation, and even though in this latter case they generally observe some generational or social hierarchies (e.g. family elders) there is a lack of vertical integration among group members.[436] On the other hand, some dealers are formal employees of firms, and as such are constrained by their employer's directives. Being part of a large organization gives them security and also facilitates their entrance to certain markets.[437]

Each dealer employs at least two different local brokers or intermediaries to purchase rough diamonds from miners. The relationship between dealer and broker is generally based on trust, but as most of the transactions take place by simultaneous exchange, thus allowing little or no room for cheating, it is relatively low risk. On the other hand, dealers have to interact with other brokers, with their foreign associates or

[436] Another interesting feature that we observed among diamond dealers, that is also pervasive in the larger social context in Venezuela, is the use of *fictive kinship*, that is, the treatment of others as if they were blood-related or had actual kinship in common with us, which also entails giving them kinship titles (e.g. calling them uncle, cousin, brother, godfather, or *compadre*). For an elaboration on how fictive kinship interacts with trust, see, KAREN S. COOK, RUSSEL HARDIN AND MARGARET LEVI, COOPERATION WITHOUT TRUST?(Russell Sage Foundation 2005)

[437] Interview with Venezuelan diamond dealer (employee of European company), in Caracas, Venezuela, (Apr. 2003)

partners, and more importantly, with merchants and members of the diamond bourses to which they belong at the international level.

DEALERS AND THE INTERNATIONAL DIAMOND MARKET

The vast majority of international diamond merchants are affiliated to at least one of the twenty five bourses that operate in the different markets around the world. Diamond bourses are clubs organized to serve as secure trading places for its members, and also as information exchanges.[438] Entrance to bourses is generally limited by strict admission policies, and their members enjoy not only economic advantages but also prestige and other reputational benefits.[439]

As part of their goal of ensuring a secure trading environment for its members, bourses also offer an institutional framework for dealing with disputes that arise from transactions among diamond merchants. As we will explain later, conflicts are commonly settled through the use of private arbitration, but compliance is achieved with the help of other social or community-based complementary mechanisms.[440]

[438] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 121 (1992)

[439] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 121 (1992)

[440] As we described *supra* (see, page 61) the ability to facilitate the informal enforcement of incomplete contracts and to deal with the disputes that arise from it, is one of the most salient features of close-knit social networks where "effective retaliation (is) facilitated by close social ties and the availability of low cost information concerning one's trading partners". See, Samuel Bowles and Herbert Gintis, *Optimal Parochialism; the Dynamics of Trust and Exclusion in Networks* 3 (2000)

Even though several cities around the world host diamond bourses, the most significant markets are those of Antwerp, London, Israel, Mumbai and New York. Among these, Antwerp is the largest and its importance can be traced to as early as the 15th century when many Jewish diamond merchants settled there after being expelled from Spain and Portugal during the inquisition period.[441]

Antwerp's market comprises four interconnected bourses, in which at least 1,600 family-based companies operate.[442] This market currently reports annual earnings of approximately 23 billion dollars.[443] Antwerp is also the seat of the World Federation of Diamond Bourses (WFDB), which was founded in 1947 "to protect the interests of the affiliated Bourses and their individual members, and to further the amicable settlement or arbitration of differences and disputes between the individual members of the affiliated bourses and between the affiliated Bourses".[444]

[441] Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 43 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/; see also, RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 24 (2002).

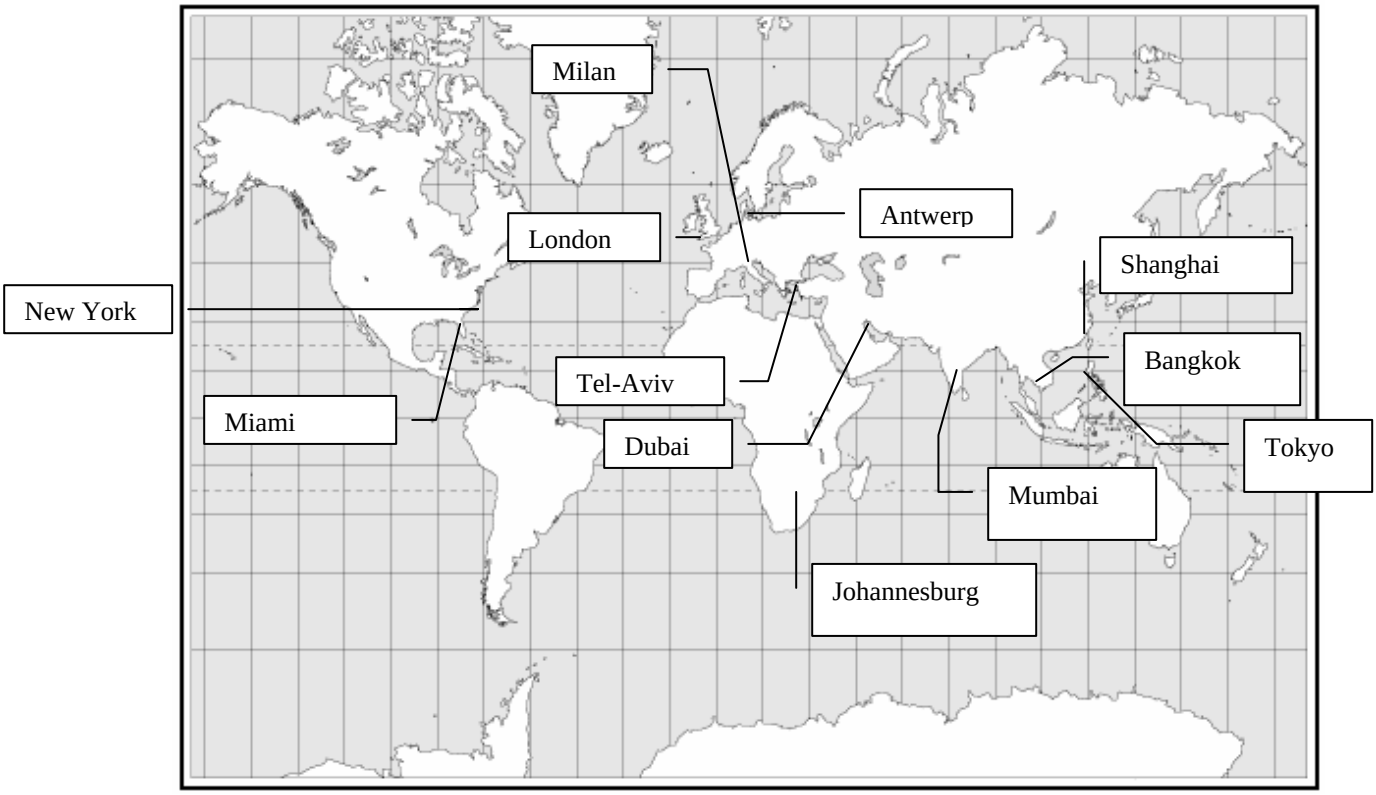
[442] Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 44 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[443] See, http://www.hrd.be (last visited, October 1, 2004)

[444] World Federation of Diamond Bourses, By-Laws, Art. 2. Available at: http://www.worldfed.com/website/bylawsandinnerrules.html (last visited, May 14, 2006)

Table 6

DIAMOND BOURSES AROUND THE WORLD



Source: World Federation of Diamond Bourses (WFDB)

Diamond bourses have their own regulations regarding admission requirements, trade rules, and dispute processing provisions. However, those that belong to the WFDB are bound by reciprocity agreements which allow their individual members to trade in any of the other affiliated bourses.[445] In addition, the Federation

[445] See, WFDB Inner Rules, Art. 1.a and 1.b. Available at: http://www.worldfed.com/website/bylawsandinnerrules.html (last visited, May 14, 2006)

also provides assurance that affiliated bourses will assist in enforcing arbitration rulings rendered in any of their peers.

Diamond cutters and polishers, on the other hand, are also organized in different associations, which in turn form the International Diamond Manufacturers' Association (IDMA). The IDMA was founded in 1946 and is currently comprised of 12 diamond associations that operate around the world. In 2000, IDMA and WFDB joined forces to create the World Diamond Council (WDC) with the objective of working with governments and different sectors of the civil society in order to prevent the "conflict diamonds" from entering the legitimate market.[446] As a result of this effort, the WDC, the DeBeers Diamond cartel[447] and 44 other participants representing all major rough diamond producing, exporting and importing countries enacted a set of regulations known as the The Kimberley Process Certification Scheme (KPCS)[448] which is believed to have played a positive effect in the deterrence of illegal mining and trade.

[446] See, http://www.un.org/peace/africa/Diamond.html (last visited, May 15, 2006) ["Conflict diamonds are diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council."]

[447] The De Beers is the cartel that has controlled the majority of the world's diamond production since the late 1800s. It was originally founded by Cecil Rhodes in 1881 under the name De Beers Mining Co. , and a few years later became the DeBeers Consolidated Mining Co. See, RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 28-38 (2002).

[448] See, http://www.kimberleyprocess.com:8080/ (last visited, May 15, 2006)

Diamond Transactions.

Differently from what occurs at the local level in Venezuela, international diamond dealers do most of their transactions by credit.[449] It helps them to balance their inventories and to overcome frequent liquidity constraints.[450] "Without credit, the international diamond market wouldn't move at the same pace, if at all", one of our interviewees expressed.

Credit is the only possible way to transact for most dealers, as it often takes them at least several weeks or months to sort, cut, polish and re-enter into the market the rough gems that they purchase from other dealers. Besides, many times dealers do not have enough cash flow to cover the value of the gems that they purchase. It is also customary to allow interested dealers to examine the gems before deciding to purchase them.

As we learned from our interviews, it is fairly common for a merchant to be in possession of hundreds of thousands of dollars worth of diamonds before actually buying them. Dealers commonly let other diamond merchants take many "parcels"[451]

[449] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 117 n. 2 (1992)

[450] Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York,* 13 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[451] "Parcel" is the term commonly used among merchants to refer to the stones, which are usually kept in a small folded piece of paper. See, RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 94 (2002).

with them during several days for examination, with no security other than their own word. Trust and personal integrity are paramount to the success of the business.

During the examination period, the prospective buyer may offer the stones to someone else[452] or simply keep them for his own inspection. If he decides to go ahead with the purchase, he will start the bargaining process by making an offer to the seller, who almost never accepts at once, but rather makes a counteroffer, and so forth.

Dealings with the Cartel are different. The De Beers offer its stones only to a selected number of dealers, known as sight holders, in presorted boxes at a nonnegotiable price which has to be paid seven days after the sight.[453] Dealers are then responsible for sorting, cutting, polishing and selling the stones into the market, which takes them approximately three to four months.[454] In other cases, parties are free to decide the terms under which they do their dealings but some essential formalities are always followed.

The bargaining process occurs like in any ordinary negotiation. Parties make offers and counteroffers about the price, terms of payment and so forth. But when the

[452] Even though this is similar to a brokerage in the sense that the dealer is just intending to be a go-between among the seller and a prospective customer, it is also different in the sense that the dealer is merely securing that he has a customer for a particular gemstone, or he may be just testing the market for that particular piece.

[453] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 118 (1992)

[454] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 118 (1992)

moment of reaching an agreement has arrived, both parties shake their hands while reciting the Yiddish words *mazal u' bracha* (good luck and blessings). This is followed by the exchange of a small piece of paper in which the price and the due date agreed upon are written. Sometimes, an additional symbolism is used to signify that a deal has been reached: the sealing of the envelope that contains the gemstone.[455] When the parties reach *mazal* there is no room for withdrawal or modification in the terms of the transaction, which is considered binding.

In general, the level of compliance is very high, since a party's failure to honor the terms agreed upon has adverse consequences of severe nature. It does not only affect the merchant's reputation in front of other diamond dealers, but also impacts the dealer's immediate family circle and often generates social alienation. Merchants with bad reputations are denied the possibility of participating in future transactions.[456]

Most of the norms followed by diamond merchants are based on Talmudic principles of justice and fairness. After all, Ultra-Orthodox Jewish have dominated the

[455] In some markets, like New York, the sealing of the envelope containing the gemstone occurs before the parties give each other *mazal*. Sealing the envelope in these cases only signifies that both parties have agreed on the price and other conditions but the gemstone is still subject to official weighing in the club premises. This is called a "sealed offer" or a "closed cachet". Weighing shall occur before 1pm of the following day in which the parties closed the envelope, and only after this occurs *mazal u'bracha* is recited, thus completing the transaction. See, RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 95 (2002).

[456] In this manner, the prevailing social norms of the diamond community "work to support efficient outcomes in frequent transactions" and "provide proper incentives to the members in every respect. Thus, not only are deviators from the desired behavior punished, but a person who fails to punish is in turn punished". Michihiro Kandori, *Social Norms and Community Enforcement*, 59 REV. ECON. STUD. 63, 64 (1992)

trade for centuries,[457] and have therefore shaped the way in which the industry operates. In general, diamond merchants –Jewish and non-Jewish- follow the same strict ethical standards to conduct their dealings.[458]

The application of Jewish law principles is extended to the ways in which disputes arising from diamond transactions are dealt with. In this industry, as also occurs in other sectors dominated by Jewish merchants, private arbitration is the most preferred method for processing disputes, and it has been used among Jews since at least the second century, after being adopted as a substitute for the courts (*Beit Din*) that, until then, had exclusive jurisdiction over grievances of all kinds among Jewish parties.[459]

Historically, the use of arbitration among Jewish people gained momentum, as a result of the *Bar Kokhba* revolt[460] when Jewish courts as other official institutions

[457]Some have traced the involvement of Jewish in the diamond trade as back as the 11th century. See, Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 6 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[458] It is interesting to observe, though, how the *content* of one tie (common religious affiliation) influences the content of another one (common business interest) in the relationship among diamond dealers.

[459] The prohibition imposed on Jewish disputants for using secular courts (*arka'ot*) is still in force to this date, but mostly observed by ultra-orthodox Jewish. Jewish parties are expected to channel their civil disputes through their own courts (*beit din*), which are also available to non-Jewish litigants who submit to its jurisdiction. The use of secular courts by Jewish is considered as an act that desecrates God's name (*hillul hashem*). See, ISRAEL GOLDSTEIN, JEWISH JUSTICE AND CONCILIATION, xvi (1981); and, also, 1 MENACHEN ELON, JEWISH LAW 14 (1994).

[460] The *Bar Kokhba* revolt, also known as the Second Roman-Jewish war, was a rebellion by the Jewish of Judea with the goal of establishing a sovereign Jewish state. The rebels were brutally crushed by Roman armies, and its major consequence was the suppression of political and religious authority. It took place between the years 132 and 135. See, H.H. BEN SASSON, A HISTORY OF THE JEWISH PEOPLE.

ceased to operate, and religious authorities allowed people to appoint their own judges (arbitrators), in panels of three, one being designated by each of the two contending participants, and the third -presiding member- being a Rabbi that had leadership within the community. Over the centuries, Jewish merchants have utilized arbitration almost exclusively for disputes among themselves and also for those involving non-Jewish parties, who have increasingly become familiarized with this mechanism and the substantive rules drawn from Jewish religious institutions.

