

The Future of Law and Economics

A seminar for PhD students of Université Paris (X) Ouest Nanterre La Défense, Université Paris 2 (Panthéon-Assas), Maastricht University, Erasmus University Rotterdam and the European Doctorate in Law & Economics (EDLE).

On 26-27 March 2015, the seventh seminar will be organized, this time at Université Paris (X) Ouest Nanterre La Défense. The title of the seminar is 'The Future of Law and Economics', symbolizing the fact that the PhD candidates constitute the future of law and economics and realizing that much of the research they undertake is in fact path-breaking and innovative.

*Location: 200 Avenue République, 92001 Nanterre
Building B, conference room*

For directions see:

<http://www.u-paris10.fr/l-universite/venir-a-paris-ouest-nanterre-la-defense-146044.kjsp>

Registration is required. The number of participants is limited. If you have not yet registered, please contact: rile-sec@law.eur.nl.



List of presenters

University of Paris X Ouest Nanterre

Clément Bonnet

Joseph Keneck Massil

University of Paris II Panthéon-Assas

Sophie Bienenstock

Maïva Ropaul

Maastricht University

Bo Chen

Wenqing Liao

Mengmeng Shi

Guang Shen

Xiaowei Yu

Erasmus University Rotterdam/Bologna University/Hamburg University (EDLE)

Shilpi Bhattacharya

Enmanuel Cedeño-Brea

Diogo Britto

Miriam Buiten

Ignacio Cofone

Yugank Goyal

Alice Guerra

Tobias Hlobil

Maximilian Kerk

Stephan Michel

Maria Pia Sacco



Discussants / Chairs (senior researchers)

University of Paris X Ouest Nanterre

Alexandre Biard (former Rotterdam EDLE)
 Bertrand Chopard
 Andreea Cosnita-Langlais
 Eric Langlais
 Yves Oytana
 Saïd Souam

University of Paris II Panthéon-Assas

Bertrand Crettez
 Bruno Deffains
 Claudine Desrieux
 Marie Obidzinski

Maastricht University

Niels Philipsen

Erasmus University Rotterdam/Bologna University/Hamburg University (EDLE)

Pieter Desmet
 Marco Fabbri
 Michael Faure
 Luigi Franzoni
 Jonathan Klick
 Mitja Kovac
 Sharon Oded
 Alessio Paccès
 Roger Van den Bergh
 George Zhou



Participants

University of Paris X Ouest Nanterre

Charles Bizien
 Eric Blaquière
 Marin Bouaziz
 Maxime Charreire
 Daria Kireeva
 Claire Léger
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Marianne Breijer
 Min Lin
 Rok Spruk
 Yixin Xu
 Nan Yu



Programme Seminar “The Future of Law and Economics”

Thursday 26 March 2015 (Building B - Conference Room)

- 9.00 – 10.00 Registering and welcoming coffee
- 10.00 – 10.10 Opening by Bruno Deffains and Eric Langlais
- 10.10 – 10.45 **Miriam Buiten**
Does the EU Directive Preserve Leniency Incentives?
 Discussant: Saïd Souam
 Chair: Bruno Deffains
- 10.45 – 11.20 **Joseph Kenek Massil**
Le changement constitutionnel en Afrique: Analyse empirique de la modification de la loi sur la limitation de mandat du président
 Discussant: Michael Faure
 Chair: Bruno Deffains
- 11.20 – 11.55 **Maria Pia Sacco**
International Corporate Bribery: The ‘Potentially Perverse Effect’ of Ethics and Compliance Programs
 Discussant: Jonathan Klick
 Chair: Bruno Deffains



11.55 – 12.10

Coffee break

12.10 – 12.45

Guang Shen

*Regulation of the Inter-Provincial Establishment of Companies:
Applying the Economics of Federalism to China*

Discussant: Roger Van den Bergh

Chair: Pieter Desmet

12.45 – 13.20

Maximilian Kerk

*Third Party Decision Making as Investment Verification: The Case of
Commercial Arbitration*

Discussant: Jonathan Klick

Chair: Pieter Desmet

13.20 – 14.20

Lunch

14.20 – 14.55

Xiaowei Yu

*Medical Malpractice Claims in Court - An Analysis of 592 Cases in
China from 2002 to 2013*

Discussant: George Zhou

Chair: Niels Philipsen

14.55 – 15.30

Stephan Michel

Constitutional Bargaining Revisited

Discussant: Luigi Franzoni

Chair: Niels Philipsen



- 15.30 – 15.55 **Coffee break**
- 15.55 – 16.30 **Enmanuel Cedeño-Brea**
Bank Ring-Fencing in the United Kingdom: Some Legal and Economic Thoughts
Discussant: Alessio Paces
Chair: Roger Van den Bergh
- 16.30 – 17.05 **Sophie Bienenstock & Maïva Ropaul**
The price of freedom: choosing between long- and short-term contracts in the presence of projection bias
Discussant: Marco Fabbri
Chair: Roger Van den Bergh
- 17.05 – 17.40 **Ignacio Cofone**
Privacy Rights and Property Rights
Discussant: Bertrand Crettez
Chair: Roger Van den Bergh
- 17.40 – 17.50 Closing remarks day 1

