

Contracting Trust: An Exploratory Essay on Islamic Institutions and Enforcement Mechanisms in Saharan Trade

(Rough Draft)

One cannot gain wealth if one does not have trust (ثقة) in people
(Motto of a 19th c. Saharan Caravaner).¹

“Now, honest (traders) are few... There will also be non-acknowledgement or denial of obligations, which may prove destructive to one’s capital unless (the obligation) had been stated in writing and properly witnessed. The judiciary is of little use in this connection, since the law requires clear evidence.”
(Ibn Khaldun, *Al-Muqaddima*).

“When a person employs only his own stock in trade, there is no trust; and the credit which he may get from other people, depends, not upon the nature of his trade, but upon their opinion of his fortune, probity, and prudence. The different rates of profit, therefore, in the different branches of trade, cannot arise from the different degrees of trust reposed in the traders”
(Adam Smith, *Wealth of Nations*).²

Ghislaine Lydon (lydon@history.ucla.edu)
History Department, University of California, Los Angeles

For centuries partnership agreements have proved vital institutional tools for organizing overseas or overland trade. Written contracts, including partnership agreements, regulated the transactions of merchants and lesser traders who tried their luck at making profits from the trans-Saharan caravan economy of northwestern Africa. Such instruments were commonly used probably as far back as the tenth century when writing paper was being manufactured in North African cities such as Fez (Morocco).³ Properly witnessed and clearly drafted, contracts served

¹ “لا مال لمن لا ثقة له بالناس”/ *lā māl liman la thiqa lahu bi al-nās*.” Interview with of ‘Abdarrāḥmān b. Muḥammad al-Ḥanshī in Shinqīti, Mauritania (10/01/97).

² Adam Smith, *The Wealth of Nations, Books I-III* (London: Penguin Books, 1999), 207.

³ Muḥammad Al-Manūnī, *Ta’rīkh al-waraqā al-maghribiya: ṣanā’a al-makhṭūṭ al-maghribī min al-‘uṣūr al-wasīl ilā al-fatra al-mu’aṣara* (Rabat: Muhammad V University Press, 1991), 17-8. Some contracts were also drafted on

multiple purposes ranging from the transfer of either property, rights to property or powers of attorney. Historians have long recognized to what extent commercial entrepreneurs relied on contracts to coordinate far-flung multi-party and multi-purpose transactions. More than half of the documents featured in the landmark collection of trade records of the medieval Mediterranean published by Roger Lopez and Irving Raymond in the 1950s are contracts of various kinds.⁴ The Cairo Geniza, a treasure trove of Maghribi trade records for the early medieval period, contains a fair number of contracts.⁵ Saharan family archives, from a much later period, are equally flush with contractual forms, whether directly drafted by merchants on pieces of paper, big and small, or embedded in commercial letters. References to contracts and sometimes elaborate discussions of them can be gleaned from the non-binding legal opinions or fatwas penned by jurists called upon to provide guidance or deliberate on contested concerns.

One of the bedrocks of economic performance, following the new institutional economic history school pioneered by Douglass North, is the enforcement of property rights at the lowest possible cost afforded by efficient and strong institutions. Building on the insights of Donald Coase and Oliver Williamson, North identified contracts as key.

Contracts provide not only an explicit framework within which to derive empirical evidence about the forms of organization (and hence are the basic empirical source for testing hypotheses about organization), but also clues with respect to the way by which the parties to an exchange will structure more complex forms of organization. That is, the contracts will reflect different ways to facilitate exchange, whether through firms,

vellum before and after the age of paper, but leather parchment later was to be considered an unreliable medium for writing because it could easily be tampered with. In an earlier period, papyri would have served the same purpose but there is no evidence for papyri use in Northwestern Africa.

⁴ Lopez, Robert E. and Irving W. Raymond. *Medieval Trade in the Mediterranean World*. New York: W. W. Norton, 1955.

