

CHAPTER-3

POST-REGISTRATION LEGAL OBSTACLES FACED BY MICRO, SMALL AND MEDIUM SIZED ENTERPRISES IN DEVELOPING COUNTRIES

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I INTRODUCTION

Micro, Small and Medium Sized – Enterprises (MSME’s) are the backbone of a country’s economy and are the catalyst to local economic development and creation of new jobs. MSME’s are particularly important in developing countries, where it is accepted that MSME’s as business rights are a key to legal empowerment of the poor, whom, to a greater extent in developing countries, depend on micro and small enterprises for their survival.¹

In order for these business rights to effectively represent a key to legal empowerment of the less favored, they have to permit “individuals to engage in economic activity and market transactions, and which include the right to start a legally recognized business without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities”.²

Nevertheless, the vast majority of MSMEs in developing countries continue to work in the informal sector.

The existent business solutions are inappropriate for MSMEs, as they are prohibitively expensive to set up (both in terms of money and time) or result in high compliance costs to meet complicated regulations³ before registration, after registration and during winding-up procedures.

The present study, therefore, represents an outline of the author’s view of some of the most common and significant obstacles MSME’s face, when they venture into the legally regulated economy of a particular country, especially after registration. The study shall analyze the legal obstacles that MSME’s face in developing and less-developed countries.

International Organizations such as the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) are undeniably making efforts to “promote and encourage the formalization and **growth** of micro, small and medium sized

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¹ UNCITRAL Document No. A/CN.9/WG.I/WP.92.

² Ibid.

³ Michael Dennis and Jose Manuel Pliego Ramos, ‘Creating an Enabling Legal Environment for Micro, Small, and Medium-Sized Enterprises: Simplified Incorporation and Registration’ (2016) 33 *Ariz. J. Int’l & Comp. L.* 71, 92.

enterprises”.⁴ This was reinforced in 2013, at the 46 session of UNCITRAL, where it was resolved that a working group should start work “aimed at reducing the legal obstacles encountered by micro, small and medium sized enterprises (MSME’s) **throughout their life cycle**, and, in particular, in developing economies.”⁵ It was also resolved at the same session of UNCITRAL that the work should start focusing on issues related to simplification of incorporation of MSME’s.⁶

Under such auspices, Working Group, I and other scholars issued several reports, papers and documents related to the obstacles faced by MSME’s during registration, including document no. A/CN.9/800.⁷ Consequently, several best practices have been identified, such as: (i) permitting the creation of a simplified company with general limitation of liability (ii) creating one-stop-shops and simplifying registration process; (iii) using electronic services (information and communication technology); (iv) reducing or eliminating the minimum capital requirement;⁸ (v) establishing a wide range of freedom of contract in the articles of association; (vi) providing fiscal transparency and simplified accounting; (vii) allowing optional use of intermediaries (e.g., lawyers, notaries, or witnesses).⁹

However, post-registration obstacles in developing countries are still to be thoroughly analyzed, studied and classified. Such obstacles have not yet been discussed by UNCITRAL or other scholars, but are definitely part of UNCITRAL’s agenda, as the growth of MSME’s represents one of its goals.

There are many obstacles businesses face, like fierce competition, unpredictable demand patterns, changing customer preferences,¹⁰ economic crises, new legislation, that actually may have a bigger impact in MSME’s. The present study shall not analyze them, as the main purpose is to go through legal obstacles that keep MSME’s in the informal sector.

We shall, therefore, turn our attention to the obstacles existing after registration and before dissolution of an MSME. Such obstacles hinder the **growth and development** of MSME’s, raise their costs or even lead them to winding-up or to insolvency. Because of that, a great part of MSME’s in developing countries continues their business in the shadows of the informal sector, which by itself has a huge impact on a particular country’s economy.

II WHAT ARE MSME’S

According to art. 2 of the Law of the People's Republic of China,¹¹ on the Promotion of Small and Medium-sized Enterprises “The standard for classifying small, and medium-sized and micro enterprises shall be formulated by the department of the State Council in charge of comprehensive coordination of the promotion of SMEs together with the relevant departments under the State Council according to the indexes such as the number of employees, the business revenue and the total assets of the enterprises.”

