FORMAL CONTRACTS WITHOUT COURTS*

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Abstract

Recent empirical findings point at the actual use of formal contracts by business parties alongside substantial elements of their dealings remaining informal, and thus subject only to reputational or other reciprocity-based consequences. In this paper we formally show the supporting role of formal contracts for relational contracts. Even entirely disregarding contract enforcement through a Court or arbitrator, we formally show that such formal (yet non-enforceable) contracts may have an important and positive influence over the reputational or reciprocity-based sanctions that firms may impose upon their suppliers in order to sustain cooperation in relational contracts. We demonstrate that setting compliance with certain tasks in a formal contract reduces the cost of reputational punishments than firms may need to inflict in order to ensure the right incentives to provide effort. We also show that formal contracts impact the way in which reputational punishments will be structured: Formal contracts optimally induce a more shunned pattern of sanctioning, compared to a benchmark case in which no formal contract has been agreed. Thus, when dealing with its counterparties a firm will be, when the relational contract comes together with a formal contract, less forgiving with those counterparties who have not performed the formal contract, and more forgiving with those other ones who have not infringed the provisions of the formal contract.

Keywords: Reputation, Relational Contracts, and Formal Contracts.


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Since the landmark findings of Macaulay (1963) about commercial contracting views and practices among US businesspeople, informal dealings and contracting has been at the forefront of the economic understanding of inter-firm cooperation. Only a very short time back, a new survey of business in various industries confirmed Macaulay’s fundamental observation that firms did not rely on formal contracting and legal enforcement in order to ensure cooperation with contracting partners, at least in respect of those business sectors that would not qualify as possessing an important innovative dimension requiring external contracting with other firms (Bozovic and Hadfield, 2013). A different empirical study (Dietz, 2014) on cross-border software development contracts, also finds that control enforcement by Courts or arbitrators plays on extremely limited role in securing contract performance.

Given these striking findings, it does not come as a surprise that relational contracts, that is, contracts in which cooperation is not induced by external adjudication and enforcement, but by the parties’ concern about future dealings with the counterparty or with other contracting partners, have received, and deservedly so, large theoretical and empirical attention. The role of informal contract relationships, social norms in business networks, and reputation within the networks has also been identified and explored in various historical and economic circumstances.

Recently, a wave of Law and Economics papers has revisited the interaction of relational contracting with legal drafting of formal and binding contracts, and to a lesser extent, the legal enforcement of such written and formal contractual instruments: Gilson, Sabel and Scott (2009, 2010, 2013); Bozovic and Hadfield (2013); Baker and Choi (2014). With somewhat different accents and arguments, all of these recent papers informally present and illustrate the advantages that, under certain scenarios, firms may obtain when complementing their relational contract with formal documents that may help, through different channels, not necessarily involving the

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1 See, MacLeod (2007) and Malcomson (2012) for useful surveys of the literature.
legal enforcement by Courts, Tribunals, or arbitrators, the outcome under relational contracting. Some papers in the economic theory of relational contracts had allowed for, and analyzed, the effects of having a formal explicit contract written over some subset of verifiable actions, on the functioning of the relational implicit contract: Baker, Gibbons and Murphy (1994, 2011); Schmidt and Schnitzer (1995). These papers, however, use a framework in which breach (non-cooperative actions) are perfectly observable. The recent Law and Economics papers just referred, and this paper, analyze relational contracts when the cooperative action of the relevant party is not perfectly observable.

In the present paper, we provide a formal model showing how drafting a formal legal contract, absent third party enforcement (i.e., when the formal contract is non-enforceable, perhaps due to verifiability issues, or ex-post costs of Court enforcement) helps to build trust between the parties in a relational interaction in which the incentive mechanism is provided by reputational or reciprocity-based sanctions. We build heavily on previous work of ours (Ganuza et al. 2011) that shows how, in settings of product markets with asymmetric information about product quality, the legal system may simultaneously reduce the cost of market sanctions, and sustain cooperation for a larger set of relevant parameter values.

Now, we apply the modelling approach and the spirit of the argument in that paper of ours to a setting of a relational contract between two firms, where there is asymmetric information about the effort invested by the seller or producing party in a given project, and where the observable outcome of the project provides only an imperfect signal of the underlying effort. We consider that the parties are able to draft a formal contract, albeit a wholly unenforceable one. The reasons for non-enforceability of the formal legal contracts may be twofold: (i) The performance or breach actions of the formal contract may be unverifiable before a Court or other third party enforcer, or they may be insufficiently definite so as to merit legal enforceability, given that Contract Law refuses to enforce obligations that lack sufficient "definiteness"; (ii) the costs of pursuing enforcement of the formal contract before a Court or an arbitrator may be too costly given the
expected benefits in terms of damages or other transfers or remedies that may be imposed by
the adjudicator, and this excess of litigation costs over expected value of litigation is common
knowledge to both contract parties.