⁵ S. D. Goitein *A Mediterranean Society: The Jewish Communities of the World as Portrayed by the Cairo Geniza*, vol. I Economic Foundations, vol. III The Family, Vol. V The Individual. Berkeley: University of California, 1999[1967-]; Abraham L. Udovitch, *Partnership and Profit in Medieval Islam*. Princeton: Princeton University Press, 1970; and Jessica Goldberg, "The Geographies of Trade and Traders in the Eastern Mediterranean 1000-1150: A Geniza Study." Ph.D. Dissertation, Columbia University, 2005.

franchising, or other more complex forms of agreement that extend in a continuum from straightforward market exchange to vertically integrated market exchange.⁶

In 1899 Max Weber, who would profoundly sway the course of economic history, published his dissertation on the subject of medieval contracts, specifically commercial partnership agreements.⁷ Relying solely on official statutes and not on original sources, Weber distinguished between general partnerships (*societas*) and limited partnerships (*commenda*), but his overall purpose was to argue against the scholarly grain that the origins of partnership agreements were not to be found in the Roman law but “that it developed historically out of trade with Mediterranean countries, especially Italy, and then were generally adopted in international trade because their features proved practical.”⁸ Decades later, Abraham Udovitch would follow Weber’s insight to suggest an Islamic origin for the *commenda* based on his readings of Ḥanafī legal manuals dating back to the 8th century, and more recently Ron Harris has attempted to make sense of the institutional migration of this limited partnership contractual model.⁹

But it was Weber’s subsequent publications where he drew the link between religious ideas and economic behavior that gained currency among some historians of the economy.¹⁰ But only recently can it be said that economic historians have paid much attention to the influence of religion or culture in structuring economic outcomes. The pioneering work of Avner Grief, inspired from North, has revolutionized the field, causing even economists to consider the extent to which cultural practices and behavioral norms influence economic organizing and shape

⁶ North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 53.

⁷ Weber, *The History of Commercial Partnerships in the Medieval Ages* (trans. Lutz Kaelber). Lanham, MD: Rowman and Littlefield (2003).

⁸ Weber, *History*, 51.

⁹ Udovitch, Abraham L. “At the Origins of the Western *Commenda*: Islam, Israel, Byzantium.” *Speculum*, 37 (1967), 198-207; See also Ron Harris, “The Institutional dynamics of Early Modern Eurasian Trade: The *Commenda* and the Corporation.” *Journal of Economic Behavior and Organization* 71:3 (2009), 609.

¹⁰ Weber, *The Protestant Ethic and the Spirit of Capitalism*.

institutions for better or for worse. While neither Greif nor North make specific reference to formal religious institutions, faith-based behavior seems to be subsumed within “cultural beliefs.”¹¹ In a recent discussion on the history of entrepreneurship, William Baumol and Robert Strom go as far as to state that “[r]eligion is perhaps one of the strongest cultural influences on the activities of the entrepreneur throughout history.”¹² Such influences could be either positive or negative depending on the degree of flexibility of legal frameworks and behavioral norms. Timur Kuran, for his part, is concerned with explaining how Islamic institutions constrained economic growth and accumulation in the Middle East’s long-run. He pays particular attention to contractual forms, their simplicity, inflexibility and limitations, while noting how many Muslims devised stratagems to circumvent the rules.¹³

This essay builds on my previous work on the contractual world of Saharan long-distance traders who outfitted and financed camel caravans that circulated between the markets of Mali, Mauritania and Morocco in eighteenth- and early nineteenth-century Africa. Here I am mostly interested in exploring how written contracts between commercial partners and associates contained in-built enforcement mechanisms. I present an overview of the religious and legal landscape of Muslim Africa, with reference to principles governing Muslim behavior and the institutional environment, the literacy skills and practical knowledge that gave commercial entrepreneurs access to contractual instruments. Drawing on examples from the Saharan record, I

¹¹ North, *Institutions*, 55 (“common beliefs”), *Understanding the Process of Economic Change* (Cambridge: Cambridge University Press, 2005); Grief, “Cultural Beliefs and the Organization of Society: Historical and Theoretical Reflection on Collectivist and Individual Societies.” *Journal of Political Economy* 102 (1994), 912-50 and *Institutions and the Path to the Modern Economy*. New York, Cambridge: Cambridge University Press, 2006.