⁴ UNCITRAL, ‘Sustainable Development Goals’ <<http://www.uncitral.org/uncitral/en/about/SDGs/Goal8.html>> accessed March 2018. See also the World Bank, Annual Doing Business Reports.

⁵ UNICTRAL Document No. A/68/17 and document No. A/CN.9/824.

⁶ Ibid.

⁷ See also UNCITRAL Document No.A/70/17.

⁸ The World Bank, ‘Starting a Business-Good Practices’ <<http://www.doingbusiness.org/data/exploretopics/starting-a-business/good-practices>> accessed March 2018.

⁹ Dennis and Ramos (n 3) 92.

¹⁰ Fred Ongisa Nyang’au, ‘Challenges Facing Micro and Small Enterprises in Inventory Management in Kisii Town, Kenya’ (2013) 13 IOSR Journal of Business and Management (IOSR-JBM) 5.

¹¹ The Law of the People’s Republic of China on the Promotion of Small and Medium Sized Enterprises was revised and adopted at the 29th Session of the Standing Committee of the 12th National People’s Congress of the People’s Republic of China on September 1, 2017, hereby issued for implementation as of January 1, 2018.

From the above, we cannot extract a definition of small business, but we can identify some common features, such as number of employees, business revenue or total assets of the company.

On the other hand, being very different in nature, it is quite hard and is not appropriate to provide with a single standard definition of an MSME, as this will vary from one country to another and, depending on the size of the market, the main factors that can identify a small business will be applied differently.¹² The two main factors that can define a business unit as MSME, are the number of employees and the annual volume of sales.¹³ One very common trait is the fact that MSME's are defined as "entrepreneurships", with a small and limited management personnel, including the owner, if not only the owner with a limited value of assets or no such assets (if we look at street vendors for instance). The most common forms of MSME's include: (i) a sole proprietorship; (ii) partnership; or (iii) Limited-Liability Company.

We can also find further traits of Micro and small businesses, such as (i) labor intensive because of low absorption of technology; (ii) unpredictable cash flows and uncontrolled costs; (iii) are flexible, and (iv) may advance to more sustainable businesses,¹⁴ (v) are vulnerable to corrupt practices, (vi) have limited access to capital or to banking services, (vii) rely mainly on family and friends for loans and risk sharing, (viii) limited access to dispute settlement mechanisms, which puts them in disadvantage before the State or larger businesses, (ix) are vulnerable to financial distress, (x) face burdensome regulatory framework and hurdles.¹⁵

MSME's can be found in many different areas, exercising a huge number of activities, such as commerce, mining, manufacturing, services, distribution etc. It is however estimated that majority MSME's in developing countries are in retail business and commerce, while to a lesser extent 30% participate in manufacturing and production.¹⁶

In developing countries, however, the owners of small businesses tend to be in retail sales on informal markets, like the Grand Marché in Niamey, Niger, the "bustling, centrally located open-air market"¹⁷ or as street vendors.

Thomas Kelly describes it very truly, as all businessmen being "crammed together in small stalls amidst a profusion of sounds and brilliant colors. Most of the market is open to the weather, but the businessmen string colorful cloths overhead to provide shade, enhancing the sense that the market is a multi-colored maze. The market does not have the outwardly orderly appearance and structure that most Western observers are accustomed to. There is virtually no signage and no advertising. Merchants who sell similar wares tend to cluster together, so in the vast market there is a consumer electronics section, a hardware section, a food section, and a women's footwear section."¹⁸

2.1 Formal vs Informal Economy

The formal economy or "legally regulated" is the one that falls within the scope of a country's law and regulation. Thus, a business that is in the informal economy is a business which activity does not comply with the implemented laws and regulations.¹⁹ Such businesses

¹² UNCITRAL Document No. A/CN.9/WG.I/WP.107.

¹³ Nyang'au (n 10).

¹⁴ Ibid.

¹⁵ UNCITRAL Working Group I (MSME's) – A/CN.9/WG.I/WP.92.

¹⁶ Nyang'au (n 10).

¹⁷ Thomas Kelley, 'Corruption as Institution Among Small Businesses in Africa' (2012) 24 Fla. J. Int'l L. 1, 54.