The reason why the players may wish to resort to drafting the formal contract (and incur the
costs that this may very possibly entail) is that the performance or breach of the obligations set
out in the formal contract may be better observed than the underlying effort (the relevant choice
variable that the parties would optimally wish to influence) and may be correlated, however im-
perfectly, with the level of effort which constitutes the variable of true interest.3 For instance, the
parties, aware of the fact that the effort taken by the relevant party will only be very imperfectly
observable, through its effect on the likelihood of success of the project, although the latter may
also be influenced by a wide range of other factors, may prefer to sign a formal contract that
imposes upon the party to provide the effort a set of tasks whose costs, or whose likelihood of per-
formance, are correlated with the level of effort chosen. One could think of writing and submitting
progress reports (monthly, or quarterly, or with a different timing), making presentations from
time to time so to update the other party, presenting detailed information on costs incurred, or
simply informally conveying information to the counterparty on the development of the project.
These ancillary tasks do not provide an actual benefit to the other side, who may nonetheless
invest time an effort in putting them in writing in a legally drafted contractual document. Not
because the customer firm intends to bring the other party to Court if one of those ancillary tasks
is not performed (probably the costs of the lawsuit widely exceed the expected damages to be
obtained from the breach of a minor ancillary obligation), but to improve the quality of the signal
about the level of effort taken by the producing firm.4

In such a setting we formally show two results of the use of formal (yet non-enforceable)
contracts on the reputational or reciprocity-based sanctions that firms may impose upon their

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3 In this respect, our idea has a flavor of those models where the contract can be a signal: Spier (1992); Hermalin
(2002).

4 Dietz (2015) also adds an interesting twist to the underlying reasons to draft the formal contract, namely the
relevance of a binding document for the relations of one or both parties vis-a-vis third parties (landing banks,
insurers tax or other governmental bodies).
suppliers of goods and services. One is that formal contracts reduce the cost of reputational punishments than firms may, from time to time, need to inflict upon their suppliers in order to keep them under the right incentives to provide effort. Obviously, given that those reputational sanctions that may occur are socially costly, formal contracts may provide net (of the transaction costs necessary to draft them) welfare benefits. The other is that formal contracts make reputational punishments more eschewed than they would otherwise be. In other words, the firm will be, when the relational contract comes together with a formal contract, less forgiving with those counterparties who have not performed the formal contract, and more forgiving with those other ones who have not infringed the provisions of the formal contract. In fact, the optimal reputational sanctioning policy is completely dichotomous: To be fully forgiving with those contractors who perform the formal contract, even if the project did not succeed; and to be fully unforgiving -that is, strike them out forever from the list of potential counterparties- with those whose project fail, and at the same time do not perform the formal contract.

Our paper and results are obviously related to that strand of the Law and Economics literature mentioned above. However, it differs from those papers on several grounds. First, we provide a formal model of the interaction of formal contracting with the relational contract and its reputational sanctions. Second, we emphasize the informative quality of the signal that ancillary tasks entrusted to one party in the formal contract may possess for the customer side of the contractual relationship. The key factors in the other papers are related to ours, but are somewhat different.

In an important series of papers, Gilson, Sabel and Scott (2009, 2010, 2013) provide complementary analyses of the phenomenon they label as ”braiding”, that is the use of legal contracts to support informal contracting specially in technology-intensive industries. They place their lens specially on provisions of formal agreements that commit to exchange information between the parties, and those that establish conflict-solving schemes, bodies and procedures. With this, the parties not only may eventually improve observability, but also increase the joint understanding of the parties concerning the development of their relationship (bringing the parties’ beliefs closer),
learn about the capabilities and the cooperative or non-cooperative features of the partner, and build increased trust among the parties. They also correctly underline how Courts, with different interpretive and enforcement strategies (essentially what they label "low-powered enforcement" such as imposing obligations to negotiate in good faith, but not delivery and payment over the main subject matter of the contract) may help the parties to fruitfully use the formal side of contracting to support the informal strands of their relationship, and how mistaken Courts’ choices may interfere with the desirable helping hand function of legal contracts and Contract Law.

Bozovic and Hadfield (2013) provide important empirical findings about how in many industries the standard Macaulay’s type of response remains prevalent 50 years later, albeit with the interesting twist that in innovation-oriented industries and relationships, namely that parties were still reluctant to go to Court to adjudicate disputes and determine outcomes, but they would make heavy use of formal contracts, involving extensive legal advice, in the negotiation and agreement of the contracts. In his study of international software development contracts, Dietz (2014) also finds heavy use of formal contracting coupled with reputational and reciprocity-based incentive schemes, and on almost complete shunning of national Courts or international arbitrators as powerful and reliable tools to provide enforcement. Bozovic and Hadfield (2013) also contribute a theory trying to explain the observed dichotomy of contracting practices in industries with or without relevant innovation-related external contracts, that they label "scaffolding". In their theory, when uncertainty about the future desirability of certain actions is very high, the parties cannot rely on formal contracts to determine those actions, but they cannot rely on informal but shared understanding by the parties either. Thus, parties may profitably opt to use the strong and proven "classification" properties and abilities of Contract Law, by signing a formal contract, and relying on the rules, doctrines, and interpretive strategies of Contract Law to further down the road to determine if there is performance or breach in concretely realized contingencies. Moreover, by relying on a trusted set of classification properties, parties are able to better align what will be the future understanding of how parties would consider that future action in that
future set of circumstances. Thus, the formal contract and Contract Law, even absent litigation and Court intervention, will be able to bridge the gap in beliefs and understandings between the parties. This is what they name as "scaffolding".