¹² William J. Baumol and Robert J. Strom, ““Useful Knowledge” of Entrepreneurship: Some Implications of the History.” In David S. Landes, Joel Mokyr and William J. Baumol (Eds.), *The Invention of Enterprise: Entrepreneurship from Ancient Mesopotamia to Modern Times* (Princeton: Princeton University Press, 2010), 529.

¹³ Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton: Princeton University Press, 2011). For my modest contribution to this debate, see Lydon, “A Paper Economy of Faith without Faith in Paper: A Contribution to Understanding Islamic Institutional History.” *Journal of Economic Behavior and Organization*, vol. 71, no. 3 (2009), 647-59.

discuss a variety of recourses, from community pressure to the use of legal service providers, certain contractors took to confront contractual noncompliance. Turning to contractual arrangements, I argue that in the Muslim case both private-order and public institutions were in play to ensure their enforcement.

Islamic Law, Market Institutions, Behavioral Norms

Institutions, following North, are “the structure that human beings impose on human interactions.”¹⁴ Greif defined these further by arguing that the “institutions-as-rules” theory does not explain individual motivation to follow “prescriptive rules of behavior.”¹⁵ In order to gauge the performance of “institutions at the level of interacting individuals,” he suggests scholars consider the “endogenous motivations of behavior.” Based on his case study of medieval Maghribis and Genoese traders, he offers that in certain institutional environments behavioral norms were self-enforcing because of a “shared cognitive model.”¹⁶ The basic gist of Greif’s argument goes as follows. For the Maghribis (11th-12th centuries), operating in an unstable environment characterized by weak political institutions, arbitrary opportunism, random violence and information asymmetries, successful traders worked in collectivist coalitions characterized by private-order institutions for contractual enforcement. They solved fundamental problems of exchange, such as the commitment problem and contractual enforcement, by organizing a “community responsibility system” with multilateral reputation mechanisms and information-sharing arrangements. In the second case, Genoese merchants a century later in the thirteenth century operated in a legal environment characterized by impersonal exchange afforded by

¹⁴ North, “A Revolution in Economics.” In Claude Ménard (ed.), *Institutions, Contracts and Organizations: Perspectives from New Institutional Economics*. Cheltenham, UK: Edward Elgar, 2000, 37.

¹⁵ Greif, *Institutions*, 8.

¹⁶ Greif, *Institutions*, 7-9, 13.

individual legal responsibility and the existence of a state and legal infrastructure that enabled bilateral enforcement of contracts.

What is missing from this picture is a recognition of the legal environment in which Maghribi and Genoese merchants operated, one characterized by Islamic and Rabbinical legal institutions (courts, jurists, contractual models) structuring transactions, including contractual enforcement; two legal environments that, I might add, were remarkably similar, which goes a long way towards explaining interfaith trade between Muslims and Jews in North Africa and across the Mediterranean.¹⁷ In fact, it is precisely Greif's failure to recognize the Jewish and Muslim legal institutions of the Maghribis and Genoese that was central to the criticism mounted against him by Jeremy Edwards and Sheilagh Ogilvie. Based on a reading of the Geniza sources translated by Goitein upon which Greif's arguments rest, they question the "sharp contrast between contract enforcement methods used by Maghribis and Genoese."¹⁸

It stands to reason that individuals belonging to a distinct religious group (Jewish, Muslim, Christian, Hindu...) operate within a cognitive space regulated by a common abidance to prescriptive rules of behavior. Instances of interfaith commercial cooperation, including the existence of partnership agreements between Muslims and Jews, was governed by parallel and

¹⁷ See for example Goitein, *Mediterranean Society*, I, 172-3. To my knowledge, a comparative study of Jewish and Muslim commercial law and especially rules on partnership agreements has yet to be undertaken. See Menachem Elon (trans. Bernard Auerbach and Melvin J. Sykes), *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994); see also the work of Daniel Schiffman ("Intangible Assets and Intangible Rights in Talmudic and Medieval post-Talmudic-Law: Economic Implications," Unpublished Paper, AHA 2011); On contracts in early India see Gregory Schopen, *Buddhist Monks and Business Matters* (Honolulu: Hawa'i University Press, 2004).