¹⁸ Ibid.

¹⁹ UNCITRAL Working Group I (MSME's) Document No. – A/CN.9/WG.I/WP.107.

are usually not registered commercially, do not pay taxes, do not register their employees and do not have necessary licenses for the pursued activity, but still operate.

By other words, we can to some extent define informal sector in developing countries as activities that pursue legal ends (**self-subsistence**) but use illicit means (**if we can call lack or impossibility to comply with regulations as illicit**). These are activities that are not by their nature criminal, but have to be pursued out illicitly, even though they are licit and desirable activities for the country and for the people.²⁰

In developing countries, the informal economy is very much engrained culturally and in the majority of cases, it is represented by MSME's. These businesses are pushed aside because of the impossible cost and overwhelming bureaucratic difficulty to enter the formal economy.²¹ Nevertheless, MSME's are usually the backbone of a country's economy and represent the engine which boosts the local economic growth and employment.²²

Evidence suggests informal activity is more prolific in some industrial sectors than in others. Studies have shown that trade, construction, and community services are relatively more important to the informal economy. The same studies also show that some areas of informal economy account for a substantial proportion of total activity in selected sectors, such as trade, finance, and construction.²³

In developing countries, the informal sector is usually comprised of very small businesses that are not registered in any way. Those businesses are in most cases run from homes or street pavements. This is usually the result of the rural-to-urban migration occurring throughout the developing world reflecting a scarcity of arable land and divisions of family farms among numerous heirs or because of the overwhelming war conflicts. Such situations leave individuals with no literacy degree and in extreme poverty. The Informal workforce survives mainly on the lowest earnings, with few opportunities to move into the "formal" economy and with no training or education possibilities it becomes impossible, even to try such shift from informal to formal. For almost all developing nations, the informal economy is the only component of the economy that is growing. The informal economy in Africa, for instance, is estimated to be 42% of the GNP (Gross National Product).²⁴

In some cases, individuals lack basic rights, because no civil registration was available to them or any existent documents were destroyed during war times. These problems are elevated under the employment status, where it was analyzed that as the category of occupation becomes less skilled, the proportion of elementary informal workers paired with a formal worker increased.²⁵

As emphasized above, MSMEs generally face a number of basic challenges, affected by or even aggravated, by operating in the extralegal economy. This "Informality" not being a uniform concept, makes MSME's to be able to operate even from "fixed premises and according to locally accepted commercial rules". Additionally, they may be "well-known by

²⁰ Enrique Ghersi, 'The Informal Economy in Latin America' (1997) 17 *Cato J.* 99, 108 (emphasis added).

²¹ *Ibid.*

²² Kitsuron Sangsuvan, 'Small Business in the WTO: Small Fish in a Big Pond or Globalization 3.0' (2015)23 *Mich. St. Int'l L. Rev.* 341, 396.

²³ Imraan Valodia and Richard Devey, 'Formal-Informal Economy Linkages: What Implications for Poverty in South Africa' (2010)14 *Law Democracy & Dev.* 133, 158.

²⁴ Bruce Sundquist, *The Informal Economy of the Developing World: The Context, the Prognosis, and a Broader Perspective* (2nd edn, 2008) <<https://www.civilizationsfuture.com/bsundquist/ie.html>> accessed March 2018.

²⁵ Valodia and Devey (n 23).

local authorities, pay some form of local taxes or be from time to time subject to extortion or corruption”.²⁶

Extralegal business activity, particularly in the developing world, may exist largely as a result of economic necessity, but the extralegal economy may also be seen as quite dynamic and as an incubator for the business potential that in fact provides economies with a large number of potential contributors to business development, with loads of accessible talent. There is an increasing acknowledgment of the informal sector and the fact that it is growing it is important that it is not treated as marginal or peripheral, but rather as an important building block.²⁷

The reasons for the extralegal sector have been largely debated on many forums and different International Organizations. The largely accepted theory is that it is the consequence of burdensome regulation and overwhelmingly costly and time-consuming procedures, put in place or not reformed in time by Governments, for the businesses to be fully compliant and to operate in the legally regulated economy. The antidote is to reduce barriers, simplify procedures and make them cheap and easy to navigate. Only under such circumstances informal MSME's will prefer and want to enter the formal economy, moving towards necessary registrations and compliances.