Baker and Choi (2014) analyze a setting of a relational contract in which Court enforcement is possible, that is, parties may resort to both reputational and legal sanctions, the two of them costly. Legal sanctions provide two advantages compared to the setting of a pure relational contract. First, contract damages -that are different in nature and size from the future benefit of the transaction to the breaching party, which provides the size of the reputational sanction as well as the cost of it- allow parties to decouple the benefit of the legal sanction in terms of deterring undesirable breach, from the cost of implementing the sanction, which is given by litigation costs. Second, a litigated case of a formal contract breach may allow the parties to uncover more evidence of the true behavior of the other parties, and thus to better tailor the reputational sanctions.

Our paper is related also to Gil and Zanarone (2014), although their focus of interest is to present a model of the optimal use of informal and formal contracts that would provide a relatively simple set of implications as to the factors affecting the use of just one or the other option (formal or informal) or a combined use (formal and informal) in terms of contracting strategies.

The structure of the paper will be as follows: Section 2 will present the basic setting. Section 3 will model the relational contract without formal contracting. Section 4 presents how the relational contract will be influenced by the parties drafting a legal and formal contract that, however, both contracting parties know that will not be enforced. Section 5 presents the extensions and implications. Section 6 briefly concludes. All proofs are relegated to the Appendix.

2 The Model

A producer firm (PF) undertakes a project for a customer firm (CF). The outcome of the project is uncertain, but the probability of the project (e.g developing an innovative process or product) being successful depends on the effort exerted by PF. In particular, we assume that PF
decides between two possible levels of effort, \( e \in \{\underline{e}, \overline{e}\} \). The choice of effort is private information (not observable by CF) and not directly contractible. Exerting effort is costly, \( c_{\underline{e}} < c_{\overline{e}} \), and determines the probability of success of the project, \( p_{\underline{e}} < p_{\overline{e}} \). For simplicity and without loss of generality, we take \( c_{\underline{e}} = 0 \), \( c_{\overline{e}} = c \), \( p_{\underline{e}} = 0 \) and \( p_{\overline{e}} = \pi \).

If the project is successful, it delivers profits \( V > 0 \). High effort is socially efficient, \( \pi V - c > 0 \). PF is financially constrained and it cannot bear the risk of financing the project. CF pays an exogenous price \( P \) to PF for undertaking the project, as \( \pi V > P > c \). In order to keep the model as simple as possible, we initially take as exogenous the price paid by CF, \( P \). Later on, we endogenize \( P \) and show that beside the fact that prices will be influenced by the transaction cost incurred by PF, our main results hold. Given these assumptions, CF would be willing to contract with the PF if effort is high (\( \pi V > P \)), but not otherwise.

In a static framework, CF correctly anticipates that given that the effort is not observable and contractible, PF has strong incentives to shirk and therefore there will be no trade. Parties can overcome this market failure when the interaction is repeated by using a relational contract.

3 Building Trust

Now we consider an infinite horizon framework with an infinitely lived PF and an infinitely lived CF, in which the basic game above is repeated over and over again. As in the static game, contracts cannot be verified by a third party who could enforce a explicit provisions of a formal contract mandating the chosen level of effort.

This repeated game has multiple equilibria, including the repetition of the solution to the static game. We will focus on equilibria supporting cooperation between PF and CF. In particular, we consider the following grim strategy subgame perfect equilibrium inspired by Green and Porter (1984):

- CF starts trusting PF in period 1, and financing the project by paying price \( P \).
- There is trade, PF chooses high effort and CF trusts PF by financing the project through the price $P$, until a project failure occurs.

- When CF observes a project failure, she reacts by discontinuing to finance the project for $T$ periods. After expiration of the $T$ periods, CF is willing to resume the relationship with PF again.

Following Gauza et al (2011), we will denote the missing trade surplus in $T$ periods incurred as the “cost of reputation”. Both agents would be better off if they do not stop trading during the punishment phase. However, punishment is necessary to preserve incentives.

We are in a setting of ex-post imperfect information: the fact that the project has failed is an imperfect signal of PF’s level of effort. If the signal were perfect, then $T$ could be infinite and the cost of reputation would be 0, since punishment would never be imposed in equilibrium. In our setting, the imperfect information leads agents to incur a cost of reputation. We will focus on the “optimal” relational contract, the one that maximizes the number of periods in which trade occurs, or, equivalently, minimizes the number of periods in which the costly reputational sanction is imposed.

