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The Role of the Economic Efficiency Paradigm in Commercial Law Reforms: A French Perspective

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This paper argues that the economic efficiency paradigm is not an appropriate methodology to assess commercial legislation in the context of legal reform. The limits of such a methodological approach will be particularly considered through the analysis of the World Bank's reports on Doing Business. These depict civil law jurisdictions such as France as providing poor legislative frameworks for commercial law in comparison with common law jurisdictions. While it is reasonable, even in civil law jurisdictions, to defend economic efficiency as a valuable tool in the law making process, it cannot constitute the sole purpose of commercial law reforms. Other aspects of the rule of law should be equally relevant. Particularly, in a context of internationalisation, it is argued that such methodology could jeopardise efforts towards harmonisation of law.

Introduction

In the context of legal reform, the economic analysis of law has recently been used as a method of scrutinizing national laws and encouraging nations to modernise their laws. The contribution of the World Bank in this respect has been significant, especially its *Doing Business* reports which yearly rank the effectiveness of national commercial laws.¹ The 'legal origin' thesis, which controversially underpins the reports, posits that law impacts upon economic growth and that common law jurisdictions demonstrate a better quality of

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¹ The *Doing Business* program is an initiative run by the International Financial Corporation (IFC), an institution created by the World Bank. The *Doing Business* Reports have ranked the quality of national legislation for doing business yearly since 2004. These reports are available at <<http://www.doingbusiness.org/>> [accessed 15 June 2014].

legislation for the promoting and facilitating of economic development.² Accordingly, the *Doing Business* reports consistently rank common law jurisdictions in the top positions for the best jurisdictions in which to invest.

In its *Doing Business* reports, the World Bank offers a measure of the ease of doing business in 189 jurisdictions. The evaluation of a national commercial law framework is based on the measurement of the economic performance in several activities (the ease of starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency).³ The idea is to assess regulatory frameworks in terms of their effectiveness for doing business and promoting economic development. Most economists would define economic efficiency as a general objective of growth and maximization of wealth that is to say, the use of resources so as to maximise the production of goods and services. The means of achieving this utilitarian goal, however, divide neo-liberal economists, Keynesians or theorists of the invisible hand (laissez-faire economic philosophy).⁴ Within the World Bank reports, the notion of economic efficiency is rooted in a neo-liberal conception of free markets. Market liberals believe that commercial transactions should be facilitated through the adoption of more ‘economically efficient’ legal frameworks which maximise transaction speed and lower transaction costs. These ‘economically efficient’ commercial legislations would, as a result, enhance foreign investments and economic growth. Accordingly, the indicators in the World bank reports take into account the number of procedures, costs and duration that is to say what economists call transaction costs. Economic efficiency is thus defined in terms of transaction costs and this is this notion of economic efficiency that will be adopted throughout this paper.

The *Doing Business* initiative does not just rank the economic efficiency of national business laws; it also encourages legal reform in jurisdictions which display according to the reports, ‘economically inefficient’ commercial laws. It is interesting to note that at the

² The legal origin thesis was originally developed by a group of researchers that belong to the World Bank, also called Group LLSV which designation encompasses the initials of the most active members (Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer and Robert Vishny). See e.g. J Armour et al. ‘Law and Financial Development: What we are Learning from Time-Series Evidence’ (March 2010). ECGI - Law Working Paper No. 148/2010 < <http://ssrn.com/abstract=1580120>> [accessed 15 June 2014].

³ World Bank Doing Business Reports methodology < <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Chapters/DB14-Ease-of-doing-business-and-distance-to-frontier.pdf>> [accessed 14 June 2014]

⁴ A Smith, *An Inquiry Into The Nature and Causes of the Wealth of Nations* (1776), (1993, Hackett Publishing Co, Inc, Abridged edition).

international level, other entities, such as the EBRD⁵ or UNCITRAL,⁶ have also encouraged jurisdictions to adopt commercial laws based on more ‘economically efficient’ models. In the field of secured credit law, for example, these international entities⁷ have promoted the adoption of a functional approach to the regulation of secured transactions modelled on the unitary secured credit law regime of Article 9 of the Uniform Commercial Code (UCC).⁸ As part of the civil law tradition, France has always been quite reluctant to assess the quality of law solely by referring to economic imperatives, and thus, it was not surprising to see that the American model was not adopted when France reformed its secured credit law in 2006.⁹ Unlike most civil law jurisdictions such as France, the role of economic efficiency within the law making process is well acknowledged in common law jurisdictions, particularly in the US. In the field of finance and secured transactions, this methodology and model have been used to justify the adoption of economically driven policies which generally provide wider protection to investors and creditors at the cost of social considerations and protection for debtors. In contrast, civil law jurisdictions such as France have tended to emphasise more clearly a broader range of social and moral considerations than simply market efficacy.¹⁰ This paper thus questions the role of economic efficiency as a means of evaluating legislative frameworks in the context of modernisation of law and, essentially, challenges the assumption of the causal link between the economic efficiency of law and economic growth.