¹⁸ Edwards and Ogilvie, "Contract Enforcement, Institutions and Social Capital: The Maghribi Traders Reappraised." CESIFO Working Paper No. 2254 (March 2008).

mutually understandable behavioral norms and shared cultural practices determined by shared language (e.g. Arabic), locale (Cairo) and merchant codes.¹⁹

Although not the only religion with a strong legal tradition, the Muslim case offers a clear example of an institutional environment dictated by religious dogma (emanating from a set of foundational scriptures). Islamic institutions, especially so-called Islamic law, are relatively well understood.²⁰ It is now well known that the Qur'ān is not just a holy book, but a book of laws that is one of the principal sources of legal knowledge. Together with the *ḥadīth* or prophetic sayings, the other canonical sources of *fiqh*, and the manuals of the various schools of law, Islamic legal sources are replete with moral codes, prescriptions and guidelines for how to engage lawfully in commercial activity. Elsewhere, I have described how Islamic legal sources provided an institutional framework for the conduct of commerce upheld by 'legal service providers' (judges and jurists); institutions that facilitated the conduct of long-distance trade, on the one hand, and ensured the protection of property rights, on the other.²¹ Leaders of communities, worship and mosques (imams), together with scholars and legal specialists dispensed religious knowledge, guiding behavior and mediating civil discord. Above all, they explicated all forms of Islamic knowledge, from theology and Arabic grammar, to Islamic law and the legal rights or claims, and corresponding obligations (*ḥukūk*) of Muslims.

¹⁹ Francesca Trivellato (*Familiarity of Strangers*), observed similar interfaith general partnerships between Jews, Christians and Hindus.

²⁰ See Kuran, *Long Divergence*; Udovitch, *Partnership and Profit*. For Islamic institutions in northwestern Africa's Sahara, see Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks and Cross-Cultural Exchange in Western Africa* (Cambridge: Cambridge University Press, 2009), Chapter 6. See also "Contracting Caravans: Partnership and Profit in Nineteenth-century Trans-Saharan Trade." *Journal of Global History* 3:1 (2008) and "A Paper Economy of Faith."

²¹ In a later draft I plan to discuss the relevance here of the distinction Acemoglu and Johnson ("Unbundling Institutions") make between "contracting institutions" and "property rights institutions."

One relevant Islamic literary genre, which is both theological and practical, focuses on the concept of *ḥisba*.²² Broadly speaking, *ḥisba* is the obligation incumbent upon every Muslim to promote good and combat evil in sink with the following Qur’ānic verse (III: 104):

Let there be among you a community (*umma*) that shall call for all that is good, enjoining what is right (in fairness; *al-ma’rūf*) and forbidding what is wrong (reprehensible). They are the ones who shall prosper.

There are parallel elements to the “institution of the *ḥisba*,” as per Ahmed Ghabin.²³ The first is the discourse on the duties and obligations of Muslims. The second is the office of *muḥtasib* or publically appointed supervisor of the marketplace (sometimes also referred to as *ṣāhib al-sūq*). The *muḥtasib*, or market inspector, was in charge of keeping an eye on weights and measures, and combating dishonesty and immorality. He warned, remonstrated, and, in the case of failure of the public authority to act, legally intervened to constrain “wrong-doers.” Naturally, the *muḥtasib* had to be trained in Islamic law and execute his functions in accordance to local definitions of *ḥisba*.