We assume that both agents face the same discount factor, $\delta \in (0, 1)$. When CF and PF play the strategy described above, let $V^+$ and $V^-$ be the present discounted value of the PF profits depending on PF’s level of effort, high and low, respectively. We have:

$$V^+ = P - c + \pi \delta V^+ + (1 - \pi) \delta V^-,$$
$$V^- = \delta^T V^+.$$

Solving the equation system we obtain both present values in terms of the parameters of the model

$$V^+ = \frac{P - c}{1 - \pi \delta - (1 - \pi) \delta^{T+1}},$$
$$V^- = \delta^T V^+ = \frac{\delta^T (P - c)}{1 - \pi \delta - (1 - \pi) \delta^{T+1}}.$$
Finally, to achieve this equilibrium we must add an incentive compatibility constraint. The following inequality captures the lack of incentives of PF to choose low effort:

\[ V^+ \geq P + \delta V^- \]

Using the definition of \( V^+ = P - c + \pi \delta V^+ + (1 - \pi) \delta V^- \), the incentive compatibility constraint can also be written as:

\[ \pi \delta (V^+ - V^-) \geq c. \]  \hfill (3)

We are interested in another equivalent expression for the inequality above, which can be found using the solution to the equation system \( V^+ \) and \( V^- \) (we plug equations (1) and (2) into (3)):

\[ \pi \delta \frac{(1 - \delta T)(P - c)}{1 - \pi \delta - (1 - \pi) \delta^{T+1}} \geq c. \]

Let \( \Phi(T) \) be the left side of the incentive compatibility constraint above. For our purposes, this function has a useful property:

**Lemma 1** \( \Phi(T) \) is increasing in \( T \).

Hence, to solve optimally the infinitely repeated game, we want to choose \( T \) in order to maximize \( V^+ \).

\[
\max_T V^+ = \max_T \frac{P - c}{1 - \pi \delta - (1 - \pi) \delta^{T+1}}
\]

subject to the following constraint:

\[ \Phi(T) \geq c. \]

Given that our function satisfies \( \frac{\partial V^+}{\partial T} < 0 \), then the optimal \( T^* \) for our problem will be the minimum \( T \) that satisfies the identity \( \Phi(T^*) = c \). But this equation has a unique solution, by Lemma 1.

The optimal punishment \( T^* \) has been characterized for a given value of the discount factor \( \delta \), probability of success of the project under high effort \( \pi \), and marginal profit \( P - c \) of PF. Next Lemma establishes how the optimal punishment \( T^* \) depends on this set of parameters.
Lemma 2 The optimal punishment $T^*$ is decreasing in $\pi$, $P - c$ and $\delta$.

The intuition of Lemma 2 is as follows. The cost of reputation decreases with $\pi$ since it is a measure of the level of imperfect information (higher $\pi$ implies lower asymmetric information, that is, project failure is a more informative signal of low effort by PF), and decreases with $P - c$ and $\delta$, since they increase the cost for PF of the missing trade following project failure.

4 Trust with Formal but Non Enforceable Contracts

In this section we explore the role that a formal contract that is not enforceable (or, being theoretically enforceable, the enforcement costs are so high that it will never be actually enforced, this outcome being common knowledge) by a third party adjudicator (typically a Court) may have in order to increase trade and welfare by improving the performance of the relational contract. We introduce a formal contract between CF and RF, $C$, that remains, however, non-enforceable. The goal of $C$ is to specify for PF some intermediate tasks that may be imperfectly correlated with the real effort invested by PF. If the innovation project succeeds, CF learns that high effort has been exerted, and the formal contract albeit non-enforceable contract plays no role. If the innovation project fails, the contract provides imperfect information on effort exerted by PF.

Formally, at the end of the innovation process, the formal contract allows the production of a signal $s \in \{s_P, s_{NP}\}$, where the sub-index means performance and not performance of the formal contract. The realization of the signal is observable by PF and CF. We initially assume that the contract signal is informative, and we take its informativeness as given. As the signal is informative, the probability of a good signal realization is higher when PF has exerted effort. $P(s_P|\pi) = \alpha > \beta = P(s_P|\xi) = \beta$.

The next step is to analyze the interaction between the formal but not enforceable contract and the relational/informal contract. The main idea is that parties can use the information provided by the formal contract for improving the functioning of the informal contract by tailoring the
reputational or relational punishment more tightly to the ex post probability that no effort has been exerted.