In the particular case of the diamond industry, arbitration is becoming widely institutionalized. Today, most bourses and similar organizations (e.g. WFDB and DDC) have adopted arbitration rules in their by-laws and require their members (regardless of their national origin or religious affiliation) to use it exclusively.[461] But even before the adoption of these formal arbitration rules, the utilization of a different dispute processing method seems to be out of the question for diamond merchants.

As one of our interviewees said, "Everybody in the (diamond) business knows that there are 2 cardinal rules: the first one that you try to avoid controversy and disagreement. After all, this is our way of making a living and we are all together in

(Harvard U. Press, 1969) Also see, B. Isaac & A. Oppenheimer, *The revolt of Bar Kokhba: ideology and modern scholarship*, 36 J. JEWISH STUD. 36, 33-60 (1985)

[461] As an example, pursuant to section A of article 4 of the World Federation of Diamond Bourses' Inner Rules (Submission to Arbitration)"every member of a Bourse affiliated to the WFDB shall submit to exclusive adjudication of a dispute involving a member of a different bourse affiliated to the WFBD, as set out hereunder". A similar provision seems to exist in the by-laws of New York's Diamond Dealers Club (DDC). See, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 120, 125 (1992)

trying to reach the same; and the second, is that whenever conflict is inevitable, the only way to resolve it is through arbitration, and nobody is supposed to challenge what the arbitrators say. This is not written anywhere, but we all know about it. It is what keeps us together".

THE BLUE DIAMOND DISPUTE: ARBITRATION AMONG DIAMOND MERCHANTS

Disputes related to diamond dealings are very rare,[462] but they still occur, and the reasons are varied. As the particular circumstances involving diamond-related grievances are usually handled in a very secretive manner and the processes are dealt with behind closed doors, there is no way for knowing if there is a particular kind of dispute that occurs more often than others, or about the nature of the claims, and so forth. However, our conversations with merchants led us understand that the most common disputes that arise and are therefore brought to arbitration are based on lack of payment, or disagreement about the quality of the goods (gemstones).

In order to show how the arbitration system works, in the next paragraphs I will describe a real dispute involving Venezuelan diamond dealers. I will refer to it as the blue diamond dispute, and while the names of the parties are fictional, the facts and other circumstances surrounding the case are based on true information obtained from several interviews with the interested parties.

[462] In Lisa Bernstein's study about the New York's diamond industry, for example, it is reported that the DDC's arbitration system handles about 150 disputes each year, which is a fairly small number if we take into account that the DDC has approximately 2,000 members who –according to FCC estimates- conduct between 700 and 800 transactions in any given day. See, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124 (1992) There is no available data about other diamond centers, but our interviewees with diamond dealers seemed to confirm that, in general, disputes are scarce.

Klaus, a non-Jewish dealer of Belgian origin, with many years in the diamond trade, conducts most of his dealings in Venezuela where he has resided since he was young. He buys most of his gems from local brokers and with some exceptions, prefers to trade with locally cut and polished diamonds. He explained that given the relatively small size of the Venezuelan diamond market –as compared to other countries- there are, however, good cutters and polishers. Notwithstanding, he mentioned that "difficult stones, are better sold rough and uncut, but the profit margin is significantly reduced" and this is why, on occasion instead of selling rough gems, he and other merchants commission foreign cutters to work on their gems, which they trade after being polished.

Among his inventory of polished stones, Klaus happened to have an unusual and valuable gem: a ten-carat[463] blue diamond.[464] Aaron, another dealer who became interested took the gemstone aside and examined it closely –diamond dealers have an expertise in appraising stones- and decided to make an offer. After an intense bargaining process, both parties agreed on a price of US$200,000 while shaking their hands and mutually reciting *mazal u'bracha* in order to seal their deal. Aaron agreed

[463] Carat (ct) is the metric standard unit of weigh for precious stones (1 carat =0.2 grams). The weight of a stone is considered the most important factor in determining its value and is part of the 4Cs test devised by the Gemological Institute of America (GIA) to appraise diamonds and other gems. It is also different from the term karat (sometimes also as "carat") used as a measure of the purity of gold and aluminum alloys.

[464] The color of a diamond is determined by the chemical impurities and structural defects in the crystal, and is the second most important factor –after the weight- in affecting the value of a gemstone. The scale used worldwide for grading the color of diamonds was developed by Gemological Institute of America (GIA) and ranges from "D" (colorless) to "Z" (yellow or brown). Diamonds whose color intensity goes beyond Z are called "fancy diamonds" and are graded in a different scale.

to pay the price via wire transfer according to the instruction given to him by the seller in a small piece of paper.

Several days passed and the seller did not receive the funds from the buyer. The seller contacted him in order to find out what happened, and the buyer said that he had discovered that the diamond's color was artificially enhanced, and that he would not pay such a price for an artificially colored gemstone. Klaus disagreed insisting that the blue color was natural, but Aaron did not change his mind. The seller immediately contacted the diamond bourse to which both dealers belong and filed a claim to initiate arbitration.

A three-member panel was formed from prestigious representatives of the diamond community. The panel set a date and time for the arbitration to take place in Antwerp. Both parties were expected to attend accompanied by a colleague, but not a lawyer. The day of the audience, both parties were present. The arbitrators gave each a limited time to present their arguments. The claimant reaffirmed not having received payment, whereas the respondent alleged that he decided to withhold payment because the gemstone was artificially colored. Furthermore, the buyer alleged that the seller failed to give him a Diamond Grading Report[465] along with the gemstone, and requested that the panel dismiss the claim.

[465] The Diamond Grading Report (DGR) is issued by the major gemological societies (e.g. Gemological Institute of America, American Gemological Society, and the European Gemological Laboratory) and it contains the key characteristics like measurements, weight, shape and value of a particular gemstone.

The panel clarified that exchange of a Diamond Grading Report was not customary and that according to industry standards there was no obligation for a seller to furnish the buyer with a DGR unless both parties had agreed about it beforehand, or had decided to make it a condition for that specific transaction. The panel members also reaffirmed that diamond merchants are experts, which makes it highly unlikely for them to be easily deceived about the characteristics of diamonds.

Furthermore, as the panel members said, diamond dealers are usually allowed to examine the stones sufficiently before agreeing to purchase them, so their decisions to buy are always well-informed. These, the arbitrators believed, were enough reasons to dismiss a claim like the one in this case.

However, the arbitrators also acknowledged that even though most characteristics of diamonds are easily perceived and accurately detected by an expert's naked eye, some features (i.e. color) may be altered as a result of artificial treatments or modifications,[466] and significantly affect the value of a gemstone. Natural colored diamonds are generally sold at a higher price than artificially enhanced ones, so it is expected that sellers disclose this circumstance and any other that may have an incidence in the price of the stone.

[466] Nowadays, there are several methods for altering or modifying color and other features of diamonds, the most common being the treatments with irradiation or by high pressure/high temperature (HPHT). As the number of treated diamond entering the market has been increasing in recent years, the WFDB and IDMA have taken measures and adopted rules in order to deter fraudulent transactions. Alteration or modification is allowed under some circumstances, but it has to be fully disclosed before any sale takes place.

The panel affirmed that dealings in the diamond industry are based on the parties' good faith and that trust is the community's cornerstone. They agreed that the basis for the Aaron to be concerned seemed plausible and, thus ordered an evaluation to be conducted on the allegedly artificially-colored diamond by the laboratory of the Gemological Institute of America (GIA).[467] If the exam showed that the color of the stone had been artificially altered, the seller would be severely sanctioned, the sale would be canceled and the buyer entitled to a refund of the purchase price and to seek compensation for any damage that he might have suffered.[468] If, on the other hand, the examination showed that no alterations were produced to the stone, the claim would be plainly dismissed.

The diamond was send to the GIA and after several days the results indicated that the stone was, indeed a naturally-colored diamond and that no artificial modification was detected. Based on this, the panel dismissed the complaint ordering

[467] The Gemological Institute of America (GIA) is a non-profit organization devoted to conducting research and providing education in the field of gemology. Founded in 1940, the GIA has become famous for developing detection techniques for treated or altered diamonds and for introducing grading methodologies for diamonds in the 1950s. Its headquarters are located in Carlsbad, California, but it has branches in eleven different countries. The GIA laboratory is in New York City. See, http://www.gia.edu/ (last visited, May 24, 2006)

[468] In 1993, The Judicial Committee of the World Federation of Diamond Bourses passed a resolution specifically intended to deal with treated diamonds. The approved text indicates: "The fact that diamonds have been artificially infused with foreign matter, or are coated, or are wholly or partially synthetic, or have been treated by irradiation, must be disclosed as such when offered for sale and in writing on the invoice and memorandum. Any breach of the above by a member of an affiliated Bourse shall be regarded as fraudulent". See, WFDB, Resolutions and Recommendations, Resolution passed by the 26th Congress of the WFDB in Antwerp, 1993. Similar resolutions dealing with treated or altered diamonds have been adopted during following WFDB's congresses in 1998, 1999, 2002, 2003 and 2004. See, World Federation of Diamond Bourses, Summary of Resolutions and Recommendations. Available at: http://www.worldfed.com/website/bylawsandinnerrules.html (last visited, May 14, 2006)

Aaron to pay the price to Klaus and to bear the costs of the arbitration, which he did the next day.

After the proceedings were over, both parties met for lunch in a public place, frequently attended by members of the diamond community, so others could see that the issue was dealt with and resolved satisfactorily, and that there was no rift between them.[469] "These things happen, and after all, people make mistakes and we need to move on with our business" Klaus said when we asked him about the reason for agreeing to do this in spite of a seemingly unfair claim brought against him. He continued saying that "being redeemed in the eyes of the community is very important for people in the position in which Aaron was; after all, reputation is perhaps the most valuable asset of a diamond dealer. When the arbitration was over, we needed to show others that there were no hard feelings and that people could still trust Aaron, who probably made a mistake by misjudging a fellow merchant and accusing me of selling him a treated diamond. That could happen to anybody, so you have to show some sort of empathy towards other colleagues". This gentlemanly behavior seems to be common among diamond merchants as it was reaffirmed by other interviewees when describing to us different situations.

[469] By publicly displaying themselves together in front of other community members, both disputants facilitate disseminating information about their dispute being, in fact, resolved; and also contribute to mitigating gossip and false rumors about their previous disagreement. In some way, this also helps to redeem the disputing parties in front of their peers and gives assurance that they are still reliable to do business with.

Even thought the proceedings took place behind closed doors, "almost everybody in the community knew what had happened between us", as one interviewee asserted. Rumors and gossip quickly spread across the trading floor and even among members of the larger community.

WHY DIAMOND MERCHANTS COMPLY?

As reported in previous research on this topic, arbitration in the diamond industry is generally believed to be effective and the level of compliance with the decisions is tremendously high;[470] over the years, arbitration has contributed to maintain the self-sufficiency of the diamond community and merchants seem to be particularly proud about how it works. Some have even called diamond arbitration "the crowning glory of the trade".[471] As in the case of the business associations of Chinatown studied by Doo,[472] diamond arbitrators lack the power of enforcing their own decisions and of imposing physical or legal sanctions, but interestingly,

[470] RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 185, 208 (2002); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 6 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[471] RENÉE ROSE SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 186 (2002).

[472] Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627, 645 (1973) ["The associations claim only a moral authority of enforcement. But very few litigants refuse to abide by the association's decisions. No physical coercion of any kind is used to secure compliance with a decision although there may be heavy reliance on criticism, ostracism, concern for face, and psychological dependence. There may also be enforcement through economic means"].

compliance with their rulings is almost always voluntary.[473] What seems to drive diamond merchants to cooperate is the presence of other informal mechanisms inherent to the diamond community, which create important incentives for compliance as we now turn to explain.

The first and foremost important feature that promotes cooperation is *reputation*. As one of our interviewees asserted, "Reputation is one of the most valuable assets for a diamond merchant". A good name is what allows a dealer to gain access to certain goods like obtaining credit, being offered better gemstones to sell, and also to get other social benefits as a member of the community. But, how does a merchant obtain a good reputation?

Most diamond merchants are part of an intergenerational family business. As one of our interviewees, explained, being a diamond dealer for him is part of following a tradition that has been going on in his family for at least four generations. "Diamonds is the only thing that my father and grandfather always talked about since I was a little boy", he said. And when trying to convey the importance of being a diamond merchant, he explained: "Dealing stones is my life, and I hope that some of my children are willing to carry on with the tradition. I went to college, got a professional degree and all that, but this is something that you learn in a different way, and it's in your veins. I must recognize that dealing (diamonds) is, indeed, a lucrative

[473] However, with the increased inclusion of formal rules in the by-laws of different diamond bourses, institutional are vested with power to impose formal sanctions (e.g. suspensions, expulsions) to those who violate the rules of trade or do not comply with decisions of internal bodies.

activity, but this is not necessarily about the money; there is more to it, you know (…) In fact, most of the people that I know in this trade have it in their blood, and I couldn't picture any of them doing something else for a living. They are too, carrying a family tradition, and most of them are Jewish also; though, I am not (…) we, diamond merchants, all belong to a small community where everyone knows, and to some extent, care about each other."[474]

These inter-generational bonds contribute to the formation of a dense social network of individuals tied by close-knit and multiplex bonds, which in turn makes the diamond sector a very efficient community. The fact that most dealers conduct business with the same parties for many years and that, very often, these happen to be the same partners or the descendants of those with whom their ancestors conducted business in the past is what helps them build credibility and therefore, a reputation.

The parties' main incentive for doing business with each other is based on their history of mutual cooperation throughout previous dealings, which also builds their expectation for future cooperation,[475] even if the monetary incentives to defect are high.[476] Credibility is based on the belief that the other party will continue to comply

[474] Interview with a Venezuelan diamond dealer #2, Ciudad Bolivar, Venezuela (April, 2003).

[475] The study of cooperation is central to the field of game theory, and has also become a recurrent notion in the negotiation literature. For a basic description of cooperation within the context of the prisoner's dilemma, See: ROBERT AXELROD, THE EVOLUTION OF COOPERATION (Basic Books, Inc., Publishers 1984)

[476] As Richman indicates, one of the fascinating aspects of the diamond community rests on the features that induce diamond merchants to cooperate with each other in spite of the "profound attractions to cheat". As he describes "for diamond transactions, a single defection –namely, stealing the diamonds-

as he and other members of his family have done in the past.[477] Dealers are not only regarded because of their individual character but most importantly, because of their family identity, or their belonging to a certain group.[478]

The reputational capital that diamond merchants are able to build as a result of their ancestral bond reinforces the parochial behavior among members of the network,[479] and has a dual function. First, it gives them an important advantage over those who are not backed by family tradition, and, second, it maintains an entrance barrier to newcomers.[480]

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produces a one-time gain that overwhelms future profits and causes the standard reputation mechanism to break down". Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 4-5 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[477] ROBERT AXELROD, THE EVOLUTION OF COOPERATION 12 (Basic Books, Inc., Publishers 1984) ["What makes it possible for cooperation to emerge is the fact that the players might meet again. This possibility means that the choices made today not only determine the outcome of this move, but can also influence the later choices of the players."]