2.2 Importance of Keeping MSME's in the Formal Economy

It is estimated that around half of the world's working population is in the informal economy, amounting to approximately US\$ 10 trillion annually or an estimate of one-third of the world's economy.²⁸

It is, however, a fact that the prosperity and robustness of the economy are directly dependable on the existence of a strong small business industry operating in the legally regulated economy. The strong MSME sector is always a sure indicator of low unemployment rates.²⁹

If MSME's operate in the formal economy, they will pull unemployed people out of social security unemployment benefits, they will pay taxes and will contribute to the economic growth of the respective country.

By staying in the informal sector, individuals and small business do not damage only the particular country's economy, but also harm themselves by limiting their ability to access expansion capital, by keeping their businesses small and thus avoiding government supervision (despite the fact that they are still subject to petty corruption practices), by standing aside of any possible legal protection in courts or arbitration procedures, by not being able to acquire assets in the most efficient manner and even by not acknowledging the possibility to run for different government programs as small businesses or receiving tax benefits. The informal sector is also quite damaging to society as taxes are not paid and labor safety procedures are not met.

Keeping simple regulations for conducting business and having strong institutions will make MSME's want to enter the formal economy, because of all the advantages they will get. Simple and clear regulations that can be understood with ease and do not represent red tape will motivate individuals to comply and consider venturing into the legally regulated economy. The so-called businesspeople in developing countries seek efficient regulations and institutions that

²⁶ UNCITRAL Working Group I (MSME's) – A/CN.9/WG.I/WP.92.

²⁷ Ibid.

²⁸ UNCITRAL Document No. A/CN.9/780.

²⁹ Blake D. Morant, 'The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses' (2003) 7 J. Small & Emerging Bus. L. 233, 282.

will protect their rights and will create an accessible legal environment for their activity. If the given possibilities are too expensive, they are not accessible, and individuals will avoid complying with the existent regulations that are supposedly in place to enhance business and investment.

Additionally, Western-funded programs that are adopted on simplifying the process of registering new businesses and that are preaching *laissez-faire*, free-market liberal economic principles and protecting different rights are the new state of the art movement and are followed many times religiously by developing Governments, but with very contradictory outcomes, i.e. or those programs are not appropriate for that particular country (not taken into consideration local cultural differences) or are very clumsily implemented by the respective Government.

On the other hand, corruption plays a major role in keeping small business in the shadows. Usually, complex business regulations in developing countries are so puzzling to small businesses that each bend in the tortuous regulatory path that creates a bottleneck where corrupt government officials can extract bribes (called also rents or urgency fees) and if the petty bribe is not given, the relevant official will not issue the necessary permit to conduct or expand the business. The existence of such petty corruption and the inefficiency it causes provides yet more reasons to improve the country's institutions and procedures, by simplifying its regulatory and legal structure and improving its laws.³⁰ It is also clear that the more obstacles are put forward, individuals will even actively seek corruption practices. And whenever fewer are the existent obstacles, the easier will be to do business, which will naturally eliminate corruption practices.

In order to encourage MSMEs to move from the informal to the formal economy, Governments may wish to consider how best to effectively allure MSME's. In addition, Governments are urged to consider which actions will motivate such migration by making it a desirable, easily accessible process, which will pose the least burden possible on the MSME's.³¹

III OBSTACLES FACED BY MSME'S WHEN VENTURING INTO THE REGULATED MARKET OF A DEVELOPING ECONOMY

There are several factors that motivate a MSME to venture into the legally regulated economy. Factors like formalization, including registration, **licensing and other registrations** will affect the final decision.³²

Many obstacles faced by MSME's in developing countries come from overregulation that leads to an overwhelming bureaucracy. As many jurisdictions are trying to simplify their registration process, the enormous burden following registration is still very much existent.

In this section, we shall address cumbersome licensing and other procedures that pull back MSME's operations.

Apart of the above, there are still intangible obstacles that are inherent to the country's economic development, such as: (i) lack of sufficient regulation to fill in legal gaps; (ii) inability of the administration to apply correctly the existent regulations; (iii) enabling ineffective regulations, despite initial goodwill of the government, (iv) high illiteracy rates among the population, (v) ineffective enforcement regulation.