Formally, we define a new infinite horizon game in which CF makes the relational sanction dependent on the performance of the formal contract. After a project failure, CF observes the signal from the formal contract, and then CF sets the relational sanction accordingly. We proceed as in the previous cases by computing the Present Discounted Value of PF profits given the punishment by CF, now based on the performance of the formal contract (we have include an upper index \( C \) to refer to the formal contract). Notice that the formal contract reduces but not eliminates the asymmetry of information (otherwise this would be equivalent to make the production effort contractible). Then, there may be Type I errors (situations in which PF exerts effort and the formal contract is not satisfied), as well as Type II errors (situations in which PF does not exert effort but the formal contract is satisfied). These errors will be key in determining the optimal punishment. In summary, in case of a failure of the project, a relational sanction is triggered, but the length of the punishment depends on the performance of the formal contract

\[
V^{C+} = P - c + \pi \delta V^{C+} + (1 - \pi) \delta \alpha V^{C-}_{P} + (1 - \pi) \delta (1 - \alpha) V^{C-}_{NP},
\]

\[
V^{C-}_{P} = \delta T^{P} V^{C+}
\]

\[
V^{C-}_{NP} = \delta T^{NP} V^{C+}
\]

Solving the equation system, we obtain:

\[
V^{C+} = \frac{P \cdot c}{1 - \pi \delta - (1 - \pi)(\alpha \delta T^{P} + 1) + (1 - \alpha) \delta T^{NP} + 1)}
\]

The formal contract also affects the incentive compatibility constraint, so in order to express that the firm has no incentive to exert low effort, now we have:

\[
V^{C+} \geq P + \delta [\beta V^{C-}_{P} + (1 - \beta) V^{C-}_{NP}]
\]

Following similar computations than in the previous section, we obtain the incentive compat-
ibility constraint under formal contracting as the inequality given by:

\[ \Psi^C(T_P, T_{NP}, \alpha, \beta) \geq c \]

where this new function is:

\[ \Psi^C(T_P, T_{NP}, \alpha, \beta) = \frac{\delta [\pi + (1 - \pi)(\alpha \delta T_P + (1 - \alpha)\delta T_{NP}) - (\beta \delta T_P + (1 - \beta)\delta T_{NP})]}{1 - \pi \delta - (1 - \pi)(\alpha \delta T_P + 1 + (1 - \alpha)\delta T_{NP} + 1)} (P - c) \]

Notice that if we impose that penalties are independent of the performance of the formal contract (which is necessarily the case when the parties do not have a formal contract in place), \( T_P = T_{NP} = T \) by construction, \( \Psi^C(T, T, \alpha, \beta) = \Phi(T) \).

We are interested in characterizing the optimal relational sanctions with formal but non-enforceable contracting, which will be the solution to the following problem

\[ \max_{T_P, T_{NP}} V^{C+} = \frac{P - c}{1 - \pi \delta - (1 - \pi)(\alpha \delta T_P + 1 + (1 - \alpha)\delta T_{NP} + 1)} \]

subject to the incentive constraint:

\[ \Psi^C(T_P, T_{NP}, \alpha, \beta) \geq c. \]

Then, we need to determine the optimal relational punishment when the firm satisfied the formal contract, \( T_P \), and when the formal contract is not performed, \( T_{NP} \). In order to compare the solution of this problem (with two punishment variables \( (T_P, T_{NP}) \)) with the optimal relational punishment in the previous framework with only one instrument \( T \), we focus on the impact of the punishment on the objective function. We say that \( (T_P, T_{NP}) \) generates lower expected relational punishment costs than \( T \) if \( \alpha \delta T_P^+ + (1 - \alpha)\delta T_{NP}^+ > \delta T^+ \). In fact, the solution to the problem is the pair \( (T_P^*, T_{NP}^*) \) that satisfies the incentive compatibility constraint and maximizes, \( \alpha \delta T_P^+ + (1 - \alpha)\delta T_{NP}^+ \), (minimizes the expected punishment costs).

First, we characterize what is the optimal punishment policy when the information provided by the contract is used.
Proposition 1 The optimal punishment with formal contracting feedback, maximizes the relational punishment in case of non performance of the formal contract (minimizing the punishment in case of performance of the formal contract). This implies that the optimal relational contract \((T_L^*, T_{NL}^*)\) may have two formats: i) Never again, \((T_P^* = T, T_{NP}^* = \infty)\) and ii) Full forgiveness \((T_P^* = 0, T_{NP}^* = T)\).