[478] Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 25 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

[479] For a description of parochialism in the context of social networks, see, page 61 *supra.*

[480] See, Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 31 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/ ["The value of a family's reputation has three important economic implications. First, if an individual entering the trade is supported by a family reputation, then he has an important advantage over an identical entrepreneur who has no family connection. The result is a powerful barrier to entry (…) second, and most obviously, the family-based nature of businesses secure future riches for relatives holding entry-level positions. (…) The third economic consequence to family reputations, and the one most critical to sustaining cooperation for multiple generations, is that reputation can be both bequeathed and leveraged"].

Traditionally, most of these families have also shared the same religious, moral and cultural values,[481] which contributed to set the conditions for another important characteristic of the diamond sector: *social cohesion.*[482] Historically, diamond dealers have been part of closed, insular communities largely dominated by ultra-orthodox Jewish, who extended their religious and social norms to their business interactions with other members of the community. Whenever non-Jewish merchants participated, they also adapted to the prevailing norms and followed the same standards of their Jewish colleagues, not necessarily because they decided to embrace Jewish religious beliefs, but rather because they viewed these norms as efficient from a business perspective.[483]

Today, in some parts of the world, other ethnic groups have become more active in the diamond trade than Jewish merchants,[484] but still under these circumstances, the same idea of cohesion persists and many of the norms developed by Jewish merchants are widely followed by other diamond merchant communities

[481] This is a typical feature of strong ties in social networks.

[482] See, note 157 *supra.*

[483] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992)

[484] This is the case, for example, of the diamond communities of Mumbai or Hong Kong which have been gaining preeminence in the world market over the last decade. However, it is also true that Jewish merchants retain some important presence in these markets, which has contributed to the maintenance of their indigenous institutions. See, Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 47 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

regardless of their religious affiliation, and diamond trading clubs have played an important role in preserving this equilibrium.[485]

As diamond merchants and their families became part of a common social setting, and got involved in multiplex relations with each other, their interaction also contributed to the building of institutions.[486] In addition, the presence of common ethical norms has acted as an effective device of social control, and community institutions have continuously played the role of enforcers, thus making it unnecessary for external enforcement mechanisms (i.e. state courts) to be used.

Diamond arbitration emerged and has always operated entirely independently from public institutions and its widespread acceptance within the industry is not related to the perceived inefficiency or malfunctioning of state courts. Diamond merchants prefer to use their own arbitration system because it embodies the values and principles that guide their industry, and not necessarily because they have compared its perceived efficiency with that of other systems. In other words, regardless of how cost-efficient and quick any other mechanism could be, diamond merchants would still prefer their own arbitration. In this sense, we cannot say that they have opted-out of

[485] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992) ["…yet, even as the force of the old enforcement mechanisms of religion and secondary social bonds began to disintegrate, a network of trading clubs, designed to promote the dissemination of information about reputation and socialization among members, emerged to fill the gap".]

[486] Sociologists have used the adjective *gemeinschaftlich* (Ger. Joint, united, collective) to explain the small clusters, small scale communities in which people interact with each others. See, Ray Forrest and Ade Kearns, *Social Cohesion, Social Capital and the Neighbourhood*, 38 URBAN STUDIES 2125, 2127 (2001)

the official legal system, because they have not even considered whether it applies to them.

The disputes that are brought to arbitration in the diamond industry emerge between members of an insular community, as a result of transactions that do not affect third parties. All participants in the arbitration proceedings (including the neutrals) are members of the same group, and as such, are familiarized with the industry norms and also with the market. But more importantly, the all have a reputation to preserve. In this sense, arbitration serves more as a "way of maintaining the accuracy of reputations" than a mechanism for enforcing contractual obligations.[487]

The diamond industry offers the optimal conditions for the emergence of private ordering. It is a community whose participants benefit from a mutual long-term relationship and enjoy important economic efficiencies, which in turn, gives them an incentive to cooperate indefinitely. Diamond dealers comply voluntarily with the decisions of community institutions and avoid cheating in their daily transactions with other merchants because by cooperating they reassure their involvement in future transactions, which allows them to obtain a long-term benefit that outweighs the potential gain from a single defection. This offers yet another case in which social networks play a decisive role on how disputants choose to process their conflicts.

[487] Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, 30 (Harvard Law School's John Olin Center for Law, Economics, and Business, Discussion paper No. 384, 2002) *available at* http://www.law.harvard.edu/programs/olin_center/

CHAPTER EIGHT

YOU HAVE AN APPOINTMENT WITH THE DEVIL: DEBT COLLECTION AGENCIES AND THE PROCESSING OF BUSINESS DISPUTES

"The Devil doesn't break your bones, or shoot holes in your kneecaps. He embarrasses you to death".[488]

The current chapter describes the use of debt collection agencies that employ shaming techniques as a way to enforce contractual obligations. It also attempts to explain the incentives that business disputants have for choosing this mechanism to channel their conflicts, in spite of its clear tension with the formal legal system.

As we will see, the use of debt collection agencies for the processing of business disputes represents an entirely different form of private ordering than the one portrayed in the diamond industry. Debt collection agencies are almost never used among members of closed-knit communities or among individuals who care about the future of their relationship. Instead, debt collection agencies are employed as a last resort, generally when the social ties among the parties are damaged and there's no interest in preserving a future relationship. However, both cases have in common the manipulation of reputation as a way of inducing parties to comply.

The research that informs this chapter was also conducted using a case study approach. The data was obtained through different methodologies as well. First, we

[488] Mike Lee, *Bedeviled by the Devil: Unusual Venezuelan Debt Collector Embarrasses Debtors Into Paying*, ABC News, Aug. 14, 2002

conducted interviews with fifteen people from different groups, Among our respondents were the representatives of three debt-collection agencies that operate in Caracas, seven lawyers (from both local and international law firms) whose firms have used the debt-collection services of the agency that was the focus of our research, Dr. Diablo and five business executives with experience on both sides (3 as creditors, and 2 as debtors) with the collection practices of Dr. Diablo. Our fieldwork was conducted in Caracas, Venezuela during 2003 and 2004. Most of the interviews were conducted face-to-face in Caracas, but at least two took place in the United States where the respondents were located at the time. Our field research was complemented by the review of at least twenty national and international news reports (printed media and video documentary) about Dr. Diablo, and finally, with the analysis of scholarly literature about private ordering.

DEBT COLLECTION AND LEGAL SERVICES

The use of non-lawyers for the enforcement of legal rights has been a common phenomenon in many societies. In some countries, as the United States, laymen were involved in furnishing dispute resolution and other "legal services"[489] even before the bar was organized.[490] As the legal profession began to be regulated in the U.S., most activities formerly conducted by laymen began to be restricted to licensed attorneys. However, some residual areas, like the collection of debts, real estate, trust and tax

[489] By this we mean, services that entail the enforcement of legal rights, although not necessarily furnished by qualified providers.

[490] For a thorough description about the development of the practice of law by laymen in the United States, see, Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 193-95 (1980).

works, or preparation of legal documents -only if no accompanying advice was given- remained outside the scope of the now defined legal profession and could be still serviced by untrained practitioners.[491]

Business corporations monopolized some of these residual areas, and specialized in meeting legal needs that lawyers were not able to meet,[492] and debt collection agencies (DCA) became an important group within a sector that the bar soon perceived as potential competitor. As a result, ample regulation has been aimed to restrict the activities of debt collection agencies (DCA) in the United States.[493] Consequentially, DCA are enjoined from filing lawsuits, giving legal advice of any kind, and in some jurisdictions, even from referring cases to attorneys that would seek judicial remedies on behalf of the creditor. Inevitably, DCA were confined to operating in a different domain than other legal actors (lawyers and the courts) handling cases that are not worth being channeled through courts, normally because of their small value, thus widening the gap that separates them from legal professionals.

DEBT COLLECTION AGENCIES IN VENEZUELA

In Venezuela, on the other hand, the law does not limit the role of DCA, thus allowing them to compete with law firms. Furthermore, it is common for some

[491] See, Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters,* 67 FORDHAM L. REV. 2581 (1999)

[492] Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159-216 (1980).

[493] Examples of this are: at the federal level, the Fair Debt Collection Practices Act 15 U.S.C.A. §§ 1692-1692. At the state level, there are numerous regulations on the subject.

attorneys to offer their services as debt collectors, and conversely for DCA to employ licensed lawyers for these activities, thus creating a wide gray area between legal services and commercial practices.[494]

By taking the form of business corporations, DCA have circumvented some of the limitations imposed on lawyers by the ethical rules that govern the legal profession, such as the prohibition on calculating attorney fees on a contingency basis.[495]

DCA, do not face this limitation because they cannot be regarded as law firms but instead as business corporations; and even when DCA employ attorneys to lead the collection activities and these are the ones providing their professional expertise, the fees are set between the client and the firm (not the individual attorney, who usually works for a salary), therefore protecting the latter from the potential risks of having the agreement declared void.

[494] The consideration of the collection of debts as a commercial activity and not as a legal service is what has permitted the existence of DCA in the United States. The fact that debt-collection practices do not entail the offering of legal advice, the filing of a lawsuit, or any other activity reserved to qualified attorneys, is what has enabled to consider their activities as a commercial practice.

[495] Under current Venezuelan law, any agreement through which an attorney acquires any kind personal interest in the outcome of a given case, either by agreeing to receive a premium, reward or bonus or just by estimating the attorney fees as a percentage of the amount being litigated, is deemed illegal (*pacto de cuota litis*). See, CÓD. CIV. art 1482 (Venez. 1982). Attorney fees are supposed to be considered as *honoraria* and their calculation may only be based on factors that do not depend on the result or outcome achieved on their client's behalf. See, CÓD. ETICA DEL ABOGADO VENEZOLANO art. 39 (Venez. 1985). A contingency fee agreement in Venezuela would not only be subject to a court ruling invalidating it, but would also jeopardize the attorney's license to practice law since it is considered as a serious violation of professional ethics.

Notwithstanding their competitive advantage in this respect, the involvement of DCA in the kind of cases that law firms are usually retained for -like complex legal matters or court proceedings- is very rare. Most DCA are confined to handling cases that are not worth being brought to courts because of their low monetary value. These companies are usually retained to recover small amount debts through the quickest and least expensive manner, which rules out the possibility of using the courts since these are usually slow and costly.

As we mentioned, DCA employ lawyers but not necessarily to bring lawsuits or to initiate other forms of legal action; lawyers are rather used by DCA just to intimidate debtors through letters and phone calls, which according to most of our informants seems to be quite effective. “When ordinary people get a warning letter or a call from a lawyer they realize that the matter is serious, and that the other party is ready to go further, so that leaves them with no option than to just pay. That is why we use lawyers in our company; the mere idea that they are able to initiate a court proceeding and the belief that they know how to apply the law intimidates ordinary people as you would not imagine, even though we are never intending to go to court”, said a debt-collector who has been in the business for several decades.

Lawyers are also used directly as debt collectors by banks, credit card companies, homeowner associations, and retail stores. Another interesting aspect is that DCA usually intervene as the next step after direct negotiation among the parties

has failed, and whenever their collection effort is unsuccessful, the creditors' other option is to simply write-off the debt and absorb the loss.

Notwithstanding the above, among the almost forty DCA that conduct business in Venezuela, we found at least one that did not fit into the general mold. This firm is known as Dr. Diablo's & Asociados, and we now turn to describe it.

WELCOME TO THE PURGATORY: THE DISTINCTIVENESS OF DR. DIABLO'S

Since its inception in 1998, Dr. Diablo's & Asociados has become the most notorious debt collection agency in Venezuela. In the last years, the company has consistently attracted the attention of the local as well as the foreign media; more than a dozen articles have been written about it, and TV reports have been aired in several countries describing its original way of collecting debts.[496] The distinctiveness of Dr. Diablo's rests on the fact that it employs a unique method for harassing debtors.[497] Its collector agents are dressed as the devil, and make their rounds accompanied by an entourage of several other individuals (women in leather costumes, a black-dressed man, a lawyer in a suit) and TV cameras, in order to humiliate debtors and force them to pay as the only way for stopping the mockery. By using this method, the company

[496] See, for example, M. Lifsher, *Company Uses Humiliation to Get Debtors to Pay Up*, Wall St. J., Jun. 25, 2001; Mike Lee, *Bedeviled by the Devil: Unusual Venezuelan Debt Collector Embarrasses Debtors Into Paying*, ABC News, Aug. 14, 2002, http://abcnews.go.com/sections/wnt/DailyNews/LeeCam_DrDiablo020814.html (last visited, Sept. 14, 2002); Corina Rodriguez, *Un Compulsivo Mecanismo de Cobro*, El Universal, Nov. 22, 1998, http://el-universal.com/1998/11/22/22530AA.shtml (last visited, Apr. 3, 2003)

[497] It is worth noting that the use of disguised debt collectors to humiliate debtors is not unique to Dr. Diablo's. We found that in Spain, Portugal, Colombia, and Brazil, similar agencies have existed or still operate.

claims to have effectively recovered six hundred out of seven hundred debts, during the first four years in the business, in other words: an eighty percent success rate.[498]

Differently from what occurs with other DCA, most of the cases brought to Dr. Diablo's are of important monetary value ranging anywhere from US$10,000 to US$150,000. Many of these cases have already been tried in courts with no success, and creditors or their lawyers have decided to refer these to Dr. Diablo's as the last resort. In some others, disputants have bypassed the courts and came to Dr. Diablo's as their first choice, believing that it can offer them better and faster results.

Formally a business corporation, Dr. Diablo's is structured as a law firm. Fifteen attorneys, administrative personnel (secretaries, paralegals, interns), and a team of debt collectors are at its core. Behind the extravagant décor of its offices with neon lights –"welcome to the purgatory", reads the one at the entrance- and red flames painted on the walls, Dr. Diablo's takes its work very seriously and seems to be a well organized business.

The company is very selective in screening its cases. Interestingly, a bulk of its work is referred by law firms –domestic and foreign- and large corporations like banks and credit card companies, that have been unsuccessful in collecting their debts through judicial proceedings, or that simply choose Dr. Diablo's because of its perceived overall efficiency. As an example, the managing partner of a large New

[498] Interview with Rodrigo Herrera, founder and managing partner, Dr. Diablo's & Associates in Caracas, Venez. (Oct. 31, 2002).