3.1 The Business License

³⁰ Kelley (n 17), 54.

³¹ UNCITRAL Working Group I (MSME's) Document No. – A/CN.9/WG.I/WP.92.

³² UNCITRAL Document No. A/CN.9/780.

Usually, the business license is intended to be obtained only after initial registration and incorporation of the company and gives the newly established company the license to commercially operate or to issue invoices.

Such requirement can be seen for instance, under Angolan Law or under Chinese Law.

In order to incorporate a private school or private training institution in the People's Republic of China, apart from the business license from the Administration for Industry & Commerce, a specific permit for running a school before the Administration for Education is still required.

In the Republic of Angola, a general business license has to be obtained from the Ministry of Commerce, which is supposed to conduct an inspection on the premises, prior or after issuing the business license.³³ The business license is necessary prior to a second license, usually required for the specific sector or area, in which the company wishes to operate, such as hospitality, private education, construction or private security companies. Another inspection may be conducted as well. In such cases, the required business/commercial license from Ministry of Commerce is always for commercial services, while the specific activity license will be delivered from the respective authority.

On the other hand, issuing any license, including business license requires prior inspections of the premises, that are conducted, in order to attest that those premises are sufficiently in good condition for the declared activity.

The business license has nowadays lost its significance and simply stops the growth and development of MSME's. Having a business license, just for the sake of having one and conducting numerous inspections increases the burden of compliance on MSME's, which do not have the necessary resources for that (monetary and human resources).

Actually, there are already countries which are eliminating the need for prior inspection. Countries like Malawi, Cape Verde or Afghanistan have recently eliminated prior inspections to premises, in order to grant a required business license to operate.³⁴

Still, the burden has not decreased dramatically, because this inspection will have to be conducted at some point. If not previously, later on, it will be conducted. Some businesses do not need at all any inspection and inspections should be clearly delineated, because, in many jurisdictions, there is still Health Certificate to be issued, for which a separate inspection may be needed, tax inspections and fire brigade inspections. Too many inspections for only one business. All of these just increases petty corruption.

For instance, in Angola the prior business license inspection requires the presence of officials from the fire department, health authorities and Ministry of Commerce. Many times, it is the requesting businessperson who has to provide transportation for the officials and petty cash for their daily expenses. Otherwise, there will be always something missing. If an "urgency fee" is paid, the inspection may be conducted by only one official, whom will collect the signatures from others and the inspection will be a success. These inspections as said above is not enough, as other inspections may be in place, depending on the activity.

3.2 The Import/Export License and Other Additional Certificates

The possibility to receive or send goods from and abroad is only possible through import/export licenses. Without these licenses, the company will not be able to clear customs

³³ The time of the inspection is never clear, as it is an internal procedure of the competent authority, which can change from time to time.

³⁴ The World Bank, 'Starting a Business-Doing Business Reforms' <<http://www.doingbusiness.org/data/exploretopics/starting-a-business/reforms>> accessed March 2018.

duty. Sometimes, this procedure can only be started after obtaining the necessary business license. Usually, import/export licensing procedures are very cumbersome in developing countries, many times requiring a load of documents and usage of different agents, like clearing agents, lawyers, notaries or payment of different fees and taxes. In some countries, there are even import quotas, which at some point can suffocate small businesses. In developing countries or less developed countries, small businesses are constantly constraint in their attempts to move into areas, which require a great deal of influence or money for corrupt practices.

In other areas, in addition to import license, specific certificates are also required, in order to import or export specific goods, such as telecommunications equipment (including mobile phones, copy machines, etc.), forbidden goods or special goods, such as minerals. It may be even possible that such certificates are required when importing such goods for personal use.

In such situations, the MSME's are obliged to use intermediaries, because of the bureaucracy to obtain all these required licenses and certificates, paying high fees and being exposed to extortion, blackmail or corruption, which of course may render impossible the continuation of the activity.