The intuition Proposition 1 is as follows. There is a set of pairs \((T_P, T_{NP})\) that generates the same expected punishment when PF exerts effort, \(\alpha \delta^{TP} + (1 - \alpha) \delta^{TNP} = U\). The optimal solution is characterized by finding the maximum \(U^*\) that satisfies the incentive compatibility condition \(\Psi^C(T_P, T_{NP}, \alpha, \beta) \geq c\). Using a change of variable we can rewrite \(\Psi^C\) as a function of \(U\) and \(\delta^{TNP}\). We show in the proof that \(\Psi^C\) is decreasing in \(U\) and increasing in \(\delta^{TP}\). The higher the relational punishment (the lower \(U\)) the higher the incentives to exert effort, since by doing so PF reduces the probability of punishment. This result implies that incentive compatibility constraint must be binding \((\Psi^C(U^*, \delta^{TP}, \alpha, \beta) = c\). Among the all the pairs that generate the same expected punishment \(U^*\), choosing the one with higher \(\delta^{TP}\) maximizes incentives of PF to exert effort. Conditional on being punished, the difference between exerting effort or not, is \((\alpha - \beta)(\delta^{TP} - \delta^{TNP})\), which is maximized with the highest \(\delta^{TP}\). Then, the optimal punishment requires to maximize \(\delta^{TP}\), implying the if conditions do not require a tough punishment, PF is forgiven if there is failure, but also there is formal contract performance. Otherwise, PF is punished in case of performance, but the relationship with CF is completely severed for ever in case of non performance (“never again”).

The above result and argument is illustrated by Figure 1.

Proposition 2 The optimal relational punishment with formal contracting feedback, \((T_P^*, T_{NP}^*)\), generates lower expected relational punishment costs than without it, \(T^*\), i.e. \(\alpha \delta^{TL} + (1 - \alpha) \delta^{TNL} > \delta^{T^*}\).
This is the main result of the paper. Technically, Proposition 2 is implied by the previous result. Disregarding the information provided by the performance or non-performance of the formal contract, that is, using the same punishment in case of performance and non performance of the task foreseen in the legal document, $T_P = T_{NP} = T^*$, is feasible but Proposition 1 shows that is not the optimal solution. By using formal contracting feedback, $(T_P^*, T_{NP}^*)$, lower expected relational punishment cost can be achieved by imposing higher penalties to the case of non performance of the formal contract which is relatively more likely to arise if PF has not exerted effort.

**Proposition 3** The optimal relational punishment with formal contracting feedback $(T_P^*, T_{NP}^*)$ is decreasing in the informativeness of the formal contract, decreasing in $\alpha$ and increasing in $\beta$.

All previous results depends on the assumption that formal contract performance or non-performance is informative over the effort decision of PF $\alpha > \beta$. We take, however, the informativeness of the contract as exogenous. Proposition 3 provides the intuitive result that the more informative the formal contract is, the better the tailoring of the relational punishment will be and, consequently, the more efficient the relational contract becomes. Higher informativeness (higher $\alpha$ or lower $\beta$) makes the optimal relational contract more effective, since minimizing the punishment in case of performance has higher impact over incentives, the higher is the informativeness of the formal contract, as it is nicely captured by the term $(\alpha - \beta)(\delta^{T_P} - \delta^{T_{NP}})$.

5 Extensions and Implications

The results of the previous section show how formal contracts that are known to be unenforceable or to remain unenforced are able to help sustain cooperation between contract parties through their effects on the reputational or reciprocity-based sanctions that the contracting parties may impose on each other. Our setting is, however, simplified in various ways. First, we take as exogenous the terms of the formal contract that the parties will write to enhance the effectiveness of reputational reactions. Second, the contract price is also exogenous.
These two simplifications will be relaxed in the extensions to our basic model. On the one side, we will endogenize the set of tasks that will find their place in the formal contract, given that there is a cost of inserting tasks, and that the underlying effort by the party in the main contractual dimension lowers the cost of satisfying the written level of compliance with the tasks that are included in the formal contract. On the other side, we will endogenize the contract price, taking into account not only the market situation affecting the parties, but also the cost of drafting the formal contract and the cost of satisfying or performing the tasks inserted by the parties as obligations in the latter.

Our findings in the present paper seem to be consistent with the recent empirical evidence that, at least in certain industries characterized by significant outside relationships with other firms dealing with innovative projects or dimensions of a larger project, points at the joint use of informal and formal contracting by the parties when structuring their business relationship by the parties.\(^5\) We believe that we provide an explanation for such empirical finding: the drafting of a formal contract setting out, with lesser or greater detail, a number of tasks that allow reasonably confident observation by the customer as to compliance does not happen by chance. Parties include tasks that increase the informativeness of the signals that the customer receives concerning the underlying, and only imperfectly observable, choice of action by the supplying firm. Obviously, this line of argument is not incompatible with other, more informal, explanations for the observed combined use of informal and formal contracts. The parties may resort to formally drafted provisions governing their relationships also to learn more about the contracting partner, or to better aligned the beliefs about what the desirable actions, and reactions to them, will be in future contingencies severely afflicted by uncertainty at the time of starting the relationship, or to help them in their relations with third-parties, such as providers of finance or insurance for the risky project. Also, actual legal enforcement may bring deterrence benefits, and may allow better tailoring of non-legal responses and sanctions.