York-based law firm told us that Dr. Diablo's has been able to collect debts for them that none of the leading law firms in Caracas was able to help with. "Overall, it has been a very rewarding relationship for both, and we are very pleased with them", he said.

We also learned that at least one multinational law firm has offered Dr. Diablo's to become partners, but this proposition was plainly rejected. During an interview, Dr. Diablo's representatives stressed that "keeping the company's independency is very important", and also said: "We don't want to be seen as belonging to any particular group within the legal area, because even if we normally represent one side of the conflict –the creditor- our role is more that of justice-doers, and some neutrality is required for that".[499]

As part of the screening process, Dr. Diablo's takes special interest in making sure that the documents reflecting the existence of the debt meet the minimum legal standards, as it obviously strengthens their bargaining position when dealing with the debtor. If, after this initial exam Dr. Diablo's decides to take a case, a written agreement is drafted and signed with the client. As with any legal contract, the agreement contains express mention of the parties' duties, their legal rights, collection procedures, fees, and paradoxically, a remedies' clause for any conflicts that may arise from the interpretation or execution of the contract itself.

[499] Interview with Rodrigo Herrera, Founder and Managing Partner, Dr. Diablo's & Asociados, in Caracas, Venez. (Oct. 31, 2002).

Dr. Diablo's works on a contingency fee basis, which ranges between twenty and thirty percent of whatever is recovered. At least fifty percent of the expected fees have to be paid up front by the client, and the remaining balance is deducted from the debt monies once collected. Usually, Dr. Diablo's also attempts to charge the debtor, in which case the creditor's liability is proportionally reduced.

Once hired, Dr. Diablo's starts by performing an exhaustive search of the debtor's assets to determine his or her capacity to pay the debt. It also conducts investigations into the debtor's social profile to see how to attack his or her reputation, in case the debt is not paid after normal efforts. Once this preliminary search is done, two written notices are sent to the debtor's office or residence with a fifteen days interval between each, prompting the debtor to pay immediately, and making it clear that non-compliance will expose the debtor to the visit by the mobile's deadbeat command. On the outside of the envelopes in which the letters are enclosed, it reads: "You have an appointment with the Devil", which has become the company's slogan and it is now familiar to many people since it appears on the numerous billboards posted along the main freeways in Caracas and other major Venezuelan cities. "Most people take our warning as a serious threat, and it is very effective", asserted the company's spokesperson. Some of the debtors that we interviewed were able to confirm this.

The mobile command consists on a crew who travels in a vintage Chevy truck painted with hellfire flames. This crew includes a man wearing a devil's costume, two

women in red miniskirts (the devil's helpers), a Great Dane dog, and a lawyer in a business suit. This procedure is known as the special operation. The presence of an attorney is deemed very important, since he is the one in charge of assuring that any settlement reached meets the legal standards and is duly enforceable. "We usually make debtors sign a document by which they abide by our terms, recognize the existence of the debt, and promise to pay within the timeframe that we negotiated with them. We want them to know that we are serious and that they are legally constrained by what they sign", said the company's spokesperson.

We also learned that most cases settle soon after the second notice is sent, making it unnecessary for the company to use the mobile command. In fact, less than twenty special operations had been carried out since the company opened its doors in 1998 until the time of our interview, but Dr. Diablo's has been especially careful in attracting the attention of the media during these procedures. TV reporters and interviewers get notice in advance so they can be present, so it becomes a big show. When off duty, the mobile unit (the hellfire painted 1950s Chevy truck) is often parked in strategic places along the city (e.g. in front of office buildings, or in large commercial areas) to give people the feeling that Dr. Diablo's is around. "The idea is to make a credible threat" assured the company's managing partner. "Even if we have conducted the operation only a few times, as our car is parked in different places every day the general perception is that we are aggressively out on the streets collecting debts, and that surely boosts our image", he then added.

As for those few cases that cannot be resolved through Dr. Diablo's peculiar methods, there is always the possibility of going back to courts, as the agreement indicates: "When collection is not possible, Dr. Diablo's will inform the client, and recommend an attorney to initiate judicial proceedings". However, this is never a realistic alternative, mostly if we consider that most cases have been precisely referred to Dr. Diablo's because of unsuccessful attempts to get them resolved in courts, or because the creditors don't think that the judicial alternative is viable. "The only cases that we cannot solve are those in which the debtor is really bankrupt, and we don't see the possibility of collecting them by any means", stressed the company's spokesperson. In addition, during an interview with the representative of an important corporation that was not successful with Dr. Diablo's we confirmed that although considered as an option, "going to courts, wouldn't improve the odds of collecting the debt. Dr. Diablo's was practically our last resort".[500]

With such high levels of success, it is easy to understand why Dr. Diablo's clients consider it an efficient collection method. To a certain extent, they also perceive it as a replacement for the court system in the sense that it helps achieving justice. As one of its frequent users explained to us: "Even if courts are the natural forum for these cases; sometimes, Dr. Diablo's serves us better than the courts, which everybody knows are inefficient and corrupt. In some sense, Dr. Diablo's is a good substitute for courts, because it does not only help us in recovering the money, but to

[500] Interview with business executive #14, in Caracas, Venezuela (Nov. 3, 2002).

also get the sense that justice has been served."[501] Dr. Diablo's representatives are also aware of this perception as it came from the interview: "Sometimes people come here seeking for justice to be done, and not only to recover their money; they want to have the debtor recognize his or her wrongdoing and treat us as some sort of judge; from time to time we get the sense that debtors have a similar opinion, since they recognize us not only as representatives of one party, but as outsiders with authority to enforce legal rights, and that is perhaps, one explanation for our success".[502]

Given the harshness of the collection techniques, we originally thought that most debtors would defy Dr. Diablo's undue pressure and challenge the legality of its collection methods. After all, trying to enforce legal rights by harassing people and threatening to damage their reputation clearly violates the law.[503] Even if there is no specific regulation in Venezuela that forbids DCA from employing harassing methods for collection purposes, the honor, reputation, and privacy of individuals are individual rights protected by the Constitution.[504] The law also prohibits the use of private enforcement methods, and deems as a crime taking justice into one's own hands.[505]

[501] Interview with business executive #13, in Caracas, Venezuela (Nov. 3, 2002).

[502] Interview with Rodrigo Herrera, Founder and Managing Partner, Dr. Diablo's & Asociados, in Caracas, Venez. (Oct. 31, 2002).

[503]The illegality of shaming punishment, however, is not an uncontested issue, at least, within the U.S. criminal justice system. In fact, the imposition of these types of sanctions by judges is still apparently legal in the U.S., to the extent that it has become a trend among certain judges to impose shaming punishment (wearing a sign, a t-shirt or a sign) as a substitute for incarceration. Obviously, this has also raised some criticism. See, for example, Ryan J. Huschka, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments* 54 KAN. L. REV. 803-835 (2006).

[504] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRPBV] [*Constitution of the Bolivarian Republic of Venezuela*] art. 60 (Venez.).

In the year 2000, the Caracas Bar Association (CBA) initiated a process geared to impose sanctions on Dr. Diablo's, on the basis that its methods violated the rights of the individuals against whom it acted. The CBA also started a public campaign against the company, but no results were achieved, aside from a public statement condemning the company's practices and recommending further legal actions to be taken. Ironically, the company's representatives viewed this as a positive occurrence: "Such actions didn't hurt the company, which kept conducting its business as usual, and in fact, became more known as a result of this controversy".[506]

Contrary to our initial belief, since the company's inception in 1998, only a handful of debtors targeted by Dr. Diablo's have challenged the company's collection methods through judicial actions, and to our knowledge, none has been able to stop it. Furthermore, it seems that the majority has accepted it and complied with its demands with virtually no resistance.

One of the reasons why debtors respond to Dr. Diablo's methods instead of challenging it through the existing legal remedies could be that, although formally available, these legal remedies are difficult to obtain in practice. The peculiar way in which the judiciary works in Venezuela (the need for contacts in order to have their

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[505] CÓDIGO PENAL DE VENEZUELA [CPV] [*Penal Code of Venezuela*] art. 270 (Venez.).

[506] Interview with Rodrigo Herrera, Founder and Managing Partner, Dr. Diablo's & Asociados, in Caracas, Venez. (Oct. 31, 2002).

cases duly heard and decided), pose critical barriers to those citizens that don't have the proper connections. In this sense, Dr. Diablo's seems to benefit twofold from the malfunctioning of the courts; firstly, because it drives more people to use DCA services as a substitute for judicial collection procedures; and secondly, because debtors are left defenseless against Dr. Diablo's harsh tactics since no legal remedy can be used to fight it effectively.

But perhaps the main reason that makes people abide to Dr. Diablo's is their fear of having their reputation negatively affected. The majority of those who have complied voluntarily with Dr. Diablo's have done it mostly to avoid embarrassment and social humiliation. "In a society like this, where everybody knows who's who, one's good name is not only very important but also irreplaceable. You can obtain and lose material wealth, but in the case of reputation once lost it cannot be recovered", expressed one of our interviewees when describing his decision to pay right away to Dr. Diablo's with no hesitation.

The common story that one hears when interviewing people who have witnessed Dr. Diablo's collection efforts is similar to what is described in the following passage from a report conducted by ABC News: "ABCNEWS went along as Dr. Diablo and his outrageously dressed team descended upon Manuel Gonzoles, a restaurant owner who is surprised and shaken by the unholy visitation. His family owes $12,000 to Diablo's client. As first, Gonzoles refused to pay. But Diablo and his entourage refused to leave. The local police turned a blind eye (…) As they sat down

to negotiate, Gonzoles seemed to be clutching his wallet for dear life. But the embarrassment and humiliation became too much, and within 10 minutes he signed a paper agreeing to pay, and even allowed himself to be fingerprinted by a Diablo assistant".[507]

And even in the cases that don't go beyond the collection letters, people comply just to prevent being subjected to public humiliation and scorn. "You don't have an idea of how embarrassing it is to receive a letter hand-delivered to you by a man dressed as the devil. It is a total disaster. When it happened to me, I just wanted to disappear and make it go away. Everybody from the building's security guards to my co-workers noticed it. Immediately thereafter I just got a loan and paid the Diablo right away. I couldn't bear his pressure anymore", said one of our interviewees.

The threat of harming someone else's reputation in case of defection or non-compliance is a common feature of most private enforcement mechanisms, regardless of the environment in which they operate (close-knit or loose-knit community). However, there is a significant difference between the disputes that are enforced by Dr. Diablo's and the ones enforced within close-knit communities like the diamond sector. In the former, the parties are usually from different social groups and –at least the claimant- do not give value to their future relationship together. In fact, the inexistence of a multiplex relationship between the parties is precisely what drives people to use such extreme retaliation against non-compliant debtors.

[507] Mike Lee, *The Devil Made Me Pay It*, ABC News, Aug. 14, 2002, http://abcnews.go.com/WNT/story?id=130178 (last visited, Jun. 6, 2006).

Nonetheless, people know that reputation is important in a society where many individuals know each other, and that it can be easily used as a bargaining tool. Also, Dr. Diablo's usually acts upon one party's request against the will of the other party.

In the case of diamond arbitration, to the contrary, both parties usually agree on using arbitration to process their dispute; precisely because they value their long standing interaction and want to preserve it for the future. Retaliation also exists but in a more moderate way, and enforcement works smoothly and without the need of extreme measures, because of the presence of other complementary mechanisms (peer pressure, fear of ostracism, common social norms)

In a social environment where personal relationships are paramount, reputation is valued as a precious asset since it facilitates the building of trust and also allows the attainment of certain social and economic advantages. Reputation is generally based on information disseminated among members of a community or social environment about someone's behavior. Particularly among members of the business sector, a good reputation is not only the gateway for trust building but also an important source for individual benefits (e.g. credit, long-standing business relationships, future partnerships and access to better opportunities or markets).

As we explained in a previous chapter, certain social mechanisms serve as vehicles for the dissemination of information about how individuals conduct

themselves and interact with others. We found, for example, that even though, pursuant to the Venezuelan law, arbitrators in general, have the authority to legally enforce their own decisions, in the case of diamond arbitration, the real strength resides in the arbitrators' ability to diffuse information about community members (e.g. by posting decisions on bulletin boards in diamond trading clubs, or through verbal channels) in order to induce cooperation and to deter future wrongdoing.

As a result, people will do their best to ensure that the information propagated about them is positive so they can preserve a good status within their community. The most obvious way for maintaining a favorable image is by cooperating with other members of the community and fulfilling one's duties in a diligent manner.

Deviant behavior is punished by disseminating negative information, and those affected by it generally feel compelled to cooperate as the only way of stopping the negative effects of having a bad reputation. Repeat offenders are very rare because after a few infractions they are simply ostracized and deprived from future participation in the common goods.

After setting aside the important differences between the two private orders that we have described so far, it can be said that Dr. Diablo's rests on the same basic principle that ensures the effectiveness of diamond arbitration. Those against whom the harsh collection practices are unleashed don't belong to a close-knit community like diamond merchants, but still care about preserving a good reputation. One

remaining question is the one about the ability of the system to create social value, to which we now turn.

IS THERE ANY GOOD IN THE DEVIL? DR. DIABLO'S, EFFICIENCY AND THE NOTION OF JUSTICE

It is hard to question the efficiency that Dr. Diablo's represents to its clients. After all, the company helps collecting legitimate debts that otherwise would be unrecoverable. Businesses like Dr. Diablo's have become successful in great part as a result of the state's failure to get the institutions "right". In this sense, malfunction of the state organs has invited dark-side private ordering like DCA to fill in the gaps.[508] Ordinary citizens use these mechanisms as a way of seeking alternative ways to enforce their property rights, reduce risk and increase predictability;[509] Dr. Diablo's has also helped to prevent debtors from getting away without honoring their legal duties, which is something similar to what official courts and other dispute processing fora and mechanisms do. To this extent Dr. Diablo's may be seen as bringing positive value.

Additionally, in spite of the fact that some of its collection methods are in tension with the legal system, people who use Dr. Diablo's and, most importantly, those against whom the enforcement is aimed, seem to perceive it as a guarantor of the legal order and to some extent view it as a legitimate authority. Furthermore, some

[508] Curtis J. Milhaupt and Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. Chi. L. Rev. 41, 45 (2000).

[509] Rogelio Pérez-Perdomo, *De La Justicia y Otros Demonios*, *in* SEGURIDAD JURÍDICA Y COMPETITIVIDAD 117, 147 (R. Pérez-Perdomo y M. E. Boza eds., 1996).

perceive Dr. Diablo's as a substitute of the courts, not only because of its overall efficiency regarding the collection of debts but also because of its apparent concern about legality[510] and its reputed ability to deliver justice; the same justice that, in their view, formal institutions are failing to provide.

Dispute resolution services like the one offered by Dr. Diablo's may work well for some types of disputes, and to some extent may be able to bring satisfaction to those who perceive it as a substitute for a malfunctioning judiciary. However, this notion of Dr. Diablo's as a substitute for courts can also entail important flaws, and we will only refer to a few.