One the earliest descriptions of his duties was penned by a North African Mālikī scholar in the second half of the 3rd/9th century and entitled “The Rules of the Market” (*Aḥkām al-Sūq*).²⁴ The market inspector acted as a local market information broker and mediator of onsite market disputes. He also authenticated handwriting, acted as a witness to contractual agreements and otherwise used his knowledge to influence market transactions. Present from an early period in Muslim Spain and most of the central markets of North Africa, there is no record of the office

²² See Claude Cahen and M. Talbi, “*Ḥisba*” *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel; and W.P. Heinrichs. Leiden: Brill, 2002 (hereafter *EI*). See also Ahmed Ghabin, *Ḥisba, Arts and Craft in Islam* (Wiesbaden: Harrassowitz Verlag, 2009); R. B. Buckley (trans. & ed.), *The Book of the Islamic Market Inspector: Nihayat al-Rutba fi Talab al-Hisba (the Utmost Authority in the Pursuit of Hisba)*. Oxford: Oxford University Press, 2010.

²³ Ghabin, *Ḥisba*, 11-3. The origins of the *ḥisba* according to some is the Greco-Byzantine office of *agoranomos* or Byzantine market inspector, and it would have been “Islamized” by the Abbasids.

²⁴ “*Ḥisba*.” *EI*.

of *muḥtasib* in Saharan markets. Officially, the institution continued to exist in a number of countries (especially in North Africa) until recently when its duties were absorbed by various administrative elements of the modern nation state.

In the Saharan context, local judges were solicited to rule on commercial disputes and everyday market transactions. They also were encharged with the knowledge of precise weights and measures (for example *qāḍīs* held the official *mudd* dry measure container used for grain), Saharan markets in Northwestern Africa operated less on the basis of Islamic law and legal institutions, but more on the basis of local customary law. In market towns under the authority of emirs, such as was the case in present-day Mauritania during the eighteenth and nineteenth centuries, fines for “breaking the market” and various other offences such as stealing were set periodically, following the mercurial. In the second-half of the nineteenth-century, fines of four times the value of the good stolen or tampered with were the norm.²⁵ In the northern desert-edge market of Guelmīm (present-day Morocco), the local ruling family and members of the town council (*jamā‘a*) periodically set market rules (*qanūn al-sūq*) and corresponding fines for misconduct ahead of the spring fair marking the end of the caravan season. In the year 1293/1876 the fine (expressed in the standard weigh for gold dust) for “stabbing another with a dagger is 30 mithqāls, and if there are four fingers remaining fingers he pays 50 mithqāls; and whomever discharges [a firearm] and misses pays 50 mithqāls...”²⁶

A consideration of religious beliefs and obligations (“prescriptive rules of behavior”) is very relevant to understanding motivation to comply with contractual obligations in Greif’s

²⁵ Lydon, *On Trans-Saharan Trails*, 262.

²⁶ Qanūn al-Sūq Guelmīm (2 Jumād al-Awal 1293/ May 26 1876); Family Archives of Bashīr b. Bakār b. Muḥammad b. Bayrūk al-Ghazāwī, Guelmīm.

sense, since in a faith-based environment, reputation was inextricably linked to perceived piety and abidance to Islamic behavioral norms.²⁷

Written Contracts in Islamic

The Qur'an sets explicit guidelines for drafting contracts. It instructs believers to commit contracts to writing in the presence of witnesses (II: 282-3), worth citing here in full:

Believers, *when you contract a debt for a fixed term, put it in writing*. Let a scribe write it down for you in fairness; no scribe should refuse to write as God has taught him. Therefore let him write; and let the debtor dictate, fearing God his Lord and not diminishing the sum he owes...*So do not fail to put your debts in writing, be they small or big, together with the date of payment*. This is more just in the sight of God; it ensures accuracy in testifying and is the best way to remove all doubt. But if the transaction in hand is a bargain concluded on the spot, it shall be no offence for you if you do not commit it to writing...*Call in two male witnesses from among you, but if two men cannot be found, then one man and two women whom you judge fit to act as witnesses; so that if either of them commits an error, the other will remember*. Witnesses must not refuse to give evidence if called upon to do so.

If you are traveling on the road and a scribe cannot be found, then let oaths be taken. If you *trust* one another (*In āmīna ba'adukum ba'adan*) with an oath, *let the trustee restore the pledge to its owner; and let him fear God, his Lord*...If your debtor is in straits, grant him a delay until he can discharge his debt; but if you waive the sum as alms it will be better for you.