\(^5\)Bozovic and Hadfield (2013); Dietz (2014).
We think, however, that the goal of increasing the quality of signals about the underlying behavior of the party who is informed about the choice of the relevant action looms large in the parties incurring the time and the expense of drafting contracts, sometimes lengthy and complex ones, that they both know will not end up in Court whatever happens. Thus, formal contracts without Courts are not an oxymoron, but the product of the informational structure, apt to be present and operating in a wide range of real world settings and circumstances.

6 Conclusions

Several observers have noticed the complexity and the multi-faceted nature of the co-existence of informality and formality in business contracting. Very few would dispute that relational elements are pervasive in inter-firm contractual exchanges and interactions, and that future dealings -with the same contract partner or with others- play a very large role in securing adequate behavior in such interactions. Formal contracting and legal enforcement of the verifiable actions within the relationship, obviously at the core of the legal understanding of contracting phenomena, have been considered often by some strands of the economic thinking on contracting as clearly subordinate, when not irrelevant or even a source of obnoxious interference or crowding out of the less costly and more effective reputational or reciprocity-based mechanisms.

Recently, the supporting role of formal contracting and Contract Law seems to have seen a revival. Our paper belongs to this revisionist school of thought about the connection between the relational and the formal sides of contracting. We have formally shown that formal (yet non-enforceable) contracts exert a positive effect on the reputational or reciprocity-based sanctions that firms may impose upon their suppliers of goods and services. On the one side, setting compliance with certain tasks in a formal contract alongside the informal contracting on the "core" performance, reduces the cost of reputational punishments that firms may need to inflict upon their suppliers in order to keep them under the right incentives to provide effort. Given that those reputational sanctions are not for free, formal contracts may provide net (of the drafting
and eventually other costs of having a formal contract) welfare benefits for the contracting parties. On the other side, formal contracts impact the way in which reputational punishments will be structured by the sanctioning contract party. This party will use a more eschewed pattern of sanctioning than if no formal contract had been agreed: When dealing with its suppliers of goods and services, a firm will be, when the relational contract comes together with a formal contract, less forgiving with those counterparties who have not performed the formal contract, and more forgiving with those other ones who have not infringed the provisions of the formal contract.

The above is shown in a simple setting with exogenous contract terms and prices. In more complicated (and realistic) settings in which the terms to be inserted in the formal contract, and the contract price reflecting the costs of drafting and complying with the formal contract are both endogenized, our main results still hold. Formal contracts, thus, are not just the gate for future litigation, if that is needed when things go wrong. Formal contracts perform an important role in perfecting the informal dealings of business contract parties.

A Appendix

Proof of Lemma 1: Let \( \varphi(x) = \frac{1-x(1-x)}{(1-x(1-x))} \). Now, we have \( \Phi(T) = \pi\delta\varphi(x(T)) \), for \( x(T) = \delta^T \). As \( x(T) \) is decreasing, in order to show that \( \Phi \) is increasing in \( T \), we have to show that \( \varphi(x) \) is decreasing in \( x \).

\[
\varphi'(x) = \frac{-(1 - \pi\delta - (1 - \pi)x\delta) + (1 - x)(1 - \pi)x\delta}{(1 - \pi\delta - (1 - \pi)x\delta)^2} \\
= \frac{-(1 - \pi\delta) + (1 - \pi)x\delta}{(1 - \pi\delta - (1 - \pi)x\delta)^2} \\
= \frac{-1 + \delta}{(1 - \pi\delta - (1 - \pi)x\delta)^2} < 0
\]

this concludes the proof.

Proof of Lemma 2: We write the binding incentive compatibility condition that characterizes the optimal punishments as follows, \( \Phi(T^*(a), a) - c = 0 \), where \( a \in \{\pi, \delta, P - C\} \). By the implicit function theorem we obtain \( T^*(a) = -\frac{\partial^2 \Phi(T^*(a), a)}{\partial T^* \partial a} \). Given that for Lemma 1 \( \frac{\partial \Phi(T^*(a), a)}{\partial T^*} > 0 \), the
that satisﬁed the incentive compatibility constraint, and incentive compatibility constraint must be binding.

Proof of Proposition 1

As the optimal punishment policy is characterized by the maximum \( \frac{\partial \Phi(T^*, \pi)}{\partial \pi} = (P-c)(1-\delta) \pi \left[ \frac{1 - \pi \delta - (1 - \pi) \delta T^t + 1 + \pi(\delta - \delta T^t + 1)}{(1 - \pi \delta - (1 - \pi) \delta T^t + 1)^2} \right] \geq c \), where the sign positive comes from the fact that \( 1 - (T + 1)\delta T + T\delta T^t + 1 \) is strictly decreasing and 0, when \( \delta = 1 \), therefore for all \( \delta < 1 \), the expression is positive. Then \( \frac{\partial \Phi(T^*, \pi)}{\partial \pi} > 0 \) and \( \frac{\partial T^t}{\partial \delta} < 0 \). □

Proof of Proposition 1:

(i) We rewrite the incentive compatibility constraint.