Friday 27 March 2015 (Building B - Conference Room)

09.30 – 10.05

Alice Guerra*Presumption of Negligence*

Discussant: Marie Obidzinski

Chair: Eric Langlais

10.05 – 10.40

Diogo Britto*Litigation and Liquidity Constraints*

Discussant: Yves Oytana

Chair: Eric Langlais

10.40 – 11.15

Bo Chen*What Can We Learn from different models of regulator in Carbon Emission Allowance Spot Market? The comparison among China, EU and USA*

Discussant: Liu Jing

Chair: Eric Langlais

11.15 – 11.35

Coffee break

11.35 – 12.10

Mengmeng Shi*The Divestiture Remedy under Merger Control in the EU*

Discussant: Andreea Cosnita-Langlais

Chair: Alessio Paccès

12.10 – 12.45

Yugank Goyal*Emergence, Sustenance and Costs of Informal Market Institutions:**Evidence from India*

Discussant: Pieter Desmet

Chair: Alessio Paccès

12.45 – 13.20

Clément Bonnet*Does green technology need a dedicated patent system? Analytical basis in light of a double externality problem*

Discussant: Niels Philipsen

Chair: Alessio Paccès

13.20 – 14.20

Lunch

14.20 – 14.55

Wenqing Liao*Mechanisms for Avoiding Inefficient Performance – A comparative law and economics perspective*

Discussant: Mitja Kovac

Chair: Jonathan Klick



14.55 – 15.30

Shilpi Bhattacharya*The Bounded Rationality of Firms and the Law of Predatory Pricing*

Discussant: Claudine Desrieux

Chair: Jonathan Klick

15.30 – 16.05

Tobias Hlobil*Why do Today's Judges follow Yesterday's Rulings? A Human Capital Perspective*

Discussant: Alexandre Biard

Chair: Jonathan Klick

16.05 – 16.15

Closing remarks



Abstracts

Shilpi Bhattacharya

The Bounded Rationality of Firms and the Law of Predatory Pricing

Abstract

Predatory pricing is the sacrifice of short-term profits by firms in order to drive competitors from the market and gain market share in the long-term. Following the US Supreme Court's decision in *Matsushita* in 1986, courts and competition agencies have generally treated any allegations of predatory pricing with scepticism on the basis that rational firms are extremely unlikely to engage in conduct where losses are incurred for certain in the present and the likelihood of recovering those losses in the future is uncertain. US antitrust law thus requires plaintiff's to establish that the predatory firm has a 'dangerous probability' of recouping its profits. EU competition law on the other hand does not have a recoupment requirement. This US law was based on a broad consensus among economists at the time that predatory pricing was irrational and unlikely to occur. However, evolving literature within game theory has shown that rational firms can engage in predatory pricing for instance in order to acquire a reputation for aggression against potential entrants. This paper extends the insights from game theory by questioning the likelihood with which predation occurs. It uses insights from behavioural and management studies and case analysis to argue that firms are boundedly rational and do not always take profit-maximising decisions. Further, firms might engage in below cost pricing without expecting to recoup their losses because they may be concerned with meeting other objectives such as achieving a market leadership position or because decision-making is impaired due to biases such as overconfidence bias and availability bias. This paper also argues that some of these objectives may be a result of the strategic position adopted by a firm to tackle competition and may be better understood with the help of the literature from management studies. Thus, this paper attempts to present a different perspective of predatory pricing by attempting to understand the different objectives driving the boundedly rational firm's decision to undertake predatory pricing. Consequently, this paper questions the need for a recoupment requirement which currently dominates US antitrust enforcement of predatory pricing.

Sophie Bienenstock & Maïva Ropaul

The price of freedom: choosing between long- and short-term contracts in the presence of projection bias

Abstract

Consumers are often subject to projection bias, such as they exaggerate the degree to which their future tastes will resemble their current tastes. Such biases are particularly acute when consumers sign into a contract for a long period. In this context, regulating the amount of early termination fees (ETF) can help mitigate the negative consequences of consumer biases. In this regards, the cell phone market offers a pregnant example.



We focus on the consequences on the cell phone market of early termination fee regulation when agents exhibit a projection bias. We allow for heterogeneity concerning the bias. Hence, the demand side of the market consists of two types of consumers: sophisticated agents perfectly anticipate their future utility, while naive consumers exhibit a projection bias.

The supply side of the market is a monopoly offering long term and short term contracts. In this framework, we show that naive consumers are not always worse off than sophisticated agents.

Moreover, depending on the percentage of naive and sophisticated agents and on the ETF regulation, a pooling or a separating equilibrium will emerge. Finally, we show that ETF regulation also impacts prices through two distinct mechanisms.

Clément Bonnet

Does green technology need a dedicated patent system? Analytical basis in light of a double externality problem

Abstract

There is a growing concern about what economists call the double externality problem. On one hand the environment suffers from negative externalities. On the second hand the knowledge constitutes a public good and the private sector does not optimally support the production of such a good, that creates positive externalities. Considering the crucial role that innovation plays in the transition toward sustainable societies, our paper raises the following question: does green innovation need a dedicated support policy?