Not only are Muslims directed to put their contracts in writing, but they also are compelled to abide by their terms. Another key verse, “O you who believe, commit to your contracts” (*Ya'ayuhā al-ladhīna āmanū awāfū bil-'uqūd*), enjoins Muslims to *commit* to fulfilling their contractual obligations.”²⁸

As with most areas of Islamic law, legal scholars wrote profusely, describing and commenting on the sources and legal commentaries. A vast repertoire of manuals on document

²⁷ c.f. Goitein on religion as part of Geniza merchants' “mental makeup.”

²⁸ Qur'an 5: 1.

drafting and contractual formularies exists among the different doctrines of Islamic law, including the Mālikī legal doctrine practiced in much of Africa.²⁹ These formularies belong to a literary genre known in East Muslim World (Ḥanafī, Ḥanbalī, Sha‘āfī legal traditions) as *shurūṭ* (contractual terms; شروط). But in the Mālikī legal tradition, prevailing in North and West Africa, and by extension, the legal tradition *de rigueur* in Muslim Spain, contractual formularies are known as *wathā’iq* (وثائق; documents). This is a generic term for legal documents that certify “the commission of a promise or legal act, such as a covenant, contract, etc.”³⁰ What is particularly interesting about this term are its derivatives, namely the word for trust, *thiqa* (ثقة), and the meanings associated with its various verb forms:

to place one’s confidence, put faith, rely, depend, trust...to make firm...strengthen, cement...to document, authenticate, confirm, certify, attest...to enter into an agreement, make a treat...to make a firm resolution on...proceed with confidence, act trustfully.³¹

It is important to note that *thiqa* is the pro-active expression of trusting, whereas *āmīna* (derived from the word *amāna*, أمانة) also translates as “trust” (as is the case in the first Qur’ānic verse cited above “If you *trust* one another (*In āmīna ba‘adukum ba‘adan*) with an oath”), refers more to the state of being trusting, or trustworthiness.³² In previous publications I argued that contractual formularies or templates functioned as models for drafting various deeds found in Saharan archives. The ones I photographed in a public library in Tishit (Mauritania) were written

²⁹ See Udovitch, *Partnership and Profit*; Jeanette Wakin, *The Function of Documents in Islamic Law*;

³⁰ “WathīKa,” *EI*. On *Shurūṭ* literature and practice, see Wael Hallaq, “Model *Shurūt* Works...” in *Islamic Law and Society*, and his latest book *Shari‘a: Theory, Practice and Transformations* (Cambridge University Press, 2009).

³¹ Hans Wehr, *A Dictionary of Modern Written Arabic, Arabic-English*. Beirut: Librairie du Liban, 1980, 1228-9.

³² Timothy Guinnane (“Les économistes, le crédit et la confiance.” *Genèse* (Juin 2010), 6-25) underscores the importance of not lumping together both diametrical meanings of the act of trusting, based on his reading of Michel Ferrary (“Confiance et accumulation de capital social dans la régulation des activités de crédit,” *Revue Française de Sociologie*, vol. 40, no. 3: 596-586).

on separate folios in larger than usual handwriting that contains the vowels (normally not included in writing) in red ink; an indication that these formularies were used as pedagogical devices. One such model (worth re-examining here), is for a straightforward agency contract for the purposes of transportation. Since transportation on camel-back was one of the main services of caravan entrepreneurs, it stands to reason that agency contracts of this kind would be common. Entitled “shipment via agency” (*risāla bil-wakāla*), it states:

This is to inform the observer of the document and whomever reads it attentively that so and so (*fulān b. fulān*), May God facilitate his affairs, commissioned as his representative his brother,³³ the industrious so and so, the helper of God. And he was entrusted with his property in the proper manner, and he abides by the agreed upon entrustment of such and such [an item] by the strength of the agency (*al-wakāla*) and the representation (*al-niyāba*), in principle and in practice, by force and by law, and so on this day of this year this was witnessed by so and so, and so on...³⁴