\[
\delta \left[ \pi + (1 - \pi)(\alpha \delta T^t + (1 - \alpha) \delta T^t_{NP}) - (\beta \delta T^t + (1 - \beta) \delta T^t_{NP}) \right] \geq c
\]

Consider the following change of variable \( U = \alpha \delta T^t + (1 - \alpha) \delta T^t_{NP} \), which implies \( \delta T^t_{NP} = \frac{U}{1-\alpha} - \frac{\alpha}{1-\alpha} \delta T^t \), and then \( \delta T^t - \delta T^t_{NP} = \frac{\delta T^t_{NP}}{1-\alpha} - \frac{U}{1-\alpha} \).

\[
\delta \left[ \pi(1-U) + (\alpha - \beta) \left( \frac{\delta T^t_{NP}}{1-\alpha} - \frac{U}{1-\alpha} \right) \right] \geq c
\]

Let \( \chi(x) = \frac{(\pi(1-x)+(\alpha-\beta)(\frac{x}{\alpha}-\frac{\delta T^t_{NP}}{\alpha})}{1-\pi\delta-(1-\pi)\delta x} \). Now, we want to show that \( \chi(x) \) is decreasing in \( x \).

\[
\chi'(x) = \frac{(-\frac{\delta}{\alpha} + \pi)(1 - \pi \delta - (1 - \pi) \delta x) + (1 - \pi) \delta \left[ \pi(1-x) + (\alpha - \beta) \left( \frac{\delta T^t_{NP}}{1-\alpha} - \frac{x}{\alpha} \right) \right]}{(1 - \pi \delta - (1 - \pi) \delta x)^2} \leq 0
\]

As the optimal punishment policy is characterized by the maximum \( U = \alpha \delta T^t + (1 - \alpha) \delta T^t_{NL} \) that satisfied the incentive compatibility constraint, and \( \chi(x) \) is decreasing, this implies that incentive compatibility constraint must be binding.
Then
\[
\frac{\delta \left[ \pi(1 - U^*) + (\alpha - \beta) \left( \frac{T_P}{1-\alpha} - \frac{U^*}{\pi-\alpha} \right) \right] (P - c)}{1 - \pi \delta - (1 - \pi) \delta U^*} = c
\]

As the left hand side of the equality is decreasing in \( U^* \), and increasing in \( \delta T_P \), this implies that \( \frac{\partial U^*}{\partial \delta T_P} > 0 \). Then, the optimal policy requires to maximize \( \delta T_P \) (minimize \( T_P \)). This implies that in the optimal solution, \( T_{NP}^* \neq \infty \rightarrow T_P^* = 0 \), or alternatively \( T_P^* \neq 0 \rightarrow T_{NP}^* = \infty \). This concludes the proof. ■

**Proof of Proposition 2**

As we mention in the main text, the proof that the optimal punishment with formal contracting feedback, \((T^*_P, T^*_NP)\), generates lower expected punishment cost than without it, \( T^* \), i.e. \( U^* = \alpha \delta T_P + (1 - \alpha) \delta T_{NP} > \delta T^* \), it is just to notice that \( T_P = T_{NP} = T^* \) was feasible and it is not optimal. We can also verify this by comparing the two binding incentive compatibility constraints.

\[
\frac{\delta \pi(1 - U^*)(P - c)}{1 - \pi \delta - (1 - \pi) \delta U^*} = c - \frac{\delta \left[ (\alpha - \beta) \left( \frac{T_P}{1-\alpha} - \frac{U^*}{\pi-\alpha} \right) \right] (P - c)}{1 - \pi \delta - (1 - \pi) \delta U^*} \tag{4}
\]

\[
\frac{\delta \pi(1 - \delta T^*)(P - c)}{1 - \pi \delta - (1 - \pi) \delta \delta T^*} = c \tag{5}
\]

Notice that the left side of both equalities is the same decreasing function of \( U^* \) and \( \delta T^* \) respectively. The right hand side of the first equality (4) is lower (the second term is negative) than the right side of (5) and this implies that \( U^* = \alpha \delta T_P + (1 - \alpha) \delta T_{NP} > \delta T^* \). ■

**Proof of Proposition 3**: By the implicit function theorem and \( \Psi^C(U^*, \delta T_P, \alpha, \beta) = c \), we obtain \( \frac{\partial U^*}{\partial \alpha} = - \frac{\partial \Phi^C}{\partial \alpha} = - \frac{\partial U^*}{\partial T_P} < 0 \). Similarly, \( \frac{\partial U^*}{\partial T_P} = - \frac{\partial \Phi^C}{\partial T_P} = - \frac{\partial U^*}{\partial T_{NP}} < 0 \). Finally notice that higher \( U^* = \alpha \delta T_P + (1 - \alpha) \delta T_{NP} \) means lower expected relational punishment. ■

**References**


Figure 1

\[ g \delta_{Tp} + (1 - \alpha) \delta_{TNp} = U^* \]