3.3 *Huge Administrative Burden*

The end of each calendar year is usually hectic, especially when it coincides with the fiscal year. All companies are therefore obliged to file extensive reports to different authorities. In developing countries, this is usually in place. Tax office, private investment authority, labor office, statistical office, commerce and other sectoral authorities will all want to receive the companies reports. In addition, almost all authorities will mainly request for an unnecessary set of documents and each authority may have a different procedure for it.

Even the MSME status have to be acknowledged with a specific certificate, in order to benefit from special Government programs. For instance, in some cases very high compensation packages for dismissal of workers may be in place. Such packages may be lower for MSME's. The catch is that to receive the MSME status, the entrepreneur will have to go through another cumbersome procedure. The perfect example is the new Labor Law of Angola, from 2015, which was presented as a business-friendly regulation, which included lower compensation packages for MSME's when dismissing employees. In order to obtain the MSME status however, the entrepreneur will have to turn to another law³⁵ and to a different authority.

The huge administrative burden can even be seen in developed countries, like the USA, where it was found that smaller businesses with fewer than 20 employees spend on average \$6,975 per employee to comply with all required federal regulations, nearly 60% more than the cost per employee for firms with more than 500 employees.³⁶

3.4 *High Cost for Corporate Changes*

On the other hand, not only registration fees and procedures can be cumbersome and complex for MSME's. UNCITRAL Working Group has issued documents, in regard to MSME's, but nothing related to corporate changes after first registration.³⁷ Many jurisdictions are opting to lower administrative fees for registration or eliminate the use of notaries, which

³⁵ The Micro, Small and Medium Sized Enterprises Law (Law No.30/11 from 13 of September).

³⁶ Joseph A. III Castelluccio, 'Sarbanes-Oxley and Small Business: Section 404 and the Case for a Small Business Exemption' (2005) 71 Brook. L. Rev. 429, 476.

³⁷ UNCITRAL Working Group I, '2014 to Present: Micro, Small and Medium-sized Enterprises' <http://www.uncitral.org/uncitral/en/commission/working_groups/1MSME.html> accessed March 2018

are extremely high in cost,³⁸ however, there is still the existence of such high fees and complex procedures when a company wants to appoint a manager, increase share capital, amend articles of association or execute other minor corporate changes.

Unclear procedures that are scattered in different diplomas, give the possibility to officials to change constantly their procedures making them more and more complicated. In order to run through such shifting procedures, businesses have the constant need of professional advice, such as from lawyers, consultants or accountants. For instance, in the Republic of Angola, when changing from one shareholder to a plural structure or vice-versa in a limited company, which should be something extremely simple (as per legal regulations in place), almost the same or even more documents are required as for initial registration or liquidation of the company (as per different practices put in place by officials).

The World Bank has found that **economies with modern business registration** grow faster, promote greater entrepreneurship and productivity, create jobs, boosts legal certainty, and attract larger inflows of foreign direct investment.³⁹ We can add, that not only business registration should be modern, the entire corporate and commercial system and procedure, including subsequent corporate changes (such as increase of share capital, conversion of companies) should be simple and modern.

Why do simple procedures are so important then? Because it leaves MSME's with more time, energy and other resources to focus on their business and growth.

So, developing countries should stop doing piece by piece legislative changes, in order to get a few places above in Doing Business reports, but should instead look at the overall corporate process and simplify it at once. The latest legislative change in the Republic of Angola eliminated the need during incorporation and successive corporate changes of a Public Deed (*escritura pública*) and lowered substantially the fees, but this had quite a controversial outcome. Public deeds, which are very complex documents will only be eliminated if the individuals choose the simplified procedure, including a mandatory model of Articles of Association. If the individuals require any change in the given draft, he will have to go through the complex procedure, where the Public Deed is required and applicable. If the company is then incorporated under the complex and costly procedure it will never be able to opt for any future simplified procedures (avoid Public Deeds for instance), which contravenes an important simplification principle – maximum freedom of contract. Instead of making it simple, it makes it even more complicated, because we have a two-gear system.

Similar situations cannot avoid the use of intermediaries, such as notaries, lawyers, accountants, increasing enormously the burden over MSME's. For instance, the mandatory requirement of notary services will many times call for the need to use lawyers and other intermediaries or administrative personnel, which can represent 80% of the global cost of registration⁴⁰ or other corporate changes.