First, Dr. Diablo's can only manage a limited amount of disputes. Although there is no empirical evidence that can tell us the real share of Dr. Diablo's within the universe of debt collection cases, we assume that it is very marginal compared to those that are resolved through courts. Even if Dr. Diablo's had a bigger share, it would not have the capacity and infrastructure to handle a large docket.

Also, the concept of having private mechanisms to compete with system of public adjudication might mislead disputants in making them believe that a private provider can offer not only a fast, cost-efficient, and effective resolution to their

[510] It is also interesting that, in spite of its illegal collection methods, in some sense, Dr. Diablo's cares about legality. The use of legal forms to regulate the relationship with its clients (i.e. making its clients sign a written agreement that contains legal terminology, and examining that debt-related documents meet legal standards) is an expression of its concern about appearing legitimate, and also the key to its success.

particular dispute, but also bring fairness, equality, and other values that are usually attributed to a proper-working judiciary.

An *efficient* disposition of disputes does not automatically go hand in hand with the objectives of the justice system. While achieving a quick and a cost-efficient resolution of disputes is what drives most users into private mechanisms like those offered by Dr. Diablo's and other DCA, it is certainly not what makes citizens use the courts in general. One reason why the use of alternative mechanisms has spread is *expediency*,[511] and not precisely for its ability to shield societal values.[512]

As Owen Fiss has asserted, litigation has important values beyond its *remedial dimensions* of resolving private disputes. The role of judges: "Is not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statues: to interpret those values and to bring reality into accord with them".[513] In this sense, courts are not only trusted for deciding private quarrels, but more importantly for interpreting the law, establishing judicial precedents, protecting civil rights, and restoring inequalities (not just power imbalances in a particular situation). Moreover,

[511] Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*. 3 J. CONTEMP. LEGAL ISSUES 1-33 (1989)

[512] By signaling a contrast between public adjudication by the courts and informal means, I do not intend to trivialize the values of the latter. Alternative mechanisms may have important values as Baruch Bush has signaled in his well-known article about mediation. See, Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*. 3 J. CONTEMP. LEGAL ISSUES 1-33 (1989)

[513]Owen M. Fiss, *Against Settlement* 93 YALE L.J 1073-1090 (1984)

in some cases judges have had to sacrifice the interest of the parties in favor of protecting these important public values.

Aside from the above mentioned, the judiciary lies on such a complex framework, that it makes any other private system an unlikely competitor, even if the courts are in "crisis" as it is thought to be the case of Venezuela. Setting aside the fact that its practices are in tension with the legal order, a private dispute resolution provider like Dr. Diablo's simply does not have the necessary infrastructure to replace the judiciary. And even if it had the capacity to compete, it is not clear how it could serve the public values linked to dispute processing.

CHAPTER NINE

THE GRASS IS GREENER ON THE OTHER SIDE: WHEN VENEZUELAN DISPUTANTS CHOOSE TO USE FOREIGN COURTS[514]

This chapter explores the incentives and the obstacles that foreign parties (claimants and corporate defendants alike) take into account when pondering which fora they select to process their disputes. In order to understand this phenomenon in a real-life context, we chose to conduct a case study of an actual litigation that took place in U.S. courts and involved an important number of foreign claimants who litigated against American defendants.

The objective of this chapter is twofold. First, it explores and summarizes the strategic -and not necessarily the "legal"- motivations that determined the parties' decision to litigate in the U.S. as opposed to the country where the harms occurred. Secondly, it describes how the networks that exist among lawyers from different jurisdictions act with each other in order to facilitate the handling of the litigation, and how some legal professionals act as brokers by connecting different social groups.

This chapter evolved from a case study conducted during 2003. Most of the information pertaining to the litigation was obtained from legal briefs, motions,

[514]The ideas described in this chapter were originally written in a paper prepared for the Complex Litigation course at Stanford Law School during 2002, which later became an article that was published as: *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation,* 11 SW. J.L.&TRADE AM. 281-300 (2004)

memoranda, opinions and rulings rendered in Venezuela and the U.S. Because the selected litigation gained some notoriety as it was tried in the U.S., the examination of news reports and scholarly papers also proved to be important.

However, perhaps the most relevant information, that is, information about the strategies followed by the parties and their lawyers and the utilization of networks of contacts, was obtained from interviews with different actors. We conducted several interviews with court officials, U.S. plaintiff and defendant attorneys, and their Venezuelan counterparts. Most interviews were conducted by telephone because the respondents where located in different cities and countries during the field research. However, at least three follow-up interviews with Venezuelan counsel were conducted face-to-face in Caracas, Venezuela during the summer of 2003.

THE GRASS REALLY LOOKS GREENER: COLLECTIVE LITIGATION IN THE U.S.

Among the many things for which the American legal system has become distinctive, worth mention is the handling of collective litigation. The different devices adopted in the United States to process large scale litigation and complex cases certainly have no equal in other countries.[515] A variety of mechanisms like class action, multi-district litigation, formal consolidation, informal aggregation and

[515] *See* Symposium, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 625 ("In particular, the class action device is unique; most foreign nations do not have a similar procedure."); Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 313 (2003) ("So far however, Quebec and Brazil are the only civil law systems that have developed a sophisticated system of class action suits."); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT. L. 157, 159 (2001) ("Some forms of class actions have been adopted in a few Canadian provinces, in Australia, and in Brazil.").

bankruptcy[516] have permitted American courts to respond to the emergence of cases involving large-scale accidents and disasters, financial fraud, product liability[517] and other litigation involving hundreds – or even thousands – of claimants, several defendants, and very complicated issues.

In a time when numerous American corporations manufacture, market and distribute their products, offer their services, and engage in diverse business practices throughout the world, they have also become a target of many lawsuits arising from the injuries, damages and economic losses caused by their products, and U.S. courts have become the likely forum to process these suits.[518] Among the cases that capture most of the attention are those related to accidents, personal injury and property damage.[519]

One of the advantages of the American legal system is that it offers a means of collectively prosecuting cases – through class action and other aggregation – that are

[516] Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int. L. 179, 182 (2001) [hereinafter *Revisiting the Monster*].

[517] *Id.* at 183 (Even though "mass torts arose in the United States in an era when class certification generally was not deemed appropriate for such litigation.").

[518] WARREN FREEDMAN, PRODUCT LIABILITY ACTIONS BY FOREIGN PLAINTIFFS IN THE UNITED STATES 1 (Kluwer Law & Tax'n 1988) ("The United States is indeed the mecca or El Dorado for injured plaintiffs because the American tort system is geared to full recognition of the rights of consumers. The rule of liability is liberal; there is procedural ease in serving defendants, in obtaining pre-trial discovery, and in promoting the jury system to answer questions of fact, *inter alia*, all of which characteristics appeal to plaintiffs everywhere.").

[519] Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 833, 833 (2001) ("For example, massive lawsuits against manufacturers of asbestos, dietary supplements, medical devices, pharmaceutical products, and tobacco are front-page news.").

not feasible to be tried on an individual basis.[520] Most Latin American countries, aside from Brazil,[521] do not have a system in place to deal with collective actions. As a result, some Latin American claimants try to find ways of bringing their cases to American courts. Even though there is no data available to show how many foreign claimants have been involved in collective litigation in U.S. courts in the last decade, the presence of foreign citizens as parties in complex cases is becoming more common, but interestingly enough, not much attention has been given to them.[522]

This chapter represents an effort to understand some aspects surrounding the involvement of Venezuelan disputants in collective litigation in the U.S. through the study of the Ford-Firestone rollover litigation. This case exhibits features that today are common to most product liability claims: a product designed or fabricated in the U.S. by an American corporation, was marketed overseas, accidents occurred in other countries (as well as in the U.S.), and foreign victims chose to bring their claims to American courts instead of processing them in the jurisdictions where the accidents took place. Conversely, the defendant corporations have put all their efforts in having the cases dismissed in the U.S. and sent back to be tried in their countries of origin.

[520] However, the public image of class litigation tends to be negative. *Revisiting the Monster*, *supra* note 516, at 180. ("Some believe that American courts are overrun with class litigation – a phenomenon that is about to inundate the courts of other countries as well. Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys.")

[521] *See* sources cited *supra* note 515 and accompanying text.

[522] Symposium, *supra* note 515, at 619 ("Surprisingly little attention has been paid to the special problem of non-U.S. class members' participation in U.S.-situated class litigation.").

Of particular interest are the strategic reasons why Venezuelan disputants decided to file their claims in the U.S. instead of their countries of origin – where the accidents occurred – and the obstacles that they faced as well as the possible incentives of the American defendant corporations to prefer litigating in other fora. Interviews with several leading plaintiff and defense attorneys provided some of the most valuable sources of information about some critical aspects of the case and about the strategic reasons taken into account by Venezuelan claimants who bring their claims in the U.S.[523]

This chapter shows that litigants, like migratory birds, travel north or south in search of an advantageous venue. It also shows that their decision for selecting a particular forum and their subsequent intervention in a trial depends on a constant interaction between networks of lawyers from several jurisdictions.

We will begin by offering an overview of the origins and development of the Ford-Firestone rollover litigation, from the initial involvement of governmental agencies in the U.S. as well as in Venezuela, to the filing of claims in American courts and the collection under the Multi-District Litigation scheme. We will also describe the circumstances surrounding foreign claimants, from the initial filing of their lawsuits to the reasons why they chose to litigate in the U.S., the obstacles they faced, and conversely, the incentives for the defendant companies to litigate in Latin

[523] All the interviews were done under the promise of confidentiality, so the names of the interviewees are omitted. Instead, the interviewees are identified with numbers, *e.g.*, Plaintiff Attorney #1, Plaintiff Attorney #2, and so forth.

America. Finally, we will explain that as has business itself, forum shopping, or seeking the most advantageous venue in which to try a case, has gone global, and it has also occurred with networks of lawyers.

THE FORD FIRESTONE ROLLOVERS LITIGATION: ORIGINS AND DEVELOPMENT

Ford Motor Corporation and Firestone, Inc.[524] had been doing business together in the automotive industry for more than a century.[525] Over the years, Ford Motors sold many of its models with Firestone tires as part of its original equipment ("OE").[526] In 1990 Ford began to produce its Explorer sport utility vehicle ("SUV") and equipped it with the Firestone fifteen-inch ATX tires.[527] The Explorer would become the most popular Ford SUV, selling more than three million units worldwide

[524] Firestone, Inc. (originally, the Firestone Tire and Rubber Company) was founded in 1900 by Harvey Firestone in Akron, Ohio. The company was bought in 1988 by the Japanese tire maker Bridgestone Corporation, becoming as a result the world's largest tire and rubber company. Bridgestone Americas Holding, Inc., *A Brief History of Bridgestone Americas*, *at*: http://www.bridgestone-firestone.com/about/index_history.asp?id=bfhistory (last visited Feb. 22, 2005).

[525] Harvey Firestone and Henry Ford, the famous two industrial titans of the early automotive industry began their business partnership in 1906 when Ford partnered with Firestone to make tires for his cars. From that date on, Firestone would become Ford's main provider of tires. For a comprehensive history of the early years of the business relationship between Ford and Firestone, *see* BRINKLEY DOUGLAS, WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS 738-739 (Penguin Books 2003); ALFRED LIEF, THE FIRESTONE STORY: A HISTORY OF THE FIRESTONE TIRE & RUBBER COMPANY 30-31 (McGraw-Hill 1951).

[526] The original equipment market (OEM) is one of the two markets served by the tire industry. The other is the replacement market (RM). The OEM is a low-profit, but very important, market "because it provides large orders (and hence the scale) as well as the prospect for future replacement sales (car owners typically replace tires with the same original equipment brand)." *See* Raghuram Rajan et al., *The Eclipse of the U.S. Tire Industry*, *in* NBER CONF. REPORT MERGERS AND PRODUCTIVITY 51-86 (Steven N. Kaplan, ed. 2000).

[527] Kevin M. McDonald, *Don't TREAD on Me: Faster Than a Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1171 (2001) [hereinafter *Don't Tread on Me*]. Even though ATX tires were the most common model, other tires such as the ATX II (introduced in 1995), and the Wilderness AT (introduced in 1996) were also part of the Explorer OE. *Id.*

during the following ten years.[528] Approximately 60 million Firestone ATX, ATX II, and Wilderness Tires were sold worldwide.[529] But in the late 1990s the success story of the Ford/Firestone alliance was about to end as a result of the enormous crisis that resulted from hundreds of lawsuits brought all over the U.S. against both companies after the occurrence of rollover accidents involving Ford Explorers and allegedly faulty Firestone tires.

The Origins of the Case

One of the first steps toward the formation of a multimillion dollar case against Ford and Firestone was the 1998 report prepared by U.S.-based State Farm Insurance,[530] noting that Ford Explorer vehicles equipped with Firestone/Bridgestone's ATX, ATX II, and Wilderness AT tires had an unusual propensity to roll over and the tire belts to separate.[531] At that time, State Farm requested the intervention of the National Highway Transportation Safety

[528] *Id.* The Explorer would also become Ford's most profitable model, each sale representing $10,000 in gross profit and $4,000 in operating profit to the company. *Id*. at 1171 n. 31.

[529] *Tire Recalls*, CBSNEWS.COM , *at* http://www.cbsnews.com/htdocs/tires/timeline.html (last visited Feb. 22, 2005).

[530] *Bridgestone/Firestone Inc. Tire Recall: Hearing Before the Subcomm. on Com. Oversight & Investigations*, 106th Cong. (2000) (prepared statement of Samuel K. Boyden, Associate Research Administrator, State Farm Ins. Co.), *available at* http://www.statefarm.com/media/release/tires.htm#testimony [hereinafter *State Farm Testimony*].

[531] Belt edge separation and belt-leaving-belt separation. This normally occurs "when the tread and one steel belt separate from the other steel belt." *See Don't Tread on Me, supra* note 527, at 1172.

Administration ("NHTSA"), but this agency did not become involved until 2000, when an investigation was launched after the filing of many claims by consumers.[532]

During the hearings held before the House Commerce Committee in September 2000, State Farm representatives expressed that their company's main interest in promoting this investigation was the concern about safety issues, and described the many public policy initiatives of the company in this regard during the last forty years.[533] They also indicated that while State Farm is not a safety regulator, one of the top priorities of the company "is to promote improved vehicle and highway safety."[534]

However, in the Congressional hearing's transcripts, another possible interest, perhaps equally legitimate, but no doubt less altruistic, was revealed: State Farm has been, for many years, the nation's leading vehicle insurer "with 37 million policies and one out of every five cars insured."[535] As mentioned during the hearings, from 1991 to 1998, State Farm got an unusually large number of claims from accidents involving Ford SUV rollovers, which obviously represented an important financial

[532] Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 14 at 6533 (Jan. 22, 2001) (to be codified at 49 C.F.R. pts. 554, 573, and 576) [hereinafter *The NHTSA Report*].