A few remarks can be made about this template. First, it follows the above-cited Qur’ānic prescriptions by the inclusion of the date and the names of two witnesses (“Call in two male witnesses...”). Second, the drafting of the contract invokes God (“May God facilitate his affairs”), and expresses submission to and fear of God (“fearing God his Lord” and “let him fear God, his Lord”); an affirmation in the belief in God as the ultimate witness. What the template does not include are the term limits of the deed (“when you contract a debt *for a fixed period*, put it in writing). Perhaps this is because travel times across and within the Sahara was not entirely predictable. Other contractual deeds such as loans and the like include due dates. Typically these coincided with seasonal events such as the next fair, the beginning of the salt harvesting or the end of the caravan season.

³³ Here the term ‘brother’ could refer to both kin and co-religionary.

³⁴ Agency Contract Formulary (AM 9), Family Archives of ‘Abd al-Mu’min (Tīshīt, Mauritania). For a contract formula describing a joint-liability contract (*mufāwada*), see Udovitch, “Credit as a Means of Investment.”

Structurally, most contractual forms discussed below bore some resemblance to this model. Yet it is clear that while they served as guidelines, models rarely were followed to the letter as contracting parties made up their own rules. Oftentimes key information went unrecorded, seemingly taken for granted, including specific responsibilities and conditions and even descriptions of specific amounts.³⁵ Another peculiarity is that Saharan contracts rarely disclosed profit-sharing arrangements, commissions or wages. These omissions probably were due to the fact that there were set commission rates for certain routes and trade goods and established wages or interest rates that required no mention on paper. The most critical information, however, was almost always included, that is to say that what, when and who, including the names of the witnesses. It is precisely the witnessing process, I argue below, that was the bulwark of contract enforcement.

Before turning our attention to the question of enforcement, however, some remarks are in order concerning the act of writing contracts. First on the question of the act of writing itself, the Qur'ān quoted above, states that “no scribe should refuse to write *as God has taught him.*” Although I have yet to consult exegesis literature on this question, I suspect that this verse suggests the sacred nature of writing, and might be correlated to the first word of God's first revelation to Prophet Muhammad delivered via Angel Gabriel which was “Read!” By inference, the written word is elevated as superior and God-given, so to speak. This could only remain at the symbolic level, however, given the fact that written documents, in accordance to the rules on evidence, were considered mere copies of agreements that were oral in nature, and so the piece of paper on which the contract was written itself did not represent the actual contract.

³⁵ Most probably being the amounts themselves were known to the contracting parties and the witnesses, and so it was redundant, in a way, to expend words on paper to describe these in precise detail.

In his recent book on Islamic law, that contains a chapter on contracts, Wael Hallaq makes reference to the “session” (*majlis*) by which he means the physical meeting of the interested parties when the contract is created.³⁶ The “unity of the session” whereby the intention of both parties is clearly expressed is key to sealing the deal and rendering the contract the binding. He explains that the use of the past tense in Arabic “indicates complete action and thus the certainty of intention to enter the contract, [whereas] the present tense denotes incomplete action that could extend into the future” which was uncertain.³⁷ Hallaq does not offer any explanation of what he means by “binding,” but I take it to mean that the contracting parties, in the presence of the two witnesses and God almighty were thus bound to deliver on promises made. He then goes on to explain that there are two types of contracts, those considered completely binding (*lāzim*) and those that are non-binding (*jā’iz*). In the first category, to which belong such contracts as sales, forward sales (*salam*), rent and hire, the contracting parties could void the contract only by mutual consent, in which case they drew a contract revocation (*iqāla*).³⁸ The contract was not invalidated by death or insanity. Agency, partnership, loan, deposit contracts, the most relevant to the organization of long-distance trade, belong to the second typology as non-binding contracts. Except for contracts involving liability (*commenda*-type contracts), where the contract is binding to only one party (the investor), all other such contracts could be “annulled unilaterally.”³⁹

The well-known, eleventh-century, Ḥānafi jurist al-Sarakhsī described best the advantages for contracting parties to make use of written agreements:

³⁶ Hallaq, *Sharī‘am* 242-3.