According to Nordhaus (2011), internalizing environmental damages with a tax (or a similar instrument like a quota market) puts green technologies on a leveled playing field with other technologies. On the other hand the social regulator must implement support policies aimed at increasing the private rate of return of an innovation in order to promote investments in new technologies. Then, pricing a negative externality on environment induces innovation in green technologies. A large majority of public policies aiming at supporting green innovation follows the same logic. The price fundamentalism means that there are no reasons for a stronger, or different, support policy for green technologies. As Nordhaus underlines, it is true under several conditions among which a perfect internalization of all product-market externalities. According to the same author this condition is the most important. The rationale for this last condition lies in environmental taxation. As a public good, environment suffers from negative externalities. For example, a polluting good induces a social cost higher than its private cost. Therefore a deregulated market is inefficient in providing the socially optimal allocation.

A well-known solution is Pigovian taxation (1932). Implementing such a tax on a polluting activity equalizes the private and the social costs. To achieve this, the tax must be equal to the marginal environmental damage of production (MED). In doing so, the market outcome



becomes efficient and delivers the optimal social welfare: a Pigovian tax is then the first-best solution. A consequence of a Pigovian tax is that the totality of the burden of the tax is borne by consumers. In fact, the price reflects the producer's marginal cost of production after the tax implementation, i.e. the social cost. This result holds only under the perfect competition assumption and for a constant marginal social cost of production ¹. As Pigovian taxation provides for a first best policy, innovation policies are addressed in a second-best setting. In fact, innovation is a result of knowledge accumulation. Knowledge is a public good to the extent that it is non-rivalrous (the marginal cost of reproduction for each unit of knowledge is zero, if transmission cost are excluded) and non-excludable (it is too costly to prevent someone from consuming knowledge). Therefore the first best level of knowledge's production is defined by a price equal to zero. In other words society benefits from the largest diffusion of knowledge.

The second best solution pertains to a free enterprise economy. The regulator acts under the private sectors incentive constraint. In this case public intervention is based on an increase of the inventions private yield. For that purpose the regulator should either reduce the R&Ds cost, or increase the inventions appropriability, or both. In any case it is impossible to reach the first best solution. This is the main difference between an externality on environment and an externality on knowledge.

The interaction of these two externalities is the core of this paper. To investigate this question we apply the model on the optimal patent's length developed by Nordhaus (1967) to green innovation, i.e. an innovation that induces a reduction on the MED.

We conclude that the results differ from the price fundamentalism, hence justifying a dedicated policy to green innovation. In fact there is an impact of the optimal environmental taxation on the inventor's profit during the patent the lifetime. As a result it induces a different choice in terms of patent's length. This work constitutes a first step toward a deeper understanding of the concept of double externality.

¹ As the marginal social cost of production is the sum of the marginal cost of production and the MED, the two must be constant.

Diogo Britto

Litigation and Liquidity Constraints

Co-author: Ignacio Cofone

Abstract

The paper tackles the problem of liquidity constraints in litigation. It shows that settlement amounts may deviate from their efficient level when one of the parties is liquidity constrained, which is likely to take place in labor law and in consumer law. This fact may reduce the expected costs of harm, hence undermining the effectiveness of substantial law and inducing potential plaintiffs to engage in more harmful behavior than it is socially desirable. We further show that a similar and independent problem also arises whenever plaintiffs are risk averse while defendants are not. The paper suggests three ways to address this problem, one of them attempting to solve liquidity constraints directly and two attempting to offset its effects.

JEL Classification: K40, K41

Key words: Litigation, Legal Procedure, Liquidity Constraints, Settlement

Miriam Buiten

Does the EU Directive Preserve Leniency Incentives?

Abstract

Leniency programs have proven to be very effective in the enforcement of cartels. Private damages claims, against which self-reporting firms are not protected, can undermine the effectiveness of leniency programs. The new EU Directive on Antitrust Damages Actions encourages private claims for reasons of compensation, and aims to provide safeguards to protect incentives to self-report. This paper investigates whether these safeguards are likely to be effective, particularly the rule capping liability of the self-reporting firm compared to that of the other cartel members. Using a model, the paper aims to demonstrate that this rule does not preserve incentives to self-report, and that the U.S. approach of limiting the amount of damages is preferable from a deterrence perspective.



Enmanuel Cedeño-Brea

Bank Ring-Fencing in the United Kingdom: Some Legal and Economic Thoughts

Abstract

As a response to the global economic crisis that reached its nadir in 2007-2008, a plethora of recommendations have been proposed to combat systemic risk in the financial system. The ring-fencing of deposit-taking functions in the UK is one of the so-called structural reforms adopted in order to guarantee the continuous provision of core bank services and allow for their orderly resolution in the event of insolvency. Similar structural reforms have either been adopted or are being proposed in the European Union, Germany, France and the United States of America. The ultimate objective of these policies is to combat and curtail systemic risk and financial contagion. This paper explores some of the legal and economic aspects that underpin commercial bank ring-fencing in the UK. The essay adopts a positive (descriptive) approach in order to explain the economic rationale behind the adoption of ring fenced bodies (RFB) through legislation. The study finds that through the prism of Corporate Law & Economics, ring-fencing through 'subsidiarisation' can be construed as a form of asset partitioning, that aims to protect depositors and taxpayers against disruptions in the provision of core financial services as well as from having to incur the costs of costly bank failures. The analysis also questions whether ring-fencing could have unintended consequences over different types of bank stakeholders. These effects could spill over and spread to the financial system. They include: moral hazard problems for depositors and supervisors and lack of coordination between bank supervisors across borders. It is argued that a better understanding of bank legal forms could help mitigate systemic risk, conducting to financial stability.