[533] Congressional hearings involved two State Farm employees, the Associate General Counsel, and the Associate Research Administrator. Both gave testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade, and Consumer Protection and Subcommittee on Oversight and Investigations on September 6, 2000. *See State Farm Testimony*, *supra* note 530.

[534] *Id*.

[535] *Id*.

burden for the company.[536] As a result, State Farm had a primary business interest in this issue, because if defects in the manufacturing of vehicles and tires were discovered, State Farm could seek compensation from Ford and Firestone, and perhaps lead policyholders to do the same instead of targeting insurance companies with their claims.

State Farm needed the help of regulatory agencies like the NHTSA to investigate the possible defects of vehicles and tires, so that if defects were found, State Farm could hold Ford and Firestone liable. Insurers are an interesting group who might have a stake in this litigation, since the occurrence of rollovers made them disburse significant amounts of money as a result of insurance policies' coverage.[537]

Accidents involving Ford Explorers equipped with Firestone tires were reported in the Middle East (Saudi Arabia) and South America (Colombia, Venezuela, Panama, and Ecuador).[538] In Venezuela, the Consumer Protection Agency ("INDECU") initiated an inquiry concerning 104 individual claims filed by the victims

[536] *Id.*

[537] One of our interviewees mentioned that during 2002, some insurance companies tried to line up with plaintiffs, and worked to organize a class, but it did not seem to work. Apparently, no insurance company has filed a lawsuit so far, at least, at the federal level. Telephone interview with Plaintiff Attorney #1 (Mar. 25, 2003).

[538] *NHTSA Investigating Failure Of Firestone Brand Tires, at* http://archives.cnn.com/2000/US/08/03/tire.investigation/ (August 3, 2000).

of accidents involving Ford Explorers equipped with ATX and Wilderness Firestone tires.[539]

On August 31, 2000, as a result of an extensive research, INDECU concluded that Ford and Firestone withheld critical information to Venezuelan consumers about certain defects in Ford Explorers as well as in Firestone ATX and Wilderness tires.[540] The report suggested such defects to be the cause of the accidents.[541] Consequently, INDECU ordered Ford to recall Explorer vehicles and replace their suspension systems as well as the Firestone tires that were installed in them.[542] Similarly, Firestone was ordered to recall the models of tires involved the accidents.[543] As for those who had already suffered harm or had lost their lives in accidents involving Ford Explorers and Firestone tires, INDECU recommended the filing of legal actions in courts.[544]

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[539] Instituto para la Defensa y Educación del Consumidor y del Usuario (INDECU), *Informe del INDECU entregado a la Fiscalía General de la República* [Report submitted to the General Attorney's Office], at 1(2000) [hereinafter *The Indecu Report*].

[540] *Id.* at 2.

[541] *Id.* at 5.

[542] The prior year, Ford had voluntarily replaced the tires of 6,768 Explorer SUV sold in Saudi Arabia. In February 2000, Ford did the same in Malaysia and Taiwan, but Firestone denied any defect in its tires. Association of Trial Lawyers of America, *Firestone/Ford Fiasco Timeline & Internal Decisions, at* http://www.atla.org/homepage/firereca.pdf (last visited Feb. 15 2005).

[543] At about that same time, Firestone started to recall ATX tires in the U.S. but the company insisted that it was part of a customer's satisfaction program, and not as a result of any defect in the tires. *See Zeroing In On The Explorer*, CBSNEWS.COM *at* http://www.cbsnews.com/stories/2000/08/02/national/main221110.shtml (Aug. 2, 2000).

[544] The Indecu was enjoined from imposing on Ford and Firestone other sanctions than fines for violating consumer rights. According to the Venezuelan Consumer Protection Act, any action seeking compensation of damages has to be pursued through courts. *See* LEY DE PROTECCION AL CONSUMIDOR Y AL USUARIO [LPCU] [*Consumer and User Protection Act*] art. 142, 152 (Venez.).

The case started to get public attention,[545] prompting the Venezuelan Congress to appoint a Commission to investigate Ford and Firestone.[546] Through these actions, the Venezuelan government threatened to impose administrative sanctions against Ford and Firestone.[547] The most severe proposed sanction consisted of banning the sale of Ford vehicles in Venezuela, which would also have direct effects on Ford's South American market.[548] After intense negotiations, Ford and Firestone reached a settlement with the regulatory agencies avoiding the sanctions.[549] Even though oriented to protect the public interest,[550] none of these governmental actions was intended to compensate those who had already suffered physical harm or the relatives of those who were killed in accidents involving Ford Explorers and Firestone ATX and Wilderness tires.[551] Victims sought an economic compensation, and even though

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[545] See, *Ford y Firestone en el Banquillo* [Ford and Firestone on the accused's bench], PRODUCTO ON LINE, *at* http://www.producto.com.ve/204/notas/ford.html (last visited Feb. 15, 2005); *Informe Ford-Firestone quedó para Septiembre* [report Ford-Firestone left for September], NOTITARDE.COM, *at* http://historico.notitarde.com/2002/08/09/economia/economia3.html (Aug. 9, 2002).

[546] Comision Permanente de Administracion y Servicios Publicos de la Asamblea Nacional, *Informe sobre el caso Ford-Firestone* [Report on the Ford-Firestone case] at 2 (2002) [hereinafter *The National Assembly's Report*].

[547] *Id.*

[548] The imposition of such a sanction would be particularly damaging to Ford Motor Company, due to its important share in the South American automotive market (69.7% of the total volume of vehicles). *Ford y Firestone en el Banquillo*, *supra* note 545.

[549] Interview with Defense Attorney #2 in Caracas, Venez. (Feb. 13, 2003).

[550] LEY DE PROTECCION AL CONSUMIDOR Y AL USUARIO [LPCU] [*Consumer and User Protection Act*] art. 1 (Venez.).

[551] In fact, pursuant to the LPCU, the Indecu can only impose administrative sanctions against those who breach any of its provisions. Any claims seeking compensation for injuries or damages, need to be filed separately in court. *See id*.

the steps taken by governmental agencies helped their case, and perhaps created pressure on Ford and Firestone, it did not fulfill their expectations.

About the same time, the U.S. House Commerce Committee[552] initiated an extensive inquiry, which "determined that NHTSA could have detected the problems with the tires sooner if it had obtained reports about the tires' problems in a timelier manner."[553] A direct result of this investigation was the drafting and implementation of The Transportation Recall Enhancement, Accountability, and Documentation ("TREAD") Act.[554] The TREAD Act, established a series of provisions requiring vehicles and parts manufacturers: (i) to report periodically to the NHTSA information about potential safety recalls,[555] (ii) to devise a plan "that prevents replaced tires from being resold for use on motor vehicles,"[556] (iii) to "advise NHTSA of foreign safety recalls and other safety campaigns."[557] It also increased civil penalties for violations of the vehicle safety law and established "criminal penalties for misleading the

[552] *Ford Motor Company's Recall of Certain Firestone Tires: Hearing Before the Subcomm. on Com., Trade, & Consumer Protection & Oversight & Investigations of the Committee on Energy & Com. House of Representatives*, 107th Cong. 107-45 (2001) [hereinafter *2001 Congressional Hearing*].

[553] *Id.*

[554] Transportation Recall Enhancement, Accountability, and Document ("TREAD") Act, Pub. L. 106-414, 114 Stat. 1800 (2000) (codified in 49 U.S.C.). For a comprehensive analysis of the TREAD Act *see* McDonald, *supra* note 14; *see also* Kevin M. McDonald, *Separations, Blow-Outs, and Fallout: A Treatise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073 (2004).

[555] *See* 49 U.S.C. § 30166 (2000).

[556] *See* 49 U.S.C. § 30120(d) (2000).

[557] *See* 49 U.S.C. § 30166.

Secretary [of Transportation] about safety defects that have caused death or injury."[558] Finally, it gave extensive powers to the Secretary of Transportation to conduct rulemaking actions in order to improve safety standards for vehicles and tires.[559]

The Litigation Starts

Soon after the first reports suggesting possible defects in Ford SUVs equipped with Firestone tires, plaintiffs started filing lawsuits in different state and federal courts throughout the U.S.[560] The majority were personal injury claims from victims or their relatives, but others were only related to the apparent economic loss that Ford SUV owners had suffered because of an alleged decrease in the value of their vehicles.[561]

One of the most interesting aspects is that many of the lawsuits involved foreign claimants – the majority from Venezuela[562] – who brought legal actions to

[558] *See* TREAD Act § 5(b).

[559] *See* TREAD Act § 15.

[560] U.S. courts started issuing protective orders as a result of accidents involving Ford Explorer SUVs as early as 1995, but the bulk of the litigation occurred in 2000. *See Firestone/Ford Fiasco Timeline & Internal Decisions*, *supra* note 542.

[561] Plaintiff's Second Amended Class Action Complaint at 3, Benford v. Bridgestone Corporation and Ford Motor Company (N.D. Ill. 2000) (No. 00 C 5406) [hereinafter Benford class action].

[562] Forty-six deadly accidents were reported in Venezuela, making it the country with the highest number of fatalities outside the U.S. where one hundred and one people had lost their lives in accidents involving Ford Explorers with Firestone Tires. *See Firestone, Ford threatened with Venezuelan legal actions*, CNN.COM, *at* http://cgi.cnn.com/2000/WORLD/americas/09/30/venezuela.tire.deaths/ (March 27, 2000).

U.S. courts instead of filing them in the countries where the accidents or losses occurred.[563]

Almost immediately after the INDECU issued its report on August 31, 2000 concluding that Ford and Firestone had intentionally conspired against consumers[564] and urging owners of Ford vehicles and Firestone tires to file lawsuits against both companies,[565] Venezuelan claimants began initiating legal proceedings.[566] The occurrence of numerous accidents in other countries helped the U.S. plaintiffs' bar build its case based on the idea that Ford and Firestone conspired to conceal the dangers of their products, therefore causing an enormous harm to consumers.[567] Instead of filing lawsuits in their own country, Venezuelan victims and their families contacted U.S. law firms through their local counsel, and individual actions were brought on their behalf.[568] During this period, for example, at least ten lawsuits were filed in the Southern District of Florida.[569]

[563] Based on both a comprehensive review of Venezuelan court filing reports and interviews with the several attorneys from both sides, the author verified that aside from the claims filed with the Consumer Protection Agency, no legal actions were initiated in Venezuelan courts.

[564] *The Indecu Report, supra* note 539, at 9.

[565] *Id*.

[566] Telephone interview with Plaintiff Attorney #3 (Mar. 15, 2003).

[567] *Id.*

[568] *Id*.

[569] Interview with Plaintiff Attorney #4 in Caracas, Venez. (Jan. 22, 2003).

In other cases, Venezuelan counsel devised sophisticated methods of organizing groups of victims, by screening the cases, gathering and organizing potential evidence, and then classifying the victims according to the seriousness of the harm or loss, the amount of the claim and other criteria.[570] These "packages" of cases were then referred to a U.S. plaintiff firm in be filed and tried in federal courts. This method was used to prepare the first class action involving foreign claimants, filed at the District Court for the Northern District of Illinois and then transferred to a Multidistrict Litigation ("MDL") judge.[571] Class actions and individual lawsuits involving only U.S. citizens were also filed in both federal and state courts. In total, approximately two hundred foreign cases were filed in federal courts and became part of the MDL docket.[572]

During this first stage Ford and Firestone made efforts to keep court cases at a very low profile and the media coverage at a minimum. The two companies began to settle most of the domestic cases but were reluctant to do so with the ones involving foreign claimants, on the apparent grounds that settling these actions could be

[570] A common way of organizing plaintiffs consisted in forming groups of consumers under the veil of civil associations (*asociaciones civiles*), which, under Venezuelan law [C.C. art. 19], may initiate legal actions on behalf of its members. The most common group formed was the *Asociacion de Propietarios de Ford Explorer* [Association of Ford Explorer owners]. Interview with Plaintiff Attorney #2 in Miami, Fla. (April 2, 2003).

[571] Interview with Plaintiff Attorney #4 in Caracas, Venez. (Jan. 28, 2003).

[572] Telephone Interview with Plaintiff Attorney #1 (Jan. 10, 2003).

interpreted as an admission of guilt and used against Ford and Firestone in pending criminal investigations involving their executives in Venezuela.[573]

The Transfer of Cases by the Panel of Multidistrict Litigation

By October 2000, there were at least sixty-three actions initiated in thirty different federal courts,[574] all related to alleged defects in Ford vehicles equipped with Firestone tires. At least three of them were filed as class actions,[575] but only the Benford class action involved foreign claimants.[576] The Judicial Panel on Multidistrict Litigation ("MDL Panel") received petitions to transfer these actions to one Court for consolidated pretrial proceedings pursuant to 28 U.S.C. §1407.[577]

[573] Interview with Defense Attorney #1 in Caracas, Venez. (Jan. 25, 2003).

[574] *In re* Bridgestone/Firestone, Inc., ATX, ATX II, and Wilderness Tires Prods. Liab. Litig., No. 1373, 2000 U.S. Dist. LEXIS 15926, at *1 (J.P.M.L. Oct. 24, 2000) (transfer order) [hereinafter *MDL transfer order*] (The Southern District of Florida had ten cases and the Middle District of Tennessee had six cases. The Northern District of Illinois and the Southern District of Texas both had five cases. The Middle District of Florida, the Southern District of Illinois and the Eastern District of Louisiana each had three cases. The following districts had one case each: the Central District of Illinois, the District of Maryland, the District of Massachusetts, the District of New Mexico and the Southern District of Ohio all had two cases within their jurisdictions. The Western District of Arkansas, the Southern District of California, the Middle District of California, the Northern District of California, the District of Columbia, the Western District of Louisiana, the Middle District of Louisiana, the Eastern District of Michigan, the Southern District of Mississippi, the Western District of Missouri, the District of New Jersey, the Eastern District of Oklahoma, the Western District of Oklahoma, the District of Rhode Island, the Eastern District of Texas, the Western District of Texas, the Northern District of Texas and the Southern District of West Virginia).

[575] *Id*. at 2 (In the Middle District of Tennessee, the Louridas class action involved only U.S. citizens. In the Northern District of Illinois, the Benford class action involved both U.S. and foreign citizens. In the Southern District of Texas, the Stallone class action, involving only U.S. citizens, was originally filed in state court, but was later moved to federal court).

[576] Benford class action, *supra* note 561, at 1.

[577] *MDL transfer order*, *supra* note 574, at 2.