3.5 Other Intangible Obstacles

Apart of obstacles that are quite clear and be easily listed, MSME's face other obstacles that can be defined as intangible. We will be looking below at some intangible obstacles MSME's can face during their lifecycle.

Employment rigidity and overregulation are a huge obstacle for MSME's. For instance, according to the World Bank, employers in Burkina Faso cannot conclude fixed-term

³⁸ Dennis and Ramos (n 3), 92.

³⁹ Ibid (emphasis added).

⁴⁰ Ibid.

contracts unless the job is seasonal. Night and weekend work are prohibited, and women are not allowed to work more than 8 hours a day. If the business needs to downsize, the employer must notify the ministry of labor to fire a single worker, and the law mandates that the redundant worker is trained and placed in other jobs prior to dismissal. If a resolute employer goes through these procedures, a redundancy would cost 18 months' wages in severance pay and penalties. Not surprisingly the majority of businesses operate in the informal sector, which accounts for 40% of economic output in the country. Despite that, according to the Government, employment regulations are designed to protect workers from arbitrary, unfair or discriminatory actions by their employers. But we must have in mind that heavy and burdensome regulations make employers to choose very conservatively, benefiting mostly men with several years of experience, while young, female and unskilled workers do not receive opportunities. Beyond these regulations, governments struggle to reach the right balance between labor market flexibility and job stability. Most developing countries err on the side of excessive rigidity, to the detriment of businesses and workers alike. Burkina Faso vies with Angola, Niger, Rwanda, Sierra Leone and Togo for the country that regulates employment the most. The analysis of the World Bank is that across the world, poor countries regulate labor much more than rich countries do. And this is done in the name of offering better jobs.⁴¹

In Developing countries there is a tendency to extremes, or the sector is overregulated, or it is poorly regulated. In both scenarios, it is a constraint to business. We have addressed above a few cases of overregulation, which causes burdensome procedures. But the opposite can cause as many problems as overregulation because when there are gaps in the law, it leaves a huge opportunity for different interpretations from officials. If there is a gap in the law or an unclear provision or contradictory provisions, it is very easy to become an impossible stumbling block for any good business idea.

Illiteracy among the population is another intangible obstacle, as it cannot be quantified or seen, but it hinders all attempts to develop a strong MSME segment within the formal economy. Even the simplest requirement is an impossible task for an individual that cannot read and write or has a very limited literacy knowledge.

Poor enforcement of laws may hinder the development of good business and especially the development of MSMS's to a great extent. For instance, a businessperson may see his bank accounts, or his assets seized for a disproportionate small payment he has not made on time. For instance, Darcy Du Toit in 'The Small Business Sector: Deregulation or Collective Bargaining' gives a very good example of South African business practices. "Abraham Adamson, owner of A&A Motor Spares in Athlone, Cape Town, was dealing with a client in June 1991 when the sheriff of the court walked in and seized 21 gearboxes and various other movable assets. His [Adamson's] crime was failing to pay two of his 14 employees the overtime rates stipulated by an industrial council which a few weeks earlier he never even knew existed." It was also reported that many Western Cape businesses were liquidated by industrial councils over the last two years, generally for non-payment of levies.⁴²

IV HOW TO REDUCE THE RAISED OBSTACLES

This chapter does not intend to suggest to Governments to eliminate their internal regulations but aims at promoting easier and simple procedures and regulations that are

⁴¹ The World Bank, 'Doing Business in 2005: Removing Obstacles to Growth' (2004) International Finance Corporation and Oxford University Press<<http://documents.worldbank.org/curated/en/523951468327409050/Doing-business-in-2005-removing-obstacles-to-growth>> accessed March 2018.

⁴² Darcy Du Toit, 'The Small Business Sector: Deregulation or Collective Bargaining' (1993) 14 Indus. L.J. (Juta) 570, 581.

transparent and can help the business and especially MSME's to stay in business. This means, that the call for a further and deeper analysis is herein served.

Initially, many licenses can be joint together in only one, simplifying and reducing the bureaucracy, the documents required, the needed inspections, the existent fees, and timeframe, thus making the overall process faster and cheaper. For instance, a business license can be part of registration or be totally abolished for some kind of activities. Inspections in place should also be reduced to only the most important and should depend on the activity of the business.