JEL Classification Codes: G01, G21, G28, K22, K23.

Key words: Systemic Risk, Commercial Banking, Ring-fencing, Ring fenced bodies, Volcker Rule, Financial Regulation and Supervision, Corporate Law & Economics, Asset Partitioning.

Bo Chen

What Can We Learn from different models of regulator in Carbon Emission Allowance Spot Market? The comparison among China, EU and USA

Abstract

Because of the different development stages of GHG reduction and legislation backgrounds, there has been formed different regulatory bodies to meet the regulatory requirements. Nowadays, the China's competent authorities of spot trading market of carbon emissions allowance is the Development and Reform Commission. The regulator for the voluntary regions of Greenhouse Gas Reduction in America is local governments, but they trust some



third-party monitoring bodies to monitor and review the market behavior. EU is currently unifying the regulatory rules for carbon emission auctions market, spot market and derivatives market, the supervision will be done by their financial regulators. Comparing with three main regulatory models, there can be some reasons to lead to these models, including advantages and disadvantages of regulator, environmental and financial policy, different development stages. At last, subjective and efficient evaluations will be drawn on China's competent authorities on spot trading market of carbon emissions.

Key words: Carbon Emissions Allowance (CEA), Spot Market, Regulator, Financial Regulation

Ignacio N. Cofone

Privacy Rights and Property Rights

Abstract

In a low transaction-cost scenario, it is irrelevant from a welfare perspective who an entitlement is given to, since in any case it will be allocated *ex-post* to its highest valuer. However, there is a caveat to this principle for goods that do not exist yet in the market. Personal data is included in the caveat since it does not fulfill the characteristics of a good until it is disclosed. Such disclosure requires investment levels in the form of privacy costs. In those cases, who the entitlement will be given to is relevant to determine levels of investment, and hence the amount of the good that will be available later.

From this perspective, contrary to the sometimes depicted tradeoff between privacy protection and information flow, there is an argument to be made for privacy protection leading to more production of information. This can be seen when evaluating the *ex-ante* incentives of creating property entitlements to protect personal information.

These considerations coincide with the developments of privacy law in the last years, and especially with the apparition of data protection law, which focus in giving people a right of exclusion over their personal information, albeit not a full property right.

In such way, the paper seeks to give a potential explanation for data protection law from an efficiency perspective and, in doing so, to provide a framework for the evaluation of data protection measures in law & economics.

Keywords: data protection, property rights, personal information, joint production.



Yugank Goyal

Emergence, Sustenance and Costs of Informal Market Institutions: Evidence from India

Abstract

Why do informal market institutions still persist in a fast paced economy? I attempt to answer this question empirically through three cases from India. I show that costly legal frameworks attract middlemen in these markets who offer services either promised or unfulfilled by the law, and which are costlier in the existing formal legal framework. These middlemen then become the pivots of such markets. In this sense, the study – part of my ongoing doctoral work – attempts to understand the functional role of informal market institutions (created by middlemen) that characterize business transactions located outside standard contract and property rights framework. I add to the existing theoretical frameworks, which explain markets ‘outside the law,’ by hypothesizing that informal institutions in unorganized markets emerge, from differences in bargaining power between transacting parties. These institutions are manifested in the form of informal intermediaries, who (seem to) offer stability to the private ordering embedded therein. This analysis opens up unique entry points to compare and understand the duality and coexistence of formal and informal markets in developing societies.

By studying three unrelated informal markets in India, I draw a pattern which explains the rise of informal intermediaries and their sustenance through time. I empirically estimate the (high) cost of these intermediaries and show why actors choose to follow a costlier informal institution, rather than adopting formal legal order.

The first case is that of the market of trade credit in Agra’s leather footwear industry cluster, which produces around half of India’s leather footwear, largely through unorganized, poor household artisans. Market runs on credit and artisans face high cost of liquidity. Over time, intermediaries have emerged in the cluster, and they purchase this credit at an ‘interest’ (in addition to offering credible commitments of traders). The interest rate varies inversely with the creditworthiness of the trader (who purchased the shoes on credit), thus acting as a self-enforcement governance mechanism for the trader to fulfil his promise. I estimate the interest rate and explain artisans’ preference for higher interest rate of the market as compared the lower ones in banks.

The second market explores the illegal business of coal mining mafia in Dhanbad, which is one of the most productive mining regions of the country. Here, I show how mafia offers the service to coal buyers by providing labourers for coal loading and unloading at the colliery. I explore its functional dynamics, and empirically estimate the ‘tax’ that this service puts on coal consumers. In other words, I show how much does coal price inflate because of the presence of mafia. By digging out the history of land revenue patterns of the region and nationalization of coal, I build a model to show how and why this illegal activity is tolerated by the State.