Even though both parties generally favored the transfer and collection of cases by the MDL Panel, defendant Ford Motor Company played the most active role in consolidating the litigation into one federal court by requesting the centralization of most of the actions in the Central District of Illinois.[578] In addition to supporting the transfer of cases by the MDL Panel, the defendants tried to move actions pending in state courts to federal courts, but that tactic was not successful.[579] When screening the cases to be transferred, the MDL panel remanded four of the class actions to state courts[580] on the grounds that no federal question was involved in any of them.[581]

Objections against the MDL came from some plaintiffs who contended either "that actions removed by Firestone or Ford from state to federal court should be excluded from transfer because there [was] no federal jurisdiction,"[582] or "that actions brought on behalf of persons injured or killed in accidents related to the defective tires should not be centralized or should be centralized separately from the other MDL-1373 actions."[583]

[578] Forty-seven cases were consolidated. *Id*.

[579] Telephone interview with Defense Attorney #1 (Feb. 12, 2003).

[580] *MDL transfer order*, *supra* note 574, at 3.

[581] In spite of the defendants' insistence in trying to move actions from state to federal courts, the MDL judge continuously rejected such petitions or remanded to state courts those cases that could not get into the MDL. Plaintiff Attorney #4, *supra* note 571.

[582] *MDL transfer order*, *supra* note 574, at 2.

[583] *Id*.

Those plaintiffs who supported the transfer request suggested different jurisdictions for the collection of cases: the Southern District of Illinois (six actions) and the Middle District of Tennessee (four actions).[584] Evidently, no coordinated strategy was followed by the plaintiffs' bar in regards to the transfer for MDL proceedings.

On October 24, 2000, the MDL Panel ordered the transfer of all federal court cases to a jurisdiction that no party had requested, the Southern District of Indiana, and appointed Judge Barker as the transferee judge to conduct pretrial proceedings.[585] The decision to select the District Court of the Southern District of Indiana as the MDL court was made by the judicial panel after considering "the range of locations of parties and witnesses in this docket and the geographic dispersal of constituent actions."[586]

In the decision to transfer the actions, the panel acknowledged "the pendency of more than 90 additional, potentially related actions pending in federal district courts,"[587] and anticipated its treatment as tag-along actions. By the end of 2003, approximately nine hundred federal cases were either transferred or filed directly in

[584] *Id*.

[585] *Id*. at 5.

[586] *Id*. at 8.

[587] *Id*. at 3.

the MDL court, seven hundred involving domestic plaintiffs, two hundred foreign claimants,[588] and fifty class actions involving both types of claimants.[589]

Class Certification

Soon after the case consolidation, and as an effort "to prevent retransfer to the originating districts for decision on the merits,"[590] a group of U.S. plaintiffs filed a consolidated suit before the MDL judge and filed a motion requesting certification of a nationwide "hybrid" class pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3).[591] This move represented an interesting shift in strategies, since the majority of the plaintiff bar was opposed to centralizing the federal cases.

The certification request was based on breach of warranty and unjust enrichment claims,[592] thus excluding personal injury and wrongful death claims. After partially granting plaintiffs' requests,[593] the district court certified the following two nationwide classes and sub-class, involving only domestic plaintiffs:[594]

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[588] The lead counsel for plaintiffs estimated foreign claims of $750 million in damages against Ford and Firestone. *See* Matthew Haggman, *Broward Jury Finds Against Bridgestone*, DAILY BUS. REV., Feb. 11, 1003, at A8. None of the informants could give a monetary estimate of domestic claims.

[589] The MDL court did not classify the cases as domestic and foreign, but instead as subject or not subject to *forum non conveniens*' motions. Most foreign claims were filed as individual cases, and to the best of knowledge, the Benford class action is the one involving foreign plaintiffs. *MDL transfer order*, s*upra* note 574, at 4.

[590] *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002).

[591] FED. R. CIV. P. 23(b)(2) & 23(b)(3).

[592] Plaintiffs contended that defendants breached express and implied warranties because of failure to repair or replace defective products, and that selling defective Explorers and tires for the price of non-defective Explorers and tires unjustly enriched defendants. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001) (order granting motion for class certification and ruling on related matters).

[593] *Id*. at 534.

1) Explorer Class: Current residents of the U.S. who owned or leased Ford Explorer SUV from 1991 to 2001;

   Explorer Sub-class: Current residents of the U.S. who purchased, owned, or leased Ford Explorer SUVs that are or were equipped with Tires (as defined in the Tire Class) from 1991 to 2001;

2) Tire Class: Those who owned or leased vehicles equipped with any of six different types of Firestone Tires from 1991 to 2001.

The district court also decided, under Indiana choice-of-law rules that Michigan law would apply to the class plaintiffs' claims against Firestone, while Tennessee law would apply to the cases against Ford, because these jurisdictions are the locations of defendants' corporate headquarters.[595]

Foreign claimants did not join the class certification efforts, since they considered it more convenient to litigate these cases on an individual basis.[596] However, some Venezuelan plaintiffs did file their claims as part of the Benford class action originally presented before the Circuit Court of the Northern District of Illinois,

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[594] *Id*. at 508.

[595] *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 155 F. Supp. 2d. 1069, 1077 (S.D. Ind. 2001).

[596] Plaintiff Attorney #1, *supra* note 58. However, more than half of the foreign cases were handled by two law firms and were originally filed in the same court of the Southern District of Florida, which for practical matters functions as if the cases were collected. Attorneys from the two firms that represent almost 140 victims serve as lead counsel for the plaintiffs. *Id.*

which entailed breach of warranty and financial loss claims instead of personal injury or wrongful death claims.[597]

FOREIGN CLAIMANTS IN U.S. COURTS: THE REASONS FOR THEIR CHOICE OF FORUM AND THE OBSTACLES THEY FACED

Even though foreign claimants did not represent the majority of plaintiffs in the Ford/Firestone rollovers litigation,[598] their presence played an important role in shaping the case. The occurrence of foreign accidents, and the way in which Ford and Firestone handled consumer complaints, reinforced plaintiffs' argument that defendants engaged in a conspiracy. The scandal resulting from the accidents in Venezuela also helped secure media attention[599] and was a key element during the Congressional investigation in the U.S.[600] In addition; the presence of foreign claimants affected the ways in which other plaintiffs and defendants devised their strategies for the case.

[597] This case only involved financial claims. The plaintiffs argued that the propensity of the their respective SUVs to roll over, aside from posing a safety risk, diminished the market value of their SUVs, which translated to a financial loss. With respect to the Firestone/Bridgestone tires, plaintiffs argued that the defected tires made the tires obsolete, thus entitling plaintiffs the right to recover the money invested in the original tire purchases. *See* Plaintiff's Second Amended Class Action Compl. at 3, Benford et. al. v. Bridgestone Corp. and Ford Motor Co., No. 00 C 5406 (N.D. Ill. 2000).

[598] As mentioned previously, until mid-2001 the MDL court had approximately nine hundred cases in its docket, of which only two hundred involved foreign claimants. *Tire Recalls*, *supra* note 15. Only a handful of these foreign cases involving Mexican victims were tried in Texas and Tennessee's state courts. Plaintiff Attorney #1, *supra* note 572.

[599] *Tire Recalls*, *supra* note 529; *see also* Plaintiff's Second Amended Class Action Compl. at 3, *Benford et. al.* (No. 00 C 5406).

[600] *2001 Congressional Hearing*, *supra* note 552, at 5.

As previously noted, South American victims did not file lawsuits in their respective countries where the accidents occurred, but instead brought their suits directly in U.S. courts. However, when analyzing the adequacy of Colombia as an alternative forum, the MDL judge made reference to some verbal proceedings brought before Colombian civil circuit judges against Ford Motors de Venezuela, S.A.[601]

Forum Non Conveniens Motion and its Outcome

In December 2000, soon after the MDL docket collected a significant number of foreign cases, defendants sought dismissal on the basis of *forum non conveniens*, arguing that these lawsuits had to be tried in Venezuela and Colombia because the courts of those countries were adequate alternative fora.[602]

The plaintiffs countered that, on the basis of certain treaty obligations, the Colombian[603] and Venezuelan citizens[604] were entitled to a presumption of convenience equal to that of resident or citizen plaintiffs. According to these treaties, the courts of both countries shall be open and free to the other's citizens "on the same

[601] *In re* Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 190 F.Supp. 2d. 1125 (S.D. Ind. 2001). Verbal proceedings are indeed of judicial nature. Article 427 of the Colombian Code of Civil Procedure includes consumer protection actions for those that can be resolved through a summary oral trial. CÓD. PROC. CIV. art 427 (Col. 1993). The outcome of these proceedings is unknown; however, from their mention in the MDL opinion, it seems they may have been dismissed without resolution.

[602] *In re Bridgestone/Firestone, Inc*., 190 F.Supp. 2d at 1128-30.

[603] Convention of Peace, Amity, Navigation, and Commerce, May 31, 1825, U.S.-Colum., 8 Stat. 306.

[604] Treaty of Peace, Friendship, Navigation, and Commerce, June 20, 1836, U.S.-Venez., 8 Stat. 466.

terms which are usual and customary with the natives or citizens of the country in which they may be."[605]

After extensive discovery, on March 25, 2002 the MDL judge issued an order denying the motions to dismiss.[606] In her ruling, Judge Barker made clear that even though her order only referred to 121 Colombian and Venezuelan cases, "the parties should take its implications into account when determining their strategies in the remaining cases."[607]

In deciding the motion, the judge was guided by a two-step analysis: (a) to determine if Venezuela and Colombia were adequate alternative fora to hear the cases, and (b) to balance the various public and private interest factors to establish if their weight favored dismissal. Even though most of the arguments presented were common to Venezuela and Colombia, some differences were discussed. In any case, the outcome was the same for both: U.S. courts retained jurisdiction over the cases.[608]

[605] *Id.* at 472.

[606] *In re Bridgestone/Firestone, Inc*., 190 F.Supp. 2d at 1126, 1156.

[607] *Id.* at 1128.

[608] *Id.* at 1156. An interesting analysis of the possible outcome of the forum non conveniens motions in this case was the focus of a law review article. See, Douglas A. Praw, *Venezuela v. Ford Motor Company: The Trend of Dismissing Mass Tort Cases on Grounds of Forum Non Conveniens*, 8 S.W. J. L. & TRADE AM. 373 (2001-02).

Strategy behind Foreign Plaintiffs' Decision to Litigate in the U.S.

In addition to the legal arguments already described, interviews with foreign plaintiffs' attorneys revealed the strategy behind choosing to sue Ford and Firestone in the U.S. rather than Colombia or Venezuela. Plaintiffs saw certain benefits about bringing their claims in foreign courts, which we now turn to mention.

First, the factor that seemed to have the most weight in deciding to bring a lawsuit to the U.S. was the potential to obtain a larger award than in Venezuela. The general perception of the interviewees was that U.S. courts are more generous in awarding damages than their Venezuelan and Colombian counterparts,[609] even though we only found a few cases in which people collected any awards at all, and from this group, only in a handful of cases plaintiffs obtained a sum worthy of the effort.

However, even if awards obtained in the U.S. were comparable or slightly less than those obtained in Venezuela, plaintiffs would still prefer to be compensated in U.S. dollars than in local currency, which is vulnerable to devaluation on a constant basis, most dramatically in Venezuela.[610] In sum, litigating in the U.S. is in a way, a mechanism used by foreign plaintiffs to protect themselves against devaluation and

[609] Some interviewees based this assertion merely on anecdotal evidence. Only favorable examples of generous awards obtained in the U.S. were mentioned to illustrate the advantage of this forum over those of Venezuela and Colombia. Plaintiff Attorney #3. s*upra* note 566; Plaintiff Attorney #4, *supra* note 569. Additionally, none of the interviewees knew of any awards obtained from South American courts in personal injury cases that could be cited in comparison. Therefore, it is impossible to know whether the perception that U.S. courts are more generous than Venezuelan or Colombian counterparts reflects reality. However, for plaintiffs the advantages of litigating in the U.S. seems to be an uncontested truth.

[610] "[T]he Venezuelan currency ('Bolivar' or 'Bs.') has devalued significantly during the last decade." Horacio E. Gutierrez-Machado, *The Personal Property Secured Financing System of Venezuela: A Comparative Study and the Case for Harmonization*, 30 U. MIAMI INTER-AM. L. REV. 343, 355 (1998).

maintain the current value of awards.[611] Conversely, this factor would affect defendants negatively.

The second advantage of bringing their lawsuits in American courts was the possibility of retaining attorneys on a contingency fee basis,[612] which as we explained in the previous chapter,[613] is prohibited in Venezuela. Our interviewees generally agreed on the circumstance that almost none of the Venezuelan plaintiffs had the substantial amount of money that was needed to prepare and bring their cases to trial.[614] Therefore, the only way for them to file a claim was to agree on a contingency fee basis, and have their attorney advance all the expenses during the trial.

Another incentive relates to the award of attorneys' fees. In contrast to what occurs in the U.S., where pursuant to 17 U.S.C. § 505, courts have the discretion of awarding the fees to the prevailing party, in Venezuela – as in most civil law countries – attorneys' fees are awarded automatically to whoever prevails (in accordance with the so-called English rule or the loser-pays rule).[615] Some interviewees thought that

[611] Interview with Plaintiff Attorney #2 in Miami, Fla. (Feb. 5, 2003).

[612] "The contingency fee is one of the defining characteristics of civil litigation in the United States." Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 (1998).

[613] See, note 495 *supra.*

[614] Plaintiff Attorney #1, *supra* note 572.

[615] CÓD. PROC. CIV. art. 274 (Venez. 1986); CÓD. PROC. CIV. art. 389 (Col. 1970).

the U.S. system relieves substantial pressure from plaintiffs, therefore making their claims easier to pursue in courts.[616]

Obstacles that Foreign Plaintiffs Faced in the U.S.

Interviewees involved in this litigation were also asked to discuss the possible obstacles posed against Venezuelan parties by litigating in the U.S. Interestingly, the American attorneys interviewed felt the foreign plaintiffs had faced no serious obstacles, aside from the defendants' motion to dismiss on *forum non conveniens* grounds.[617] On the other hand, the Venezuelan attorneys involved in the case identified at least three practical obstacles, discussed below.

The first practical obstacle mentioned during our interviews was the perception among Venezuelan lawyers that U.S. counsel screened more heavily foreign plaintiffs than domestic plaintiffs and evaluated more carefully the evidence, and other factual and strategic circumstances surrounding the case. U.S. counsel confirmed this and justified their carefulness on the elevated costs of gathering and bringing evidence to the U.S. among other things. For example, some vehicles and tires had to be shipped from Venezuela in order to be available as evidence for the trial, and witnesses needed

[616] For an interesting analysis regarding fee shifting in class actions, *see generally* Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP.& INT'L L. 125 (2003).

[617] Plaintiff Attorney #1, *supra* note 572; Plaintiff Attorney #3, *supra* note 566.

to be flown in.[618] In addition, because U.S. attorneys took these cases on a contingency fee basis, the screening process was very important.