Import/Export licensing can be simplified by reducing its issuance to only specific goods or specific abnormal situations.

The overall necessity of using Public Deeds and other costly and complex procedures has to be reduced and the administrative fees should be calculated in accordance with the service provided. Fee calculation and implementing regulation have to be clear, simple and publicly accessible and the corporate changes procedure have to be simplified, just alike in during initial registration.

As we have mentioned above, one of UNCITRAL goals is to promote the growth of MSME's and facilitate sustainable development in developing countries. The reduction of impediments and further research into the post-registration obstacles faced by MSME's will simplify their day-to-day operation and help them integrate into the formal economy, thus giving them among others access to credit, dispute resolution possibilities, which will end up being a major boost for international trade.

We can look for instance at Kenya's approach, where Nairobi County has introduced a new unified business permit. The "New Unified Business permit", will consolidate in only one, five existing permits needed to start and operate a business:⁴³

- The single business permit
- Fire clearance certificate
- Advertising signage
- Health certificate
- Food hygiene

In addition to this, businesspersons will no longer need to submit applications physically, but can rather do it online and pay online all required fees and afterward just print the certificate.

In order reduce the obstacles it is most important to involve practitioners and avoid having only bureaucrats that have never faced the problems of the business.

Governments should introduce sound principles that have to be followed by officials. Governments should ultimately address intangible obstacles, faced by MSME's, with practical long-term programs that will not only decorate the shelf of the bureaucrats, but will be implemented through different governments.

V CONCLUSIONS

In summary, in developing countries, too many authorities deal with companies and businesses after their initial registration, too many procedures that are too long, complex and expensive, in order to be complied with, particularly by MSME's. All these time-consuming

⁴³ 'Nairobi County Introduces The New Unified Business Permit'(October 31, 2016)<<http://www.rookie-manager.com/nairobi-county-introduces-the-new-unified-business-permit/>> accessed March 2018.

and complex procedures, many times represent a big setback to their development, as MSME's simply cannot focus on their business activity, in order to comply with all the legal requirements in place.

The overregulation and bureaucracy, high administrative burden, lack of sophistication and knowledge and prohibitive costs (money and time) are all obstacles for the MSME. The intangible hurdles down the road to formalization are another stumbling block and they need to be carefully analyzed.

MSME's are quite vulnerable and this is not only a developing countries' trend. In developed countries MSME's struggle to survive. An Export Subcommittee study identified five major complaints from small businesses: (1) difficulty in getting payments, (2) obtaining credit and/or banking inefficiencies, (3) the high cost of money, (4) too great a financial risk, and (5) lack of tax incentives.⁴⁴

What is really important and comes short in developing countries is the legal certainty. In developing countries, legislative changes seem more of a speed process, in order to satisfy bureaucrats and level their ratings, instead of carefully thought and implemented procedures. Moreover, formalization program created and run by people who do not understand the uniqueness of each country can also lead to disastrous consequences for MSME's. All this can affect legal certainty because, in this global world, everyone is competing for the same investor (small or big). The place where each investor and businessperson feel safe and protected will dictate formalization and/or investment.⁴⁵

It is however not recommendable to implement many changes in an existent legal environment at once. Based on the recent UNCITRAL work on reduction of legal obstacles faced by MSME's when operating in the legally regulated economy, with special emphasis on developing countries, the best way is to deal with a specific issue at a time and make sure there are continuity and avoidance of contradictory measures.

Finally, the main aim of the present chapter was to raise awareness on the existence of legal obstacles after initial registration and prior to dissolution, as something that was not analyzed until the present moment and show that such obstacles are as dangerous as all the others to the existence and growth of MSME's.⁴⁶

⁴⁴ Robert T. Arthur, 'U.S. Government Export Incentives for Small Business' (1988) 22 Int'l L. 791, 808.

⁴⁵ Fabio Ulhoa Coelho, *Principios do Direito Comercial* (Editora Saraiva, 2012).

⁴⁶ Such as obstacles related to registration of property, duly analyzed in *Doing Business in 2005: Removing Obstacles to Growth*.