The third case focuses on market for sex (prostitution) in New Delhi. Prostitution per se is legal in India, but everything else associated with it is illegal. This makes prostitution de



facto illegal and becomes a victimless crime. As any victimless crime, it slides underground and attracts violence from gang members, clients and indeed the police. To offer protection, intermediaries emerge in the form of pimps. Through extensive interviews, I calculate the average commissions charged by pimps, and build a case for decriminalization of prostitution.

Methodology is largely empirical in nature. I attempt to design a theoretical model showing how agents of the State (law enforcement officials for example) can easily be understood as accomplices in illegal activities. But largely, the argument rests on empirics. For the footwear cluster case, I collected data during April-August 2013, talking to footwear traders and manufacturers. The values of interest rates were verified from two independent sources. The information on mafia tax was more difficult to collect. It was done intermittently from June 2012 until July 2014, through various anonymous visits to the town, and through help of common friends who have useful resources in the region. I also conducted several interviews with labourers in the mine to ascertain the veracity of the information. For the study of prostitution, I selected a specific area in Delhi, and I collected information from sex workers directly through interviews facilitated by an NGO working on AIDS prevention in the region, during January-September 2014. The NGOs support was crucial to gain confidence with sex workers who would candidly explain the dynamics of their trade, pimps' shares and violence incidents with me. Cross verifying their information with NGO records was also done.

My findings in a nutshell are as follows. Interest rate on trade credit in the footwear markets is 18% per annum, which is 5% points more than the bank's on equivalent loan. The mafia tax loads the cost of coal by approximately 10% purchased from the open market mines of the region. The pimps offer protection at a commission of 50% of sex workers' earnings. These findings have several layers to them, which help understand informal institutions in an expansive and analytical manner. Results are analysed in the light of informality and in relation to a hypothetical formal arrangement. Policy conclusions follow.

This is the culmination of my doctoral work, and I bring my case studies to show the value and cost of middlemen in sustaining informal market institutions. While a nontrivial research explores the idea of informal institutions, and some of it indeed examines some markets analytically, there is little empirical work – particularly in S. Asia – that pushes forth the frontier of knowledge in this direction. One of the reasons for this research malnourishment is the lack of data and difficulty in understanding cultural contexts in which these markets are located. Their heterogeneity also makes it difficult to come up with generalized conclusions. Yet, their importance in understanding economic forces of our times is only increasing. Recent ILO estimates suggest that between half and three-fourths of non-agricultural population of developing world belongs to the *growing* informal economy. In this context, understanding their dynamics is crucial for informing policy decisions. I posit that central to this understanding is the middleman, who either absorbs the cost of *effective* law, or simply offers stability which the law is unable to. In doing so, I

also show the potential cost in having markets retain their informal nature. More importantly, my inquiry develops processes through which it becomes easy to observe these markets empirically – crucial to add to theoretical frames, which I show may or may not be appropriate depending on the contexts. This enables my work to explain the duality of formal and informal mode of market behaviour, their coexistence, and drawing general conclusions for ascertaining a preference between the two.

Alice Guerra

Presumption of Negligence

Abstract

This paper is about the incentive effects of legal presumptions. We analyze three interrelated effects of legal presumptions in a tort setting: (1) incentives to invest in evidence technology; (2) incentives to invest in care-type precautions; and (3) incentives to mitigate excessive activity levels. We suggest that the overlooked interaction between evidence and substantive tort rules is an important dimension that should inform the choice of legal presumptions. After considering the traditional factors that guide the choice of legal presumptions in tort law, we introduce the concept of “best discovery-bearer” to capture these factors, serving as a normative criterion for the choice of legal presumptions. The best-discovery-bearer criterion requires a shift of the burden of proof on the party (a) who can most effectively invest in evidence technology; (b) whose precautions are more inelastic relative to discovery errors; (c) who is not already burdened by the residual liability.

Keywords: burden of proof, cheapest evidence-producer, best discovery-bearer

JEL Codes: K13, K32

Tobias M. Hlobil

Why do Today’s Judges follow Yesterday’s Rulings? A Human Capital Perspective

Abstract

This paper asks and answers the question of why today’s judges follow yesterday’s rulings. To answer this question a model is developed that combines elements of a search model with human capital accumulation. It is argued that judges accumulate human capital that is specific to a ruling each time a ruling is given to resolve a dispute. This reduces the cost in terms of time and effort of giving the ruling, but also makes it easier to find this ruling once a similar or the same dispute arises again. Compared to the models offered in the literature on judicial decision-making, this model is more general and subsumes the other models as special cases which are furthermore contingent on how the judiciary is organized in common law and civil law legal systems. The model thus also accounts for why judges today



may behave differently than judges in the past and so offers an explanation for how the doctrines of *stare decisis* and *jurisprudence constante* came to be as a consequences of institutional change. The paper does this in three steps. First, what it means for today's judges to follow yesterday's rulings is operationalized. Second, inspired by Becker (1962) it is shown what results can already be said to hold based on human capital accumulation and time constraints when judicial behaviour is irrational. Third, the rational choice model is developed and its (testable) implications and applications discussed after which the paper concludes.