³⁷ Hallaq, *Sharī‘a*, 242.

³⁸ *Ibid.*, 245. I discuss several sale’s revocation cases in *On Trans-Saharan Trails*.

³⁹ *Ibid.*

The purpose then of a document is reliance and precaution...Partnership is a contract that extends (into the future). The recording of a deed is, thus, recommended in such a contract so that it *becomes a decisive proof between them in case of dispute*.⁴⁰

By clearly defining contracts in writing, and making multiple copies of such documents, partners avoided ambiguity in business deals. This required the existence a standard system of weights and measures, because, as North recognized, “without being able precisely to measure what it is we are exchanging, we also are not in the position to be able to enforce agreements.”⁴¹ They also eliminated the risk of potential disagreements between their business partners or their inheritors after their passing. Indeed the need to document transactions in writing was a means for individuals to protect their property during their living, but also after their death, since such records constituted proof of transactions when assessing the estates of the deceased.

Whether written in person, or by a scribe serving as scribe and witness contracts sometimes were so meticulously drawn that small slips of the pen, crossings-out or deletions were acknowledged in text to ensure authenticity.⁴² Other times contracts were sparsely written, or embedded in multipurpose commercial letters dispatched via agents or messengers to partners in trade.

⁴⁰ Al-Sarakhsi’s *al-Mabsūṭ* (155) cited in A. K. Nyazee Imran, *Islamic Law of Business*, 31; also cited in Udovitch (? check).

⁴¹ North, “A revolution,” 39 (Referring to the work of Steven Cheung whose.

⁴² Typically, an inadvertent scribble on a contract was cause for a special explanatory note such as “and what is on the second sentence in not of consequence.” Sales contract (1864), IK3-

Contractual Models in Saharan Trade

Private Saharan archives often contain bundles of *'uqūd* (sing. *'aqd*), a term literally meaning “contracts” used generically for deeds.⁴³ As already noted, one of the most frequent contractual forms was the agency contract (*wakāla*), on commission, drawn for all kinds of transactions, between kin and non-kin, for anything from trading via proxy to collecting inheritances. A similar arrangement is the agency contract/sale contract without commission (*ibdā'* or *fuḍūlī*), often negotiated between Saharan women trading via proxy and their husbands.

Because the hazardous nature of long-distance trade, namely the high risk of losing partners to death and having to recover capital in foreign markets, partnerships tended to be short-term and typically were drawn for single ventures. The first is the classic *qirāḍ* partnership defined as “when a man takes money from his colleague in order to work with it without liability to himself.”⁴⁴ Stemming from the word for “loan” (*qarḍ*), this partnership was occasionally referred to as *qirāḍ al-muḍāraba*, also known as silent partnership loan. The word *muḍārabā* itself is derived from an expression found in the Qur'ān to describe the act of “traveling or roaming around the world” (*ḍarb fī al-arḍ* or *ḍarb fī al-arḍ Allah*).⁴⁵

Often called *wakāla al-mufāwāḍa*, to distinguish it from other agency contracts, this partnership agreement primarily was used on international as opposed to regional caravan

⁴³ Sometimes these records were referred to with the general term for legal documentation (*wathā'iq*), as discussed above.

⁴⁴ Mālik ibn Anās' *Muwaṭṭa'* cited in Udovitch, “Origins,” 196.

⁴⁵ *Qirāḍ*, or *muḍāraba*, is thought to be the origin of the *commenda* as already noted.

expeditions. This general partnership or joint-liability contract whereby one of the investors traveled with the joint-capital and plenipotentiary rights to engage in trade. It was apparently best suited for overseas commerce involving long-term travel. Following Williamson, this choice of contract is explained by the context of trans-Saharan trade where transactions were less transparent across time and space, information asymmetries were high and the conduct of trade was fraught with danger. Consequently, *mufāwaḍas* or so-called “pooling contracts” were “applied in