It is argued that the value of economic efficiency criteria within the law making process is limited. While nations, including civil law jurisdictions, have been helped by such criteria towards undoubtedly desirable legal reforms, this paper will provide evidence of some of the limits to the use of economic analysis within the modernisation of commercial laws. This will

⁵ The European Bank for Reconstruction and Development was originally created in 1991 following the fall of the Berlin wall. The EBRD invests in projects, engages in policy making process and provides advisory services to enterprises <<http://www.ebrd.com/pages/homepage.shtml>> [accessed 15 June 2014].

⁶ United Nations Commission on International Trade Law enacted a series of conventions, model laws, and legislative guides with the aim of to promote legal reform in the light of an approximation of laws in the field of international commercial law <http://www.uncitral.org/uncitral/en/about_us.html> [accessed 15 June 2014].

⁷ See e.g. the EBRD Model Law on Secured Transactions 2004 <<http://www.ebrd.com/downloads/legal/secured/modellaw.pdf>> [accessed 15 June 2014], and the 2007 UNCITRAL Legislative Guide on Secured Transactions <http://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670_Ebook-Guide_09-04-10English.pdf> [accessed 15 June 2014]. These legal instruments both encompass a unitary secured credit law regime based on the American model (Article 9 UCC).

⁸ Article 9 UCC adopts a functional approach to the regulation of a unitary security device, the security interest. It encompasses large scope of coverage, including all categories of personal property, tangible and intangible and all types of parties. Article 9 UCC provides for a single functional system together with the recognition of a single set of rules, a notice filing system and a first to file priority rules, applicable to the security interest.

⁹ The Ordinance of 23rd March 2006 reforming French Secured Credit law added a new chapter to the French Civil code. On the French Law reform, see P Simler, ‘La réforme du droit des sûretés - Un Livre IV nouveau du Code civil’ (2006) JCP éd. G, n° 13, I 124.

¹⁰ S Whittaker, ‘The Law of Contract’ in J Bell et al, *Principles of French Law* (2nd edn, OUP 2008) 296-302.

mainly be done through the examination of certain aspects of the methodology used by the World Bank to assess national legislations and promote legal reforms. Particular emphasis will be given to the examination of the *Getting Credit* indicator which assesses the quality of limited aspects of national secured credit and bankruptcy laws. Given the current economic climate and the recent trend to reform financial laws, the assessment of the *Getting Credit* set of indicators is opportune. The analysis will seek to demonstrate the limits of the methodology adopted by the World Bank in producing a ranking of the countries in which to invest. It concludes that the sole use of this particular concept of economic efficiency cannot provide an appropriate assessment of commercial law legislation and, should not constitute the sole purpose of commercial law reforms. Particularly, in a context of internationalisation, the World Bank's aim to 'encourage good practice' via legal transplantation of more 'economically efficient' legal frameworks could ultimately undermine modernisation and harmonisation endeavours.

The impact of the World Bank Reports in civil law jurisdictions: “*le choc*”

Significant work in the 'mapping' of commercial laws¹¹ can be found with the reports of the World Bank which rank nations according to the quality of their legislation to regulate commercial transactions. The reports are published each year by a subsidiary of the World Bank and rank 189 countries according to the ease of doing business in them.¹² The reports are based on a series of empirical research studies which essentially found their analysis on a particular concept of economic efficiency and more controversially, on the legal origin thesis.¹³ Accordingly, it is claimed that legal origin affects economic growth and that the law from common law jurisdictions is more effective than commercial laws from civil law jurisdictions in promoting the development of the economy.¹⁴ Needless to say, the postulates of the legal origin theory are very controversial. In particular, in the present context of the financial downturn, it is arguable that what would seem to actually dictate the new commercial legal framework are the current economic circumstances and not the other way round. The World Bank reports also make a series of assumptions that are questionable. For

¹¹ Beside the World Bank *Doing Business* Reports, reference can also be made of the work of P R Wood, *Maps of World Financial Law*, (6th edn, Sweet & Maxwell 2008).

¹² Op. cit. (n 1).

¹³ Op. cit. (n 2).