Plaintiff attorneys scrutinize these cases, and as a result "many of them have been rejected because the evidence was deemed weak, or the potential award to get for them [was not] worth the effort and the cost."[619] Having strong ties with Venezuelan lawyers was pointed out by U.S. counsel as one of the most important ingredients that helped them during the screening process. After all, Venezuelan lawyers were the ones with contacts inside official agencies, local courts, and this helped them enormously to collect evidence when building the case. "One of the first things that you learn when doing business down there (in Venezuela) is that what you get largely depends on who you know. It is not only a matter of professional skills, but equally important, of using the people with the right social abilities. If it weren't for the fact that our local counsels are well-connected we wouldn't be able to do our work here", highlighted a U.S. plaintiff attorney.

Another potential obstacle for plaintiffs is the perception that U.S. courts also seem to scrutinize heavily foreign cases. As indicated when describing the arguments presented by defendants to support their *forum non conveniens* motions, one of the factors that the court weighed as favoring dismissal was the appropriate exam of the

[618] Plaintiff Attorney #2, *supra* note 549.

[619] *Id*.

"driving conditions to which the vehicles and tires were subjected."[620] In this respect the court acknowledged that local judges could assess these issues more accurately than a U.S. judge, even more if it involved allegations of tires and vehicles being improperly serviced, as well as negligent or reckless driving as causes for the rollovers.[621]

In their joint reply to the plaintiffs' response, Ford and Firestone expressed concern about the importance of viewing the accident scene for some cases.[622] They also stated that "it would be difficult for an American to imagine" conditions like "high speed driving over road conditions with steep shoulders with sharp drop-offs."[623] The MDL judge said that U.S. courts could instead employ videotapes, or aerial photographs to determine the real conditions of the roads and circumstances in which the accidents occurred.[624]

As the cases were to be litigated in the U.S., the trial courts were expected to evaluate defendants' arguments about the victims' shared fault in their accidents, and most likely, would use different standards than Venezuelan or Colombian judges would. As the enforcement of traffic regulations in the U.S. arguably is stricter than in

[620] *In Re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 190 F.Supp. 2d 1125, 1141 (S.D. Ind. 2002).

[621] *Id*.

[622] *Id*.

[623] *Id.* at 1144.

[624] *Id*. at 1144-5.

Venezuela or Colombia, trial judges could be more severe than their Venezuelan counterparts when analyzing the negligence of plaintiffs and their contribution to the accidents.

Some interviewees, pointed to the little or no involvement of clients in critical decisions regarding their cases as another difficulty for them. Others also mentioned the absence of direct communication between them and U.S. counsel representing their case. As earlier explained, in most foreign cases U.S. counsel were retained by the Venezuelan attorneys, and not directly by their clients. One of the interviewees acknowledged not having met in person most of his Venezuelan clients.[625] We were also told that all communications were channeled trough the Venezuelan counsel, and that important decisions about the case were made using this method.[626]

Even though the involvement of Venezuelan counsel mainly occurred backstage, all the U.S. lawyers that we interviewed deemed it key to the success of their legal strategies. The numerous connections that Venezuelan lawyers had both in the public and private sectors helped them at different levels, from the screening and selection of clients, to the process of building the case (gathering evidence, obtaining official records, and governmental support)

[625] Plaintiff Attorney #4, *supra* note 571.

[626] *Id*.

From our interviews with counsel on both sides, we could identify at least two different levels of social networks that played a role in the handling of the case. At the local level, Venezuelan counsel relied on their contacts in administrative agencies and local courts to obtain official records and legal documents that were needed to process the cases in U.S. courts. By using the networks, lawyers bypassed many common obstacles that exist when dealing with administrative agencies in Venezuela, and gained access to evidence that otherwise would be impossible to obtain.[627] At another level, Venezuelan counsel also relied on their ties with other lawyers who helped them identify, screen and select potential clients for the collective litigation. Also, these social ties were also instrumental in helping Venezuelan lawyers to connect with U.S. plaintiff attorneys.

Plaintiffs might have reasons to trust their counsel, not only because of a favorable perception about their professional competency, but also because of their lawyers "knew the right people" and as a result would make the most favorable decisions for them. Venezuelan plaintiffs were confident that their lawyers' social connections would not only help them in Venezuela but also in the U.S. by getting them the best representation and ultimately the most favorable outcome on their behalf. They often assumed that U.S. plaintiff counsel also relied on a network to navigate through the system.

[627] These connections worked in the same way as reported in the description about the use of the courts to process business disputes. See, *supra* Chapter Five.

The different levels of networks were also connected by *weak ties*, that is, through common members who served as brokers by bridging different groups in order to obtain certain benefits. As we can see, the social networks in this case were not relied upon for channeling actual disputes, but their presence was important for creating favorable conditions in which legal conflicts were processed.

Potential incentives for defendants if cases were tried in South America: the two faces of judicial inefficiency

One cannot conclude without commenting on the possible strategic advantages that Ford and Firestone would have if the cases were tried in Venezuela. As earlier mentioned, defendants dedicated important efforts toward the dismissal of cases by U.S. courts, under the argument that Venezuela and Colombia were the adequate fora to try those cases. Defendants argued that "these cases should be tried in the countries in which the accidents occurred, where the victims live, and where the witnesses and the investigative authorities are located."[628]

But are these the only reasons? One could assume that some of the obstacles that Venezuelan and Colombian victims faced in their countries represented advantages to Ford and Firestone. If Venezuelan courts tend to give smaller awards than their U.S. counterparts, it clearly benefits the defendants because they can expect to pay less. If Venezuelan and Colombian attorneys cannot be retained on a

[628] *See generally In Re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 190 F. Supp. 2d 1125 (2002).

contingency basis it may also benefit the defendants since only those victims who are able to cover trial expenses will sue. By the same token, the existence of the "British rule" system in regards to award of fees may deter risk-averse plaintiffs from filing actions in Venezuela and Colombia. In addition, there are other obstacles mentioned by plaintiffs (i.e. overall inefficiency of Venezuelan courts), which one would assume are negative for any disputant, but may turn out to be advantageous to some. Among the arguments presented to persuade the MDL court to retain jurisdiction over foreign cases, plaintiffs highlighted "the long delays plaguing the Venezuelan judicial system."[629]

Plaintiff attorneys brought in the oft-repeated argument that Venezuelan courts had an estimated backlog of two to three million cases[630] and suggested that trying these lawsuits in Venezuela would be difficult, lengthy, and costly.[631] While the objective of plaintiffs was to obtain an "easy, expeditious, and inexpensive" resolution of their cases, defendants might want the opposite.[632]

Congested and slow courts clearly deterred victims from filing their claims in Venezuela and forced those who had already sued to settle their cases quickly in order

[629] *Id.* at 1153.

[630] *Id.*

[631] *Id.* at 1152.

[632] *Id.*; Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947) (among the important private interests to be considered in forum non conveniens analysis are "practical problems that make trial of a case easy, expeditious and inexpensive").

to avoid costly trials. It is true that if a trial took long, defendants would have to face that cost too, but that might not hurt their pocketbooks as much as it would the plaintiffs'.

In sum, the reasons why litigants decide to use a particular forum depends heavily on important strategic considerations that go beyond the legal arguments presented in the courts. Disputants, as migratory birds, fly north or south in search of a place that offers the best shelter for them, and social connections play an important role in the process of deciding where to go. In this case, it seems that Venezuelan plaintiffs found it by flying north to the U.S. – whereas, not surprisingly, the American defendant corporations preferred to fly south to Latin America. And all this was possible with the help of lawyers and their social networks on both jurisdictions.

CONCLUSIONS

Almost two decades after the implementation of judicial reform agendas throughout Latin America, scholars and reform advocates are still debating why many reform policies have failed in the region, and why institutionalized ADR process have been so timidly received by Latin American business disputants, contrary to what their proponents initially predicted.

In order to understand the reasons for these phenomena, scholars have increasingly proposed the need for empirical research, but not much has been done in that respect. To a certain extent, this dissertation has attempted to fill that gap.

The present study showed that business disputants in Venezuela have access to a variety of alternatives for processing their legal conflicts. As we could see, these alternatives operate on different levels ranging from the official fora that typically host formal mechanisms (i.e. trial in courts) to the non-institutionalized environments where formal (i.e. diamond arbitration) and informal processes take place (i.e. enforcement based on shaming, and mediation outside ADR centers).

Furthermore, our research has revealed that individual choices for dispute processing are heavily influenced by the social environment, and not only by the factors commonly portrayed in the traditional scholarly literature that views disputes

as "disembodied events separated from the social world" and not as a cultural behavior.[633]

Traditional scholarly approaches have focused on the functioning of official institutions and the processes that take place within them, without taking into account the larger social context. These paradigms have also described societies and their legal systems in terms of an artificial dichotomy that labels them as traditional or modern. As none of these approaches[634] has given importance to social interactions and the ways in which individual behavior is affected by the social context, researchers have been able to obtain only a partial view of how institutions and social processes operate.

Legal and judicial reform advocates, for example, have traditionally looked at dispute resolution processes through the narrow lens of state-sponsored institutions and the mechanisms that typically take place within them, therefore reaffirming the centralistic approach that has characterized traditional legal scholarship for many years.[635] Most reform agendas have focused on strengthening official institutions and

[633] Sally Engle Merry, *Disputing Without Culture* 100 HARV. L. REV 2057, 2063 (1987)

[634] It could be argued, however, that the *new legal pluralism* paradigm constitutes an exception due to the fact that it not only looks at the social interactions, but also at the "unofficial forms of ordering located in social networks or institutions". Sally Engle Merry, *Legal Pluralism* 22 LAW & SOC'Y REV. 869, 873 (1988)

[635] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 20-21 (1981). However, more recently we have witnessed a surge of scholarly work related to the idea of private ordering, thus offering a more ample view about which processes disputants use and why.

the processes that take place within them, and have largely disregarded the dynamics that occur outside formal institutions.

Socio-legal scholars have usually paid most of their attention to dispute resolution processes that take place within the courts, in spite of the fact that the majority of business disputes are not even channeled through these official fora. Few conflicts are actually brought into the judicial process; only a fraction of these reach the stage of formal decision or judgment,[636] and an even smaller number are actually resolved.[637] As in many other legal systems, the majority of business disputes are not brought into the Venezuelan courts as parties seem apparently do not view the courts as their first option. Nonetheless, as we explained, reform advocates seem to have an entirely different picture.

In the specific case of Venezuela, by being entrenched in such court-centered approach, reformers and ADR advocates overlooked some important procedural choices that business disputants often make in that country, and this has prevented them from getting an accurate assessment. Also, reformers acted on the basis of several assumptions that were far from being proved.[638]

[636] Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLUR. & UNOFF. L. 1, 3 (1981).

[637] Meaning that both parties reach any form of closure.

[638] See, Manuel A. Gómez, Shooting First, and Finding out Later: ADR in the World Bank Judicial Reform Agendas (2002), (unpublished manuscript) (on file with author).

This dissertation, instead, has recognized that the context in which disputants interact and the social relationships that connect them with other social actors, exert an important influence on how they decide to process their legal disputes through the various formal and informal mechanisms.

As our research showed, the decision to use a particular mechanism (formal v. informal) or procedural approach (adjudicatory v. conciliatory, dyadic v. triadic) depends on the social context, and not necessarily on the intrinsic characteristics of each mechanism. Venezuelan lawyers, for example, do not use judicial processes because of their intrinsic value as impartial adjudicatory mechanisms, but rather because they occur in a forum where disputants feel comfortable. By the same token, diamond dealers seem to use formal arbitration not because of its ability to ensure distributive justice, but instead, because it takes place in a familiar social context. And the same seems to be true of debt-collection agencies and non-institutionalized ADR processes, where the choice of mechanisms follows from the perceived advantages of the forum to those who actually use it.

Additionally, by going beyond the artificial dichotomy fashioned by traditional scholars to describe societies and their legal systems, the social networks' paradigm has allowed us to describe dispute processing choices in an environment that combines many features that are typically seen in technologically advanced, modern and affluent societies; and at the same time, some of the characteristics that socio-legal scholars attribute to societies considered to be indigenous or traditional.

As we were able to see, dispute processing among Venezuelan business actors takes place in a context where interpersonal relations are paramount and social networks have permeated private and public institutions. This characteristic is what has allowed social networks to become stronger and to maintain a leading role in the operation of the business sector, and has strongly influenced the way in which its members process their disputes.

As we described, many times social networks are still directly used for processing disputes outside state institutions, but from time to time, people need the intervention of courts or other state-sponsored agencies which interestingly, are also used with the intervention of social networks.

Each of the five small case studies of procedures and procedural choices embedded within the larger case study of the Venezuelan business sector demonstrates how disputants' choices are heavily influenced by the social context in which they interact.

In the first place, our research described how the reliance on social networks is what drives business parties in Venezuela to use the courts voluntarily in spite of the conventional wisdom –among judicial reform advocates- that disputants avoid using the judiciary at all costs. Secondly, we have demonstrated how social networks are also relied upon for mediating and arbitrating disputes that arise among

businesspeople and paradoxically, how this has discouraged potential users from using the recently established ADR centers.

Social networks also influence the processing of legal disputes among members of close-knit communities such as the diamond sector. In this instance, arbitration is used to enforce incomplete contracts in the absence of a centralized formal authority and to facilitate the flow of information among trading partners.

We also described how the Venezuelan business sector has relied on non-traditional mechanisms (i.e. Dr. Diablo's) that use shaming sanctions as a way to obtain the enforcement of rights, and how business disputants have incentives for using them in spite of their tension with the legal system. Finally, we described that when Venezuelan litigants decide to take their disputes to foreign courts, social connections, though they are not directly relevant to the actual procedures, still play a role in facilitating the handling of the litigation.

Although our project focused on the Venezuelan business sector, it has broader implications. The social networks paradigm has offered a way to explore the ways in which individuals cope with interpersonal conflict within social group settings, to understand the ways in which group norms are effectively enforced in the absence of a centralized formal authority; but most importantly, to explain the influence of the social context on individual choices for dispute processing mechanisms and fora, in a way that goes beyond the dichotomy that views societies as either traditional or

modern.[639] Ultimately, our analysis also helps us to understanding the role of conflict in the transformation and maintenance of social structures.

[639] In fact, as Clyde points out, "the use of the notion of social networks in the interpretation of field data…was introduced into British social anthropology in the first instance particularly because the conventional categories of structural/functional analysis did not appear to be adequate when anthropologists began to make studies outside the ordinary run of small-scale, isolated 'tribal' societies." See, J. CLYDE MITCHELL, *The Concept and Use of Social Networks, in* SOCIAL NETWORKS IN URBAN SITUATIONS 8 (J. Clyde Mitchell, ed. 1969). The weakness of the structural approach is that "involve(s) generalizations about the behaviour of people in terms of the positions they occupy in the social system but that these generalizations based as they are on abstractions ignore individual deviations from the pattern. Id. at 9.

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