JEL Code: K40, K49

Keywords: Judicial Decision-Making, Stare Decisis, Jurisprudence Constante, Human Capital, Search, Legal Evolution.

Joseph KENECK Massil

Le changement constitutionnel en Afrique: Analyse empirique de la modification de la loi sur la limitation de mandat du président

Abstract

Le vendredi 31 octobre 2014, le président Blaise Compaoré du Burkina Faso est contraint à l'exil dans sa 28ème années de régné. La cause de ce départ forcé du pouvoir est le dépôt du projet de loi à l'Assemblée Nationale de changement constitutionnel visant à modifier l'article sur la limitation de mandat devant lui permettre de briguer un cinquième mandat en 2015. Bien avant lui, cette tentative a réussi dans les pays comme le Cameroun, le Gabon, le Togo, la Guinée, Niger, la Tunisie, etc... Mais échoué aussi dans le cas du Benin, Nigéria, Zambie. Que ce passe-il depuis les années 2000 du point de vue de cet article de la constitution? Pourquoi cette montée de velléité de changement constitutionnel visant particulièrement à faire sauter le verrou sur l'article limitant le nombre maximum de mandat du président?

Ce phénomène nouveau et d'actualité de changement de l'article sur la limitation des mandats des présidents en Afrique s'insèrent dans le domaine de l'économie constitutionnelle¹ dont Buchanan (1962) est l'un des pionniers. La littérature empirique sur l'économie des constitutions dans laquelle se positionne cet essai se décompose en plusieurs aspects. La première porte sur l'effet des règles constitutionnelles sur la croissance et la productivité du travail (Hall et Jones, 1999; Henisz, 2000; Persson et Tabellini, 2003; Feld et Voigt, 2003; Robinson et Torvik, 2008; Blume et al, 2009). La deuxième composante se focalise sur l'effet des constitutions sur la politique fiscale (Matusaka, 1995; Persson et

¹Voigt (2011) considère que l'économie constitutionnelle est une partie de la Nouvelle Economie Institutionnelle. « Constitutional political economy as part of the new institutional economics » (Voigt, 2011, p.207)

Tabellini, 2003; Plumper et Martin, 2003; Rodden, 2003; Blume et al, 2009). La troisième vague de travaux analysent l'effet des règles constitutionnelles sur la gouvernance économique et politique (Panizza, 2001; Persson et Tabellini, 2003; Lederman et al, 2005; Blume et al, 2009). La dernière vague de travaux dans laquelle s'insère étroitement notre travail s'intéressent aux déterminants du changement des constitutions (Posner et Young, 2007; Kimenyi et Shughart, 2010; Hayo et Voigt, 2010, 2013).

Hayo et Voigt (2010) s'intéressent aux déterminants qui permettent de passer des régimes parlementaires aux régimes présidentiels. Dans Hayo et Voigt (2013), les auteurs montrent que, les changements dans les formes de gouvernances (parlementaires et présidentiels) ne sont pas influencés par des variables économiques et démographiques. Les travaux de ces auteurs s'intéressent aux changements de forme de gouvernance tandis que, le nôtre s'intéresse à la modification de l'article sur la limitation de mandat et non aux formes de gouvernance. Bien que notre travail et ceux de Hayo et Voigt (2010,2013) se situent dans le même paradigme théorique et empirique des déterminants du changement constitutionnel, le nôtre s'en distingue de par son originalité et sa singularité.

Dans le paradigme de l'économie constitutionnelle, aucune contribution ne se focalise sur la modification de l'article sur la limitation de mandat malgré la tendance à la généralisation du phénomène ces dernières années en Afrique. Sur le point de vue analytique, seuls les travaux de Posner et Young (2007) proposent une analyse du pouvoir politique en Afrique allant dans notre direction mais sans aucune vérification empirique. De même que les études des politistes qui s'intéressent à la fabrication des constitutions en Afrique (Loada, 2003; Bolle, 2005; Sambou, 2012; Du Bois de Gaudusson, 2012; Kokoroko, 2012).

L'objectif de cet essai est d'analyser empiriquement les facteurs qui influencent le changement de constitution ou l'amendement de constitution en ce qui concerne la modification de l'article sur la limitation de mandat des présidents en Afrique.

Maximilian Kerk

Third Party Decision Making as Investment Verification: The Case of Commercial Arbitration

Co-author: Klaus Heine

Abstract

Parties involved in an international joint venture face the risk that their investments are hold-up in a dispute with the other party. This might be an important reason why joint ventures and other forms of organization with joint asset ownership appoint third parties, such as arbitrators, to resolve their disputes. This paper, in a first step, addresses formally how third party decision-making can mitigate the hold-up problem of joint asset ownership by verifying the parties' investment levels. Since the third party decision maker acts as an investment verification mechanism, he initiates a contest for the surplus of the joint venture and thereby sets additional incentives to invest. On the basis of this formal consideration, observability, enforcement, and short proceedings are identified as crucial characteristics



for effective third party decision-making. In a second step, the paper argues that commercial arbitration has a comparative institutional advantage over ordinary courts due to these characteristics. Moreover, arbitration can be considered as an integral part of the organization's structure. This novel characterization of arbitration within the boundaries of the firm improves the understanding of organizational structures with joint ownership and explains why arbitration is preferred over ordinary courts as a third party decision making mechanism.

Wenqing Liao

Mechanisms for Avoiding Inefficient Performance – A comparative law and economics perspective

Abstract

According to law and economic theory, it is costly for contracting parties to draft ex-ante perfect contracts, which have stipulated all possible risks, as well as the other party's opportunistic behavior that might occur after the conclusion of the contract. By the same token, achieving settlements ex-post might also be discouraged by the high negotiation costs. As to such a problem, contract law may provide various default rules as well as mandatory rules in relation to different risks and hence facilitates transactions. Hence, how to design an efficient contract law rules in order to motivate contract parties to behave efficiently after the conclusion of a contract has gained many scholarly attention. A special question is raised concerning what kind of approach should be chosen in the circumstance where some unexpected contingencies have rendered the contract "inefficient". In terms of this question, this paper takes a comparative law and economic perspective by comparing the mechanisms for avoiding inefficient performance offered by three legal systems, including English Law, European Union Law as well as Chinese law.

Firstly, Contract remedy rules is a mechanism that indicates the consequence of the breach and hence influences a promisor's incentive to perform the contract (section 2). Regarding the mechanism of contract remedies, a preliminary hypothesis is that a desirable model should be able to facilitate the promisor to estimate the prospective consequence of his decision and to fully protect the performance interest in a less costly way. After comparison, it is found that convergence is achieved among English law, EU law and Chinese law in certain aspects, such as specific performance, expectation damages, and damage limitation rules. However, differences exist between these three systems in the specific ways that the law motivates people to perform or breach a contract. The Chinese contract remedy system, among the three legal systems, imposes the highest requirement of performance on the promisor. This is greatly impacted by the understanding of contracts as a mechanism of performing promises. In contrast, the remedy system in England is largely grounded on compensatory damages. On the one hand, it focuses on recovering the expected profit to be obtained by the promisee at the completion of performance; and on the other hand, it limits the amount of damages to be paid by a breacher to a scope that is foreseeable by the



breacher at the time when the contract was made as well as when the breach is made. Although EU law makes specific performance as a primary remedy available to a non-breaching party as well, the rules of rejecting specific performance for the possibility of alternative transactions has narrowed down the difference between EU law and English law in the scope of specific performance.

Secondly, Contract laws may also provide contract parties with specific solutions to the situations where performance of the contract is considered to be inefficient, such as the force majeure rule, the hardship rule and the impracticability rule, etc (section 3). When a contract falls into the zone where strict performance is inefficient, three major approaches are available to contract parties for avoiding strict performance. English law, EU law and Chinese law all forbid a promisee to request performance by discharging the contract in situations where the contract purpose has been frustrated or there is force majeure. However, the above legal systems differ as to the approaches to avoiding performance with regard to change of circumstances not amounting to impossibility. In this aspect, English law chooses an approach on the basis of complete discharge or no discharge. Change of circumstances not amounting to impossibility in English law will not lead to the parties' additional obligations to renegotiate with each other nor the court's power to adapt the inefficient contract. However, English law does realize the efficiency of renegotiations and hence motivates renegotiations in way of removing the obstacles to modifications, including the acts of "unilateral imposed alternation" or "opportunistic advantage taking". In contrast, European law creates a high requirement on renegotiation by imposing an obligation to renegotiate in good faith on contract parties or setting an attempt to renegotiate as the precondition for invoking the court's interference. If the parties cannot reach a settlement, the court will have the power to modify or terminate an inefficient contract. Chinese law treats the encouragement of renegotiation as a policy preference in judicial trials but lacks operative rules. In practice, it is shown that disputes over inefficient contracts are mostly dealt with through judicial mediations or judicial adaptations.

The choice of legal mechanisms for shaping a promisor's incentives is closely related to the elements embodied in the legal environment in which a contract law operates, such as legal culture or conceptions of contracts (section 4). For example, Chinese law's preference for renegotiations and mediation results from a culture that disfavors conflicts and litigation. If those elements are taken into account, it is found that the practical effects of different approaches all point to the same direction that in the end strict performance of an inefficient contract will be avoided. In this sense, it is difficult to make a conclusion that one legal system produces a higher level of efficiency than others.



Stephan Michel

Constitutional Bargaining Revisited

Abstract

This article combines the findings from bargaining theory and the research on constraints faced by constitutional drafters to set up a formal model of the constitution-making process. The results derived from this model show that the inside options of the drafters, the risk of breakdown, the discount factors and the relative proportions of the different factions in the assembly are the key determinants of the outcome of the bargaining game. Furthermore, this article argues that an additional deliberation stage within the constitution-making process can be justified based on rational choice considerations and does not require selfless drafters, as has been argued previously.

Keywords: Constitutional Assembly, Constitutional Choice, Bargaining, Referendum, Deliberation

JEL Classification Numbers: D02, D72, K19

Maria Pia Sacco

International Corporate Bribery: The ‘Potentially Perverse Effect’ of Ethics and Compliance Programs

Abstract

In the last decades the deterrence of international corporate bribery has been at the forefront of the international debate. Corruption erodes trust in governments, business and markets and undermines economic growth and development. In order to deter this phenomenon, national and international regulators enacted legislative regimes providing for the criminalization of corporate organizations involved in bribery in international business transactions. Moreover these regimes promote responsible business practices, by incentivizing the implementation of ethics and compliance programs. This form of ‘negotiated governance’ is justified on the basis of efficiency considerations. In fact the deterrence of transnational corporate bribery is particularly expensive for national public authorities and the cooperation of business organizations has played a fundamental role. This paper is aimed at assessing the impact on social welfare of criminal liability regimes that incentive the adoption of anti-bribery ethics and compliance programs through the mitigation of the sanctions imposed on organizations. In order to achieve this objective I develop a theoretical model in which I allow for a strategic interaction between the State and the corporate organization. When taking into account the information asymmetry between the State and the organization, the efficiency enhancing effect of these regimes is challenged. Anti-Bribery ethics and compliance programs may not only result in a costly and



ineffective investment but also in a higher level of crime. These results seem to challenge the 'negotiated governance' movement fostered in the last decades with regard to international bribery and may set the path for an improvement of the existing liability regimes adopted at an international level.

JEL Classification Codes: K42, K22

Key words: Corporate Crime, Corruption, Corporate Law & Economics, Compliance and Ethics Programs, Criminal Liability

Guang Shen

Regulation of the Inter-Provincial Establishment of Companies: Applying the Economics of Federalism to China

Abstract

Central regulators in China have the power to govern the establishment of companies across provinces. However, decentralized regulation of the inter-provincial establishment of companies can meet the different needs of economic development in different regions. Regulating the cross-border business establishment at local level also allows competition among Chinese provinces, which can generate other benefits.

Through examining economic arguments in favour of centralization, there seems to be few public interest rationales to support the regulation by the national regulators. Transboundary externalities in the form of interprovincial pollution can be recognized, but a decentralized environmental policy could manage to cope with this problem. Moreover, a race to the bottom seems not to exist, since provinces usually do not lower environmental standards to attract capital and only sometimes some sorts of companies make location decisions based on lenient environmental controls.

Nevertheless, public choice analysis provides some plausible explanations for regulating the inter-provincial establishment of companies at central level. Central governmental agencies may significantly benefit from the centralization of the regulation. According to law, these regulators are empowered to decide how to implement business licensing. In practice, this authority enables them to increase power, receive licensing fees and create opportunities for corruption. Another benefited party can be state-owned enterprises under the jurisdiction of the central governmental departments. These companies may support the centralization of the regulation, since barriers to entry can be created.



Mengmeng Shi

The Divestiture Remedy under Merger Control in the EU

Abstract

Divestiture, as a preferred structural remedy to behavioural ones under merger control in the EU, serves as a tool to remedy the anticompetitive effects created by mergers and to restore competition to pre-merger level. EU, as one of the most advanced jurisdictions as far as competition policy is concerned, gets more involvements in global mergers due to an increasing amount of mergers happen at worldwide level. Thus, understand merger divestitures in the EU can help to set up mutual understanding and respect, so that trade conflicts can be avoided.

The article investigates on what are the applicable merger control rules in the EU and how did merger divestitures emerge and evolve there. It makes a comparison between the 2001 version and 2008 version of the *Merger Remedies Notice*, and analyses the *2005 Merger Remedy Study*. It argues that merger divestitures in the EU were at the beginning largely influenced by the established-US practice. Later, the European Commission revised its Merger Remedies Notice and released in 2008, tailoring it to further satisfy the practical demands of merger remedies in the EU. This also reflected the Commission's desire to build a predictable, transparent and coherent regulatory divestiture scheme.

Xiaowei Yu

Medical Malpractice Claims in Court - An Analysis of 592 Cases in China from 2002 to 2013

Abstract

In recent years in China, conflicts between patients and doctors are claimed to be increasingly serious. Incidents of violence against doctors are frequently reported by the mass media. These conflicts and violence is usually attributed to a high incidence of medical malpractice and low quality of medical care. An increasing number of disputes over medical malpractice are settled both in court or outside the court. However, recent studies on Chinese court cases concerning medical malpractice are few and are between, let alone those on settlements outside the court. For this reason, this retrospective study undertakes an analysis of medical malpractice actions brought before a district court in the capital city of Jiangsu Province, China.

Over a 12-year period (2002-2013), 592 medical malpractice cases accepted and heard by the district court of Gulou were assessed in terms of outcome of the lawsuit, application of legal rules, types of expert evidence, medical disciplines, degrees of injuries, types of medical errors, compensation awards, etc.

In doing so, this study aims to discover the characteristics and fundamental causes of medical disputes and the impact of legal rules on the outcome of malpractice claims. The results of this study will lay a solid foundation for further law and economics analysis.