¹⁴ On the legal origin thesis see e.g., CJ Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy' (2009) 57 AJCL 831.

instance, it is claimed that the more reforms are introduced in a given jurisdiction, the better. But in a context of multiple reforms, it is quite difficult to work out whether a particular reform in itself would provide better quality of legislations. Nevertheless, and unsurprisingly, the trend of the *Doing Business* reports has been that common law jurisdictions have always appeared amongst the jurisdictions most favourably rated while civil law jurisdictions have always scored very poorly. The poor rating obtained by civil law jurisdictions in the World Bank reports have clearly shaken the civil law community who have had to react to what they perceive as attacks and provide constructive responses. Many academics doubt the real usefulness of establishing such a financial map and contest the methodology and criteria used to reach such conclusions.¹⁵ In 2006, France was occupying the 44th place behind Samoa, Botswana and Jamaica.¹⁶ In 2013, France moved to the 34th place¹⁷ with Singapore, China, New Zealand and the US occupying respectively first, second, third, and fourth position. This improved position can be justified by a myriad of different factors and not just because France reformed its commercial law. Since 2004, a great deal of work has been done by academics from civil law jurisdictions analysing and setting out criticisms of the methodology used by the World Bank in assessing the quality of legislations.¹⁸ The *Association Henri Capitant*¹⁹ (the *Association*) published two series of answers to the *Doing Business* Reports; one was the product of French academics²⁰ and the other was produced

¹⁵ See especially, 'Regards Civilistes sur L'Analyse Economique du Droit' (2010) 1 *Henri Capitant Law Review* <http://henricapitantlawreview.org/edito_revue.php?id=18&lateral=18> [accessed 15 June 2014].

¹⁶ World Bank *Doing Business Report Creating jobs, 2006* <<http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db06-fullreport.pdf>> [accessed 15 June 2014].

¹⁷ The 2013 *Doing Business* report <<http://www.doingbusiness.org/reports/global-reports/doing-business-2013>> [accessed 15 June 2014].

¹⁸ The *Association Henri Capitant* and the *civil law Initiative* have engaged in activities to promote the civil law culture. The *civil law initiative* or "*La Fondation pour le Droit Continental*" was created to promote the civil law culture within the internationalisation of law process. Its activities are led by legal academics and professionals from a wide range of jurisdictions. <<http://www.fondation-droitcontinental.org/en/>> [accessed 15 June 2014].

¹⁹ *Association Henri Capitant des amis de la culture juridique française* was created in 1935 by a group of legal academics from different francophone jurisdictions and under the authority of Henri Capitant Professor of Law at the Law Faculty of Paris. The *Association* is now composed of legal academics and professionals from a wider range of jurisdictions, including non-francophone jurisdictions, interested in the civil law legal culture. Information on its recent work, publications and other activities can be accessed <<http://www.henricapitant.org/>> [accessed 15 June 2014].

²⁰ The first volume of answers to the *Doing Business* reports was the product of various authors including French legal academics and also professionals such as lawyers and notaries. The full list of contributors can be found in *Association Henri Capitant des amis de la culture juridique française*, 'Les Droits de Tradition Civiliste en Question. A Propos des Rapports Doing Business' (2006) 3 *Revue de Droit des Affaires*. <http://www.henricapitant.org/sites/default/files/Les_droits_de_tradition_civiliste_en_question.pdf> [accessed 15 June 2014].

from a wider range of other civil law jurisdictions.²¹ Both contested the methodology used by the *Doing Business* reports. The first volume of responses strongly criticised the use of economic efficiency as a method for assessing the quality of national commercial laws and as a method of determining ‘ease of doing business’. These criticisms proceeded onto a verification of the pertinence of the data used and of the conclusions drawn by the World Bank.²² Particular emphasis was also given to the intrinsic structural and substantial advantages of the civil law tradition in regulating economic activities. It is not the purpose of this paper to consider in details all the arguments advanced in these reports, but some elements should be emphasised. The *Association* argues that the major structural advantage of civil law systems is the ‘accessibility’ of law guaranteed by codified legislation. First, codified rules ensure material accessibility in that every citizen can easily identify and find the relevant legal texts. Secondly, codified legislation guarantees an intellectual accessibility to the rule of law in that the rules are enshrined as general principles in codes thus offering greater clarity and intelligibility. In this respect, it is significant to acknowledge the general trend towards codification within common law jurisdictions, and particularly in the field of commercial law.²³ Other structural advantages of civil law systems include security and flexibility of the rule of law. Security and predictability are reinforced because codification enables sources of law to be known *ab initio* and not to be revealed *a posteriori* by the judge. Indeed, civil law systems such as France do not generally recognise case law or *jurisprudence* as a direct formal source of law unlike common law jurisdictions. Nevertheless, French judges can be recognised as having broad interpretative powers²⁴ where the law remains imprecise, incomplete or unclear.²⁵ These interpretative powers thus allow some flexibility within codified legal systems which are often described as being too rigid. Advantages of civil law systems can also be found within the substance of legal norms. In this respect, the *Association* considers aspects of contract law to highlight some of the

²¹ The full list of jurisdictions involved is available in Volume 2 Association Henri Capitant des amis de la culture juridique française, ‘Les Droits de Tradition Civiliste en Question. A Propos des Rapports Doing Business’ (2006) 3 *Revue de Droit des Affaires*.

²² In this respect, this paper will focus on the World Bank’s assessment of secured credit legislations and, particularly, the “getting credit” set of indicators.

²³ The process of codification is all the more accentuated by the current harmonisation and unification of law process at the international level. See e.g. the Uniform Commercial Code in the US.

²⁴ See e.g. Article 1382 of the French Civil code which lays down the general principle of delictual liability but which left its legal regime to be specified by judges (by the *jurisprudence*).

²⁵ This is the result of the principles inherited from Montesquieu who described the role of French judges as “*bouches de la loi*”. See Articles 4 and 5 French Civil code.

normative advantages of French law.²⁶ The *Association* concludes that the law, whether part of the civil law or the common law traditions, has its own value and, consequently, should not be subordinated to economic analysis.

Despite the strength of these reactions to the reports of the World Bank, they should not be seen as an expression of patriotism or chauvinism. Reactions to the reports were also constructive for many civil law jurisdictions. For instance, France considered some of the criticisms addressed and tried to improve the attractiveness of French law within the international commercial scene.²⁷ The reports have in fact been an important wakeup call for France. The issuing of these reports had a strong political impact, particularly for the Ministry of the Economy, which urged legal reformers to make French law more ‘economically efficient’ and more competitive at the international level. In this respect, the French reform of secured credit law in 2006 is an obvious illustrating this trend towards greater efficiency.²⁸

Economic efficiency: A ‘universal’ methodological tool for evaluating commercial law among others?

In an era of internationalisation of legal relations, some have argued that approximation of laws has become a necessity. Legal insularity is no longer an option for legal reformers. As such, the use of economic efficiency as methodology to modernise commercial law frameworks seems fairly neutral and can be understood by any legal system. Although, it was born in the US, this is not seen as a methodology that requires the adoption of common law assumptions. For example the *travaux préparatoires* to the 2006 reform clearly emphasised the need for French law to become more ‘economically efficient’ and more competitive.²⁹ In 2005, the President of the French *cour de Cassation*, Mr Guy Canivet, highlighted that:

²⁶ ‘Les Droits de Tradition Civiliste en Question. A Propos des Rapports Doing Business’ (2006) 3 *Revue de Droit des Affaires* 98.

²⁷ Paris bar organised a conference in Washington in 2004 entitled: ‘The American and French Legal systems: Contrasting Approaches to Global Business’. In 2005, the Paris Bar organised another conference including members of the French government and representatives from the World Bank and from other international institutions entitled ‘Paris-Place of Law’. In 2006, France reformed its secured credit law regime, simplifying the current regime (*Ordonnance No 2006-346 du 23 Mars 2006 art.13 Journal Officiel du 24 Mars 2006*). In 2007, France introduced the *fiducie*, a civil law trust (*Loi n° 2007-211 of 19 February 2007*). See, B Fauvarque-Cosson et al, ‘Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law’ (2009) 57 *The American Journal of Comparative Law* 817.

²⁸ On this point, see M Renaudin “ The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets” 24 (11) *International Company and Commercial Law Review*, 385.

²⁹ The working group, *Commission Grimaldi*, delivered in 2005 a Report to the Minister of Justice entitled ‘Groupe de travail relatif à la réforme du droit des sûretés, Rapport a Monsieur Dominique Perben, Garde des

“French law is, in the global order, suddenly reminded of efficiency imperatives by American Schools of Law and economic analysis. They postulate that the quality of laws and regulations governing commercial transactions play a decisive role in economic growth. Their studies have observed many systems of law, and aim to demonstrate that the most burdensome regulations produce the worst results because they are usually accompanied with inefficient public institutions, long delays within decision-making, high costs of bureaucracy, inefficiency within judicial proceedings, higher unemployment and corruption, less productivity and the drying up of investment. Based on these criteria, systems derived from the French model appear to be adversely rated and classified.”³⁰

This extract evidently refers to the World Bank Reports which, as explained above, offered a severe assessment of commercial laws based on civil law models as not being as ‘economically efficient’ as those based on common law models. Despite strong criticisms of this methodology,³¹ it is quite clear that the World Bank ranking has shaken those responsible for the commercial law frameworks of many jurisdictions into moves toward more economically efficient legislation, and this is also true of civil law jurisdictions such as France. The reform of French secured credit law is an obvious illustration of this trend. The extent to which economic efficiency has been a useful tool within the French secured credit law reform will not be considered in detail in this paper but some aspects of the reform show evidence of a significant move towards more economic efficiency.³² It is also evident from reading the *travaux préparatoires* that achieving greater economic efficiency was not the only aim underpinning the French secured credit law proposal. The report of the *Commission Grimaldi*³³ that preceded the proposal for secured credit law reform confirmed the need for economic efficiency but also emphasised the need for French law to modernise secured credit legislation in a way that would preserve an adequate balance of interests between ensuring

Sceaux, Ministre de la Justice’
<http://www.henricapitant.org/sites/default/files/Rapport_du_Groupe_de_travail.pdf> [accessed 15 June 2014].

³⁰ Inaugural speech of the President of the French *cour de Cassation* in 2005

<www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf> [accessed 15 June 2014].

³¹ The limits to the use of the economic analysis within commercial law reforms and harmonisation of law will be considered in greater depth in the second part of this paper.

³² Op. cit. (n 28).

³³ *Commission Grimaldi* led by Professor Michel Grimaldi which was affected to the task of reforming French secured credit law was presented on 31st March 2005

more accessibility to foreign investors and greater efficiency for both French commercial actors and citizens.³⁴ This approach is to be welcomed. As it will be argued in the next part, because there is no established theory recognising the existence of a causal link between economic efficiency, the rule of law and economic growth, it is difficult to sustain the view that economic efficiency criteria alone will produce successful commercial law reforms.

The limits of economic efficiency within commercial law reforms

Recent trends towards the internationalisation of commercial transactions have demonstrated that national commercial laws often do not adequately enable commercial actors to carry out their business activities across national borders. As such, it has been argued by some that national commercial law reforms should be adopted with the aim of promoting the convergence of national legal rules so as to facilitate trade beyond national boundaries. In this respect, it is important to emphasise that the reports of the World Bank not only aim to inform international investors about the quality of national commercial laws, but also to encourage jurisdictions to reform their laws in the light of an approximation of laws. Clearly, the motives of the World Bank are to encourage legal reforms through legal transplantation of more economically efficient models. However, the economic efficiency criteria used by the World Bank reports to assess national commercial law legislation is open to criticisms. In particular, this quest to transplant more ‘economically efficient’ legal frameworks could ultimately undermine modernisation and harmonisation endeavours.

The methodological lacunae of assessment based on economic efficiency

The theories and methodology that underpin the World Bank *Doing Business* reports have been heavily criticised in civil law jurisdictions³⁵ but generally not in common law jurisdictions. The reports claim to measure the quality of legislation for doing business. However, what is actually measured is quite questionable. National business legislation is

³⁴ See the Report that preceded the secured credit law proposal for reform by the Commission Grimaldi (31st March 2005): “*Moderniser les sûretés afin de les rendre lisibles et efficaces tant pour les acteurs économiques que pour les citoyens tout en préservant l’équilibre des intérêts en présence, tels sont les objectifs de la présente ordonnance*”.

³⁵ Op. cit. (n20 and 21).

compared in the light of specific factors.³⁶ These factors each contain different indicators which have been determined so as to provide a model of economic efficiency based on the ease with which business can be conducted. Economic efficiency is thus the ultimate goal to be attained if one wants to score well on the indicators used in the reports. However, the system adopted to measure these different factors remains quite unclear. The empirical data on which the *Doing Business* reports are based derive from questionnaires and thus depend on the views of experts and professionals who remain largely unidentified.³⁷ Generally speaking, using questionnaires does not appear to be an adequate and objective approach to assess national legislations. This was even recognised by the authors of the reports in its first edition of 2004.³⁸ The results will always be influenced by the perceptions of the respondents which may produce subjective results.³⁹ From a linguistic perspective, there is also the obvious issue of translation. Initially, these questionnaires were only available in English.⁴⁰ Despite the fact that questionnaires have recently been translated, the issue of legal translation still remains. For example, in “*Getting Credit*”, the methodology sets out some case scenarios which refer to terminologies specific to common law jurisdictions such as the security interest or the floating charge.⁴¹ These are unknown legal concepts in France and in many other civil law jurisdictions. Thus the objectivity of the assessment carried out by the World Bank can once again be challenged. Moreover, the methodology within the report is inconsistently applied which significantly challenges the validity of the ranking. For example, in relation to “*registering property*”, France ranked 149 with China ranking 48.⁴² When we look closer at the time it takes to register property in both jurisdictions, we notice that the time period in France starts at the negotiation phase whereas it starts once the sale is concluded in China.⁴³ These preliminary remarks highlighted some aspects of the

³⁶ The 2011 Report uses a methodology based on 10 different factors, namely: starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business.

³⁷ A Raynouard, ‘Comment gagner facilement vingt places au classement Doing Business’ (2009) Journal La tribune < <http://www.latribune.fr/opinions/20090113trib000330948/comment-gagner-facilement-vingt-places-au-classement-doing-business.html> [accessed 15 June 2014].

³⁸ See ‘Other Indicators in a Crowded Field’ (2004) Doing Business Report 7.

³⁹ B Du Marais, *Des Indicateurs Pour Mesurer le Droit, Les Limites Méthodologiques des Rapports Doing Business*, études du Programme “Attractivité économique du Droit” (2006) La documentation française Paris 35.

⁴⁰ These are now available in French and other languages.

⁴¹ ‘Getting Credit Methodology’ < <http://www.doingbusiness.org/methodology/getting-credit>> [accessed 15 June 2014].

⁴² <<http://www.doingbusiness.org/data/exploretopics/registering-property>> [accessed 15 June 2014].

⁴³ On the *Registering property* indicator and methodology < <http://www.doingbusiness.org/methodology/registering-property>> [accessed 15 June 2014].

methodology used by the reports that clearly display some lacunae. The next part of this section will seek to determine the extent to which economic efficiency should be used as the sole model to assess the quality of business legislations, particularly through the prism of the *Getting Credit* set of indicators.

In *Getting Credit*, the first set of indicators used relates to the extent to which secured credit and bankruptcy laws facilitate lending. For example, jurisdictions will obtain a higher score if businesses can use movable assets as collateral while keeping possession of the assets or if businesses can grant a non-possessory security right in a single category of movable assets⁴⁴ without requiring a specific description of the collateral.⁴⁵ The second set of indicators relates to the coverage, scope and accessibility of the credit information that is available through a public credit registry or a private credit bureau. In relation to the first set of indicators, France has significantly improved its law on secured credit which now guarantees, to certain extent, more economic efficiency for commercial actors.⁴⁶ In relation to the second set of criteria,⁴⁷ the report considers the importance of private score rating agencies in providing extensive information about debtors so as to enhance lending from banks. It is recognised that the availability of information concerning the solvency of companies might increase the production of good investments, reduce risky credit and provide better control for creditors over the credit.⁴⁸ In France, a private bureau does not exist which meant that France got a low score within the *depth of credit information index* set of indicators. The public *Banque de France* provides information on the companies and individuals who have defaulted in the past through a special registry, the *Fiben*⁴⁹ for companies and the *FICP* for individuals.⁵⁰ In relation to the *Fiben*, and this is a major criticism made by the World Bank reports, not all companies are rated by the *Banque de France*. Only companies with a turnover superior to 750 000 *Euros* or with a credit that is over 380 000 *Euros* are eligible to appear in the *Fiben*

⁴⁴ such as accounts receivable or inventory.

⁴⁵ The full description of the *Getting Credit* methodology is available at <<http://www.doingbusiness.org/methodology/getting-credit>> [accessed 15 June 2014].

⁴⁶ On the first set of indicators (*strength of legal rights index*), France scored 7 out of 10 in the 2014 Report.

⁴⁷ On the second set of indicators (*depth of credit information index*), France scored 4 out of 6 in the 2014 Report.

⁴⁸ Above, n 43.

⁴⁹ *Fichier Bancaire des Entreprises*. In this database held by the *Banque de France*, appear companies and also individuals who are involved in economic activities. A code of conduct provides some specific guidance on this rating activity undertaken by the *Banque de France* <http://www.banque-france.fr/fr/institut/telechar/services/code_conduite_cotation_bdf.pdf> [accessed 15 June 2014].

⁵⁰ *Fichier National des Incidents de Remboursement des Crédits aux Particuliers*. This database is held by the *Banque de France* and only deals with individuals who are not involved in any business or economic activity. In relation to individuals, recent legislation now compels banks and other financial institutions to consult the *FICP* before providing any credit.

database.⁵¹ In 2010, approximately 250,000 companies were registered on the *Fiben* database which provides a credit score rating for each of them. Further, this credit rating is not automatically communicated to the public, it is exclusive to banks which have to pay for this service and which are bound to a duty of confidentiality. Although, one can argue that, from an economic perspective, this relative lack of transparency could deter foreign investments, France clearly shows a preference for balancing economic imperatives with other values such as fairness and adequacy. In effect, the question is not solely one of an economic nature, it further addresses the questions of whether public disclosure is adequate and whether the process of broadcasting the information is fair. Should the management and distribution of crucial information on the wealth of businesses be left in the hands of private entities?

In France, individuals' banks are central to providing information and borrowers (such as small limited companies and sole traders) tend to develop a durable relationship with their bank as a result. Accordingly, it is arguable that, at least in France, the establishment of a database of information concerning the solvency of companies and the sharing of information amongst private bureaux may not be adequate as it would not seem to affect the lending decision of banks. Further, the question of collecting information on companies raises issues of fairness. The information provided to creditors is very influential in lending decision making. As such, it is essential that the information provided is accurate. However, empirical studies have demonstrated that errors have often been made by private credit agencies.⁵² An undeserved bad credit rating could be very costly for the legitimate interests of companies and individuals. Indeed, it is arguable that the legitimate interests of companies also encompass individual rights of those who own, manage and work in them. The collection and sharing of such information thus affects individual liberty and it is arguable that providing such information might also exclude certain social groups from basic legitimate expectations such as access to credit. France thus chose to protect a wider range of interests than simply those driven by economic imperatives. The restriction imposed in France on the dissemination of private information is justified by other imperatives such as adequacy,

⁵¹ See <http://www.fiben.fr/pdf/fibenligne11.pdf>, [accessed 14 June 2014] and see especially, C Stevant, 'Le Système de Cotation de la Banque De France : Un Atout pour la Banque Centrale et un Outil pour les Banques' (2010) 180 Bulletin de la Banque De France.

⁵² M Miller, 'Credit reporting Systems Around the Globe : The State of the Art in Public and Private Credit Registries' (2000) World Bank Policy Research Working paper 3443, M Miller, *Credit Reporting Systems and the International Economy*, (MIT Press, 2003), R Hunt, 'The Development and Regulation of Consumer Credit Reporting in America' (2002) Federal Reserve Bank of Philadelphia Working paper 02-21, November 2002 < <http://www.phil.frb.org/research-and-data/publications/working-papers/2002/wp02-21.pdf>.> [accessed 14 June 2014].

ensuring the protection of privacy, individual freedom and liberty. The fact that private credit agencies are considered as indicia of the good quality of legislation is thus debatable because it does not take into account other essential values which form the cultural, social, political and factual background in each jurisdiction. It only reflects a particular, neo-liberal conception of economic efficiency. Finally, it should be pointed out that the recent economic crisis highlighted the vulnerability of the credit ratings determined by these agencies.

A particular national law can never be said to be better than another in any absolute sense. The analysis of some of the factors underpinning *Getting Credit* ratings shows that an assessment of legislation solely based on economic efficiency criteria is not adequate. What is also quite worrying is that the World Bank is spending resources in producing such paradoxes because ultimately, it does not matter so much that France ranks 52nd in the getting credit ranking or 41st within the access to electricity ranking,⁵³ it also supports the idea that certain forms of political governance, centralised government and dictatorship for example, are the best way towards legal reform and successful modernisation (e.g. Singapore ranks first). The methodology used by the World Bank can thus be further questioned in the light of a broader aim that the institution is seeking to achieve, that is legal reforms to promote an approximation of laws. The objective pursued by the World Bank and by many other international institutions is to be welcomed in a world where commercial transactions regularly cross boundaries. However, the final section of this paper argues that the World Bank reports and its methodology could jeopardise the success of legal reforms aimed at approximation of laws by compelling reformers to adopt inadequate legislation so as to obtain a better score.

Transplantation, economic efficiency and commercial law reform

The aim of the World Bank reports is not just to provide information to international investors but also, and predominantly, to promote legal reforms in jurisdictions that are found to be ‘economically inefficient’. In this respect, it is arguable that the reports may also contribute to the convergence of laws by promoting the legal transplantation⁵⁴ of more ‘economically efficient’ models, particularly common law models such as, for instance,

⁵³ Doing Business Report 2013.

⁵⁴ On the phenomenon of legal transplantation see for e.g. A Watson, *Legal Transplants: An Approach to Comparative Law* (2edn, University of Georgia Press 1993) and JS Gillespie, *Transplanting Commercial Law Reform, Developing a ‘Rule of Law’ in Vietnam* (Ashgate 2006). ‘

Article 9 of the American UCC in the field of secured credit.⁵⁵ This phenomenon is however open to criticism in the context of legal reforms because these are solely based on economic efficiency rationales and because the so-called more ‘economically efficient’ legal system cannot be demonstrated to be superior in quality by any established absolute standards.⁵⁶ As already suggested, the shaping of commercial laws should not just be driven by economic imperatives: other values inherent to each particular national legal culture are equally important. Whether a specific national legislation can be said to be ‘economically efficient’ remains an empirical question that cannot be answered through economic indicators⁵⁷. While the eagerness of the World Bank to promote legal reforms and convergence of law may be a good thing in principle, the achievement of these objectives could prove challenging.

It is arguable that the modernisation of commercial laws should not solely be based on economic efficiency criteria and should definitely not be the result of strategy rooted in political economy. After all, there is always the risk that reformers and private actors, engaged in the making of the law, will produce projects more influenced by political and economic power than legal expertise. In this sense, the methodology used by the *Doing Business* reports could have a negative impact on legal reforms with countries focusing on how to improve their ranking rather than focusing on the real legal issues that their system is facing.⁵⁸ The cultural, economic, political, social and commercial backgrounds of every jurisdiction differ and thus it should not be assumed that ‘economically efficient legislation’ in a given jurisdiction will produce similarly efficient results in another.⁵⁹ Reforming commercial law frameworks is a delicate undertaking that cannot solely be driven by economic imperatives. Indeed, there are substantial policy choices to be made in regulating commercial transactions. For instance, in the field of secured credit, questions arise as to the extent to which debtors should be entitled to use their assets for security purposes, the extent to which secured creditors should be entitled to a preference of repayment over other

⁵⁵ For e.g. Australia (Australian Personal Property Security Act 2009), New Zealand (Personal Property Securities 1999) and some provinces of Canada (e.g. Ontario Personal Property security Act 1967) all adopted a secured transaction law regime modelled on Article 9 UCC.

⁵⁶ In the field of secured credit, measuring the economic efficiency of Article 9 of the American UCC has been the topic of an on-going debate. On this issue, see the symposium reported at 82 Cornell Law Review (1997).

⁵⁷ Ibid.

⁵⁸ See on this point R Michaels, ‘Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law’ (2009) 57 American Journal of Comparative Law 765; B Arruñada, ‘Pitfalls to Avoid when Measuring Institutions: Is Doing Business Damaging Business?’ (2007) J. Comp. Econ. 729.

⁵⁹ See e.g., C Montesquieu, *De L'Esprit Des Lois*, (1748, Reprints eds Broché 2009). Montesquieu states that: “[t]he political and civil laws of each nation... must be so peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another.”

unsecured or involuntary creditors upon the debtor's default, or the extent to which third parties should be informed of the creation of property rights through public registration. Each jurisdiction opts for different views on the problem. This set of questions should indeed be considered in the light of different cultural, economic, social and political backgrounds that will affect the way in which each secured credit law regime is defined.⁶⁰ Economic analysis purely considers the issue in the light of economic efficiencies; it is arguable that the law of secured credit, and more generally the rule of law, should also be looked at in the light of other values.

The achievement of legal reforms aimed at the convergence of laws, through legal transplantation, could also be jeopardised. The willingness of the World Bank and other international entities⁶¹ to reduce the differences in the fundamental legal values held by different legal systems to a unique common denominator can be assimilated to the eternal quest for 'finding the lowest price at the lowest costs'. This has been highlighted by the president of the *Association Henri Capitant*, '... *Après les Low Costs, la Low Cost Law*'⁶² who argues that the law should not only be generated through abstract equations and solely through economic analysis. Of course, economic efficiency and promotion of economic growth are important to the elaboration of commercial law but other essential values enshrined in each national legal culture also have their importance in the making of the law. Accordingly, proponents of the conservation of legal cultures argue that, since law is cultural and that there cannot be a universal culture, there cannot be and there should not be a universal law.⁶³ The point made is not to favour a certain legal culture over another but to determine whether one can provide a rational justification for the adoption of a foreign legal system.⁶⁴

⁶⁰ Wood, above n 9.

⁶¹ Endeavours for the approximation of secured credit law regimes can be found with international initiatives such as UNCITRAL, EBRD, or UNIDROIT.

⁶² *Association Henri Capitant des Amis de la Culture Juridique Française*, "Communiqué de presse : présentation officielle du volume 1 "Les droits de tradition civiliste en question" on the 26th April 2006.

⁶³ Pierre Legrand also believes that legal transplants are simply impossible. See e.g., P Legrand, 'European Systems Are Not Converging' (1996) 45 *International Comparative Law Quarterly* 52; P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, P Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44.

⁶⁴ This movement to protect the diversity of legal cultures is important in assessing the success of legal reforms that aimed at the approximation of laws. The importance of protecting legal cultures has already been shown during the *General Agreement of Tariffs and Trade* (GATT) in 1993 under the doctrine of 'cultural exception'. On this point see P H Gordon et al, *The French Challenge: Adapting to Globalization*, (Brookings Institution Press, 2001) 48.

Conclusion

The use of the economic efficiency criterion on its own cannot provide an assessment of the quality of laws. Its use to dictate the content of commercial law more generally has been strongly criticised in civil law jurisdictions, and particularly in a context of legal reforms.⁶⁵ The related legal origins thesis which clearly underpins the World Bank reports assessing the ease of doing business in more than 180 jurisdictions cannot provide an adequate representation of the quality of laws. The nature of commercial law embraces a wider variety of values and interests and also encompasses a certain legal culture that should not be eroded by exclusive consideration of economic imperatives. This paper further attempted to demonstrate that while, the willingness of the World Bank to promote legal reforms aimed at the convergence of law may be a good thing in principle, this should not solely be justified by imperatives of economic efficiency. This paper concedes that economic efficiency can be a valuable tool within commercial law reforms but should not constitute its sole aim. What is further criticisable is that the World Bank reports have encouraged legal reforms using a culturally biased means of assessing national business legislation. This clearly creates a competition between legal systems that ultimately tends to promote certain legal systems and undermine others. However, it is important to emphasise that within this legal contest, national legal reformers should not overlook the distinct legal expertise needed to create adequate legislation that also reflects the societal, political or economical values of their own jurisdiction.

⁶⁵ See e.g., B Fauvarque-Cosson et al, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law' (2009) 57 *The American Journal of Comparative Law* 811; R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 *The American Journal of Comparative Law* 765, C J Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy' (2009) 57 *The American Journal of Comparative Law* 831.