Why and How Empirical Study in Commercial Law

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WHY AND HOW EMPIRICAL STUDY IN COMMERCIAL LAW?

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Introduction

The growth in international trade in the late twentieth and early twenty first century combined with rapid developments in technology generated rapid and continuous developments in trade practices and market regulations. We may anticipate that this market and regulatory instability will continue into the future. Giving the fact that law is rigid, it is plausible that the doctrines of National laws refer to trade usage as a source regulating many issues in commercial matters. Some variation of trade usage may be important as an express term of a contract, as an interpretative tool when construing a contract, or as the source of guidance on the standards to be applied to a banker's actions or office systems. As the norm of trade usage serves the freedom of market developments and generally holds the expectations of the actors, it is regarded as one of the cornerstones in both commercial law under legal orders and transnational commercial law. The procedural rules of legal orders rely on expert evidence to prove the concurrent trade usage in commercial litigations.[1] The paper calls for an empirical study to clarify the status of trade usages not only to determine the relevant trade usage prior to the proof of the usage by expert evidence in litigations, but also to evaluate the efficiency of the legal procedures which provide the rules of how to prove a trade usage by expert evidence.

Why empirical study?

Both the defects in procedural rules as to expert evidence in commercial litigations and the pragmatic needs for the revelation of trade usages to advocates and clients are the main reasons for the need to conduct empirical study in respective of trade usage in commercial law. Of course, there are many other core reasons to conduct an empirical study in commercial law where the study of law is pursued according to Dworkin's normative interpretative jurisprudence, namely: angling the analysis to normative premises so that we defend the legal concepts and interpret them so as to be consistent with societal morality.[2] Such a normative jurisprudence functions through constructive interpretation, which proceeds by imposing the 'best' light of meaning on the legal practice of "law" from the perspective of the

[1] For instance: in the UK Civil Procedures Rules, Rule 35.3.
[2] Dowrkin, *Law's Empire*, (1986).

internal participants of law such as judges and then try to restructure such law according to that meaning.[3] The paper, however, tackles the above two reasons.

The fiction of trade usage in procedural rules

The required number of experts to establish the facts of trade usage is usually one or two experts. Such a number, from the perspective of social science, would not be sufficient to even represent the practice of a local business community.[4] In litigation inducing the best qualified expert in banking cases, often a senior employee of the bank, is difficult: both because this person usually needs the permission of her employer which is often withheld; and, the expert is anxious about the undesirable effect on her reputation if her evidence is rejected by the court.[5] Goode noted that usually there is a dispute in cases involving expert witnesses as to the meaning and the existence of un-codified trade usage. He concluded that bankers have different practices, according to their different interpretations of the law and contractual terms, as incorporated into their different practices.[6] Thus, Goode doubts if there truly is "international" trade usage on such issues.[7] This seem a little disingenuous, as we are generally aware that the practice of commissioning and using expert testimony serves not a disinterested interest in the *de facto* practice of the market, but the needs of the litigation. As Sedley LJ has observed extra-judicially:[8]

"… [T]he myth that the business of law is the ascertainment of truth. It is no such thing: the business of law is winning cases."

It would be remarkable indeed if litigants consistently led expert evidence that undermined their own case. Where trade usage is important to an argument one can expect divergence in expert testimony.

The pragmatic needs

It is essential for advocates and their clients to know in advance the position of trade usage in relation to the relevant transaction.[9] The advocates for claimants and defendants in a commercial litigation face difficulties in giving a legal advice that must be based on trade usage where such usage has not been judicially noticed or proved in previous cases by expert evidence. The secondary legal sources provide no help, in general, for they lack the empirical study that can determine or expect what is the current trade usage for the issues in question. By illustration, the permitted period to return documents to the seller in documentary credits (i.e. international method of payment) - after refusing the presentation by the bank- is a reasonable promptness time, which is proved by the expert evidence as one to

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[3] Dowrkin, *Law's Empire*, (1986).
[4] Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012) .
[5] Peter Ellinger, *Expert Evidence in Banking Law,* [2008] Journal of International Banking Law and Regulations 557 at 565.
[6] Roy Goode, *Usage and its reception in transnational commercial law* [1997] International & Comparative Law Quarterly 1 at 13.
[7] Roy Goode, *Usage and its reception in transnational commercial law* [1997] International & Comparative Law Quarterly 1 at 3.
[8] Stephen Sedley, *Declining the Brief, in Ashes and Sparks: Essays on Law and Justice* (2011) Cambridge University Press at 156.
[9] Empirical study by Lisa Bernstein's 1996 /89/79.

two banking days in the UK.[10] The permitted period to return the documents to the seller in Jordan is expected by the doctrinal study to be a reasonable promptness time, but such a period of time must be determined by the trade usage in Jordan which needs to be proved by the expert evidence before courts, and that has not occurred yet in Jordan. It is, thus, extremely difficult for an advocate to know whether the time is two or four banking days due to the fact that a pure doctrinal study is unable to establish or even to expect the position of the trade usage. Thus empirical study serves certainty (i.e. what ought to be).[11]

The situation is not much better for codified practice, such as the Uniform Customs and Practice for Documentary Credits (UCP). Such codifications not only reflect the pre-existing usage, but try to fashion new usages[12] and amend current usage. Therefore, there is a need to establish which terms in the code are intended to reflect trade usage.[13] Also, we cannot be entirely sanguine as to the accuracy of those terms intended to reflect current usage, for example the practice of traders is likely to be only weakly reflected in the UCP given the dominance of bankers on the drafting group.[14] Thus, we cannot comfortably argue for the UCP as evidencing trade usage simply because it claims to do so.

The aim, the design and the claim of Empirical study

Given the problematic nature of information generated as an incident to litigation or codification the existence of international changeable trade usage in a particular trade needs to be ascertained by empirical study, based on methodological approaches of social science. Ideally the aim of such empirical study in this context would be to establish *de facto* trade usage, usage that would satisfy the requirements of most legal orders for recognition of a practice as trade usage. This entails practice that is universal within the trade, notorious, and treated as compulsory by members of the relevant commercial community.[15] Such an empirical research seeks to ascertain whether such trade usage exists, and if so to describe the trade usage as a sociological fact, rather than being opinions of the individual experts or of the researchers, in the terms of social science the study aims to describe an event.[16] On this spirit, the empirical study needs to be designed as an inductive qualitative research for it aims to get insight into the commercial and legal practices.[17] Success depends on many factors, such as the access and the nature of the inquiry. The main empirical methods proposed are field observations, interviews or questionnaires.

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[10] As provided by the expert evidence in *Fortis Bank S.A./N.V., Stemcor UK Limited v Indian Overseas Bank* [2011] 1 C.L.C. 276, 287.
[11] Kennedy*, Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685, 1687.
[12] Introduction of UCP 600.
[13] Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539 at 550.
[14] Bacon, *Who speaks for the exporter*, [2006] 9 DCInsight.
[15] Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539 at 551.
[16] 6 and Bellamy, *Principles of Methodology*, (2012) p.26.
[17] 6 and Bellamy, *Principles of Methodology*, (2012).

It is not plausible to argue that the existence of a trade usage must be acknowledged by every individual banker or trader in a trade sector, and in the same terms. Neither, is it reasonable to think that the international nature of trade usage entails that such trade usage must exist in every single state or legal order in the same form. However, since the existence of trade usage depends on acclamation "general adoption", the establishment of trade usage is a fitting subject matter in the study of human behaviour. By this token claims such as generalizability, fittingness, comparability or translatability - attempts to seek general regularities in behaviour- are applicable.[18] In essence, the claim for such empirical study is that the results are *representative* of the trade usage of the issues in question. This, however, does not entail a claim for *applicability* that would warrant courts to apply the empirical results directly in litigation. As well as methodological problems this would remove an aspect of litigation from the control of the parties and the forum, and generate difficult procedural problems differing in each forum,[19] regardless of any apparent defects from the point of view of establishing sociological fact.

Selection of samples

Any claim that results are representative will inevitably require the right selection of the representative samples, that: "... *the sample is made up of the same kinds of people, in the same proportions, as the population*".[20] The sample for a trade usage should reflect the personnel of the institutions of the relevant sectors of a targeted country,[21] and ideally people who would be qualified experts as required by law.[22] For instance, in the context of documentary credits the relevant institutions would be banks, each of which is represented by one or two experts who have been working in the department administrating documentary credits (or letters of credit according to local terminological usage) for at least two or more years, and who still have the contemporary banking knowledge. Securing representative cases for the trade usage of documentary credits is manageable and doable. However, there is a major problem in conducting an empirical study on the criterion of representative samples for all States involved in the use of documentary credits. If one tried to investigate a representative range of States: say between three and five European Nations; one or more States of the United States of America; two or three countries in South America; two sub-Saharan African countries; two or three East Asian countries, two countries in Middle East, and one country from Australasia; would be very costly, time consuming, and difficult in terms of access to appropriate individuals. In practical terms such a research programme is not doable, and we are better off relying upon the institutional resources of the ICC and the drafting group of the UCP. There is an alternative: the selection of a typical case[23] the results for which can justify a claim for translatability of the data to other States.

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[18] Hammersley, *Social Research, Philisophy, Politics and Practice*, (1993), p.p 2002-208, Sage, London.
[19] Civil Procedure Rules, Rule 35.3.
[20] Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012) p. 70.
[21] As understood from the literature view of social science: Bryman, *Social Science Methods*, (4edn, 2012) Ch 18; Kane, *Doing your Own Research: Basic Descriptive Research in the Social Science and Humanities* (1990).
[22] Civil Procedures Rules, Rule 35.
[23] For typicality in selection cases: Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012) p. 71.

Translatability

When the finance of international trade was subject to the dominating influence of a single hegemonic power the obvious candidate for such a typical case would have been the hegemonic power. However, in a situation of multiple centres of power the better candidate is a cosmopolitan State. By illustration, the country of Jordan is good candidate for a typical case to establish international changeable trade usage in documentary credits. Jordan has a hybrid legal system constituted by both Civil and Common laws.[24] The economy is based on capitalism and it has an open market. The country is considered to be a developing country.[25] The banking sector has interconnected links with other banking sectors around the world,[26] and it has a fairly extensive experience in dealing with documentary credits. Jordan represented the Middle East in the ICC in the revision of UCP 600.

The writer conducted an empirical study using the method of elite interviews,[27] interviewing individuals with particular expertise in the practice of documentary credits[28] in Jordan, to attempt to establish the trade usage on some issues of interest in the law and practice of documentary credits. The interviews were conducted in 2013, according to the SLSA and NTU ethical code, with six bankers, four of them representing the main four banks in Jordan (the Central Bank, the Arabic Bank, the Housing Bank for Trade and Finance, and Jordan Ahli Bank) and two of them representing the other banks in Jordan.

One of the issues explored was the period of time within which documents were examined for compliance with the terms of the documentary credit. The practice in five of the banks was found to be to examine the documents in two banking days. The bankers who represent these banks confirmed that they felt that as professional organisations they are obliged to examine the documents in this period, even though they think that they are legally protected providing they examine the documents within the period of five banking days, as set out in the UCP 600.[29] However, one of the main banks (Arabic bank) usually takes four to five banking days for the examination of the documents, as they have a large number of documents to process, a comparatively huge work load, and also because they approach the buyer before taking a final decision regarding the status of the documents as complying or non-complying. It can confidently be said that the normal practice in Jordan is to examine the documents in two banking days. However, this practice is not universal and one major participant in the trade depends upon a longer time period being available. Finally, the universal perception is that banks are not legally required to examine in less than five banking days.

The question of whether such a trade practices and understandings are international in nature, is more tendentious. It is submitted that as Jordan is a "typical case" trade usage of that country is capable of being taken, to certain extent, as representative of international trade usage. We can turn to more familiar sources of evidence at this stage. The period for the examination of documents for

[24] www.lob.gov.jo.
[25] www.pm.gov.jo.
[26] www.cbj.gov.jo.
[27] Morris, *The Truth About Interviewing Elites*, [2009] Politics 29 (3) p.p 209-217.
[28] Burnham and others, *Research Methods in Politics*, (2004).
[29] Sub- article 14 (b) UCP 600.

compliance with the terms of the documentary credit in the UK was found to be two banking days, by the court in *Bankers Trust Co v State Bank of India*[30] on the basis of the expert evidence in that case. However, we need to reflect upon the variation revealed by the empirical study. If evidence on trade usage was given in good faith by an expert witness from Arabic bank under Jordanian law it would support a finding of four banking days as a usual trade practice in Jordan. Even at this early stage of analysis the empirical study is providing useful information for understanding the status, nature, and inherent limitations of expert evidence in litigation.

Method of elite interviews[31]

It is submitted that interviews are the most suitable method in conducting the inductive qualitative empirical study for the inquiry of trade usage in commercial law. This is due to the fact that the nature of the inquiry is a qualitative rather than a quantitative and that, in general, it is feasible and durable to interview experts since their number is usually low. The other core reason is the attribute of this method of being a successful tool to convey the complex doctrinal concepts to the respondents and to check the understanding of both the interviewer and the respondent. The type of interviews in such empirical study must be semi-structured constituting a series of structured questions that are strictly in accordance to the doctrines of law and uniformly directed to the respondents, but the answers must be open – ended ones since the nature of the inquiry is to know the unknown facts.

Interviewing experts such as bankers is known as elite interviews which can loosely be defined as interviewing individuals with particular expertise.[32] In comparison with the doctrinal procedures for the proof of a trade usage by expert evidence in courts, the main advantages that can be achieved throughout interviewing experts is that experts need not to take the permission of their employers in order to be interviewed - unlike the expert evidence -[33] and thus the access to experts is far easier in interviews than in courts expert evidence. The other advantage is that experts are more willing to give information in interviews than in courts expert evidence, since they can be offered to off the record of any of the given information and they can require their identities to be concealed. Experts are not, as well, very anxious of the impact of the given data in the interviews on their reputation where their given data will not be considered as the trade usage by courts in a future litigation due to the fact that interviews are not authoritative sources in nature.

However, the main challenges that can be converted into defects in the nature of interviewing elites (experts) in the context of a trade usage are as follows: (i) applicability: the data of interviews have no authoritative enforcement; (ii) subjectivity: the potential lack of certainty as to the doctrinal concepts that are analysed by the researcher, and the possibility that the collected data represent the interpretive opinions of the respondents rather than the factual matters; (iii)

[30] [1991] 2 Lloyd's Rep 443.
[31] Morris, *The Truth About Interviewing Elites*, [2009] Politics 29 (3) p.p 209-217.
[32] Burnham and others, *Research Methods in Politics*, (2004).
[33] Ellinger, *Expert Evidence in Banking Law,* [2008] J.I.B.R, 557, 564.

seriousness: the respondents do not perceive the interviews as important as giving evidence in courts. It is argued in this paper that these challenges can be handled by the application of the following suggested solutions.

Applicability

The challenge of applicability can be absorbed by enhancing the claim for the representation of the interviews by selecting the representative cases as above mentioned and by the fact that the legal procedures of expert evidence in law requires only one to two experts to establish the trade usage,[34] for the speed and the low cost of litigations is far more given weight in the legal procedures than the sufficient representation of the market. The promotion of the interviews data throughout publications can also assist the implementation of the data in courts, such data might be used for the arguments in the cross examination of experts in courts.

Subjectivity

Subjectivity in terms of the lack of certainty in the legal doctrines which constitute part of the structure of the questions and from the perspective of providing interpretive opinions of the respondents in answers leads to biased results. A researcher needs to identify the approach that is undertaken under the doctrinal analysis prior the interviews. For questions that seek answers *responding* to settled doctrinal positions (e.g. reasonable time under Common law to examine documents in documentary credits), the researcher needs to adopt Hart's descriptive jurisprudence. As being a pragmatic conceptual analysis that does not claim the warrant of inferences from legality to legitimacy.[35] Such an approach is also normative in the sense it answers to norms of constructive theory and aims to discipline the use and structure of concepts. As it is a conceptual analysis of law it rationalises the concept of law through the articulation of criteria to its use.[36] The identified doctrinal positions are certain in terms of being accepted to have the force of law in the relevant National law. The collected data (i.e. description of events) would inform what is required by the doctrinal positions. For questions seeking answers to *build up* upon the doctrinal analysis, Dworkin's normative interpretative jurisprudence (i.e. angling the analysis to normative premises so that we defend the legal concepts and interpret them so as to be consistent with societal morality) needs to be applied.[37] The collected data would accordingly give insight as to the 'best' light of meaning on the legal practice of "law" from the perspective of the internal participants in the relevant transactions.

Secondly is the sense of the social science positivism that matters in real world can be observed throughout senses and experience in an objective way that is separate from the conscious of a human.[38] This needs to be – as far as possible - applied on respondents to warrant that their answers descriptively represent the market

[34] Civil Procedure Rules, Rule 35.3.
[35] Hart, *The Concept of Law*, (1972) in his Postscript.
[36] Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), ch 8 by Coleman.
[37] Dowrkin, *Law's Empire*, (1986).
[38] Guba, E.G. and Y.S. Lincoln (2005), 'Paradigmatic Controversies, Contradictions, and Emerging Confluences' in N.K. Denzin and Y.S. Lincoln (eds.), The Sage Handbook of Qualitative Research (3rd edn.), London: Sage.

practices rather than representing an interpretation of what is the market practices are or suppose to be. A researcher, therefore, needs to clarify in the participant's information sheet the nature of the task and to implement the positivism approach in the questions and in the way of delivering them (e.g. how many days your bank and other banks actually take to return the refused documents in a documentary credit?). The researcher needs to indirectly monitor the answers of the respondents by checking with the respondent that the given answer represent the market practice (e.g. so not only your bank but most banks in the UK take two banking days to return the refused documents).

Level of seriousness

The level of the respondents' seriousness in interviews needs to be taken into consideration. It is presumed that respondents do not treat interviews with a high level of seriousness as they do in giving evidence at courts under oath. This can generate biased in the results by giving inaccurate answers in order to avoid consuming time because the subject matter of a trade usage usually demands a great technicality in details that might require respondents to check different sources before giving an answer. This entails time consuming and unless the interview is perceived with a high value, the respondents might become a performer of a "front stage" and a "back stage".[39] The front stage in this context would be designed by the respondent to provide answers that intend to avoid the consuming time or to avoid assisting other parties in an ongoing litigation with the respondent's employer. Where, on the other hand, the respondent keeps in his "back stage" the reality that the answers need more technical study.

As a step – stone in maximising the level of seriousness in interviews, the researcher must be aware that he might lack power relative to elites.[40] This can be tackled by the ways the researcher represents himself and the subject of the research, if, thus, the researcher is perceived as an expert in the area the issue of power will be balanced. It is suggested, a researcher in Jordan and Middle East needs to use "Dr" and "solicitor" in representing himself to be seen as a professional, where the emphasis in the UK should rather be on the institution that supports and regulates the research.[41] It is also suggested that where the researcher is an academic and a practitioner lawyer in commercial law he will be perceived as a kind of being insider (banker) and outsider (non banker)[42] which tremendously assists to perceive the researcher as a kind of expert who is not a rival.

The level of seriousness is heightened where the value of the research, particularly how the input of the respondent will benefit the research,[43] is explained both orally

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[39] Goffman, *The Presentation of Self in Everyday Life,* (1999) New York: Doubleday; Goldstein, Getting *in the Door: Sampling and Completing Elite Interviews*, [2002] PS: Political Science & Politics 35(4), pp. 669–672.
[40] Bygnes, *Interviewing People-Oriented Elites,* [2008], Eurosphere Online Working Paper Series, Bergen: University of Bergen.
[41] For similar suggestions: Herod, *Reflections on Interviewing Foreign Elites: Praxis*, Positionality, Validity, and the Cult of the Insider, [1999] Geoforum 30(4), pp. 321.
[42] For insider or outsider status of the researcher in elite interviews: Herod, *Reflections on Interviewing Foreign Elites: Praxis, Positionality, Validity, and the Cult of the Insider*, [1999] *Geoforum* 30(4), p 315.
[43] Richards, *Elite Interviewing: Approaches and Pitfalls*, [1996] *Politics* 16(3), p 202.

and by written in the information sheet. The content form is an essential to be provided to the respondents in order to ensure that they understand the possible consequences of the data;[44] this entails that the research being perceived with a high level of seriousness since respondents, as suggested, associate legal rights and responsibilities with the process of signing a content form.

Finally, the researcher needs to maintain the perception of being a professional in the subject matter of the interview by being well equipped and by the assertion of technical phrases in the interview.[45]

Conclusion

The essentiality of empirical study in commercial law is driven by pragmatic needs to clarify the status of trade usage, which is one of the cornerstones of commercial law, for potential litigants. The usage as proved by expert evidence might in many cases be a fiction that mainly aims to assist the speed of litigation and to settle solutions as a respond to the social pressure that justice demands swift resolution. Designing inductive qualitative empirical study would response to the need for a clarification as to the status of concurrent trade usage. It would also provide insight to the legal doctrines under legal orders. The paper analyses how the samples must be selected for the empirical study in commercial law in that the sample is made up of the same kinds of participants in the same proportions as the population. This fertilises the ground for a claim of representation: the sample represents a particular market in a geographical area. In turn we might identify a case as a typical one, by analysing its variable and stabilised conditions, that is applicable to many other cases "translatability". Finally, the paper evaluates the potential difficulties in conducting elite interviews, as being the most plausible method for empirical study in commercial law. The first dilemma is the "applicability", unlike expert evidence before courts, of the collected data in litigations before courts, tribunals or even before arbitral boards. Publications and co-operation with governmental bodies might enhance the influence of the collected data in litigations. The problem of subjectivity in that the data represent the researcher and the respondent interpretative opinions rather than descriptions of events or even descriptions of shared criteria. The distinction on the application of Hart and Dworkin approaches as to the doctrinal analysis is the first step to reduce the effects of subjectivity. Still, the adoption of the epistemological positivism in social science is the other stage to tackle the power of subjectivity. The researcher must be aware that he might lack power relative to the interviewed elites. Such a challenge needs to be tackled by pragmatic elastic ways, as illustrated in the paper, depends on the culture of the participant. Given the technicality commercial law, the researcher needs to be aware that the respondent might become a performer of a "front stage" and a "back stage.

[44] Homan, *The Ethics of Social Research*, (1991) London: Longman.
[45] Pollitt and others, *No Hiding Place: The Discomforts of Researching the Contemporary Policy Process* [1990] *Journal of Social Policy* 19(2), p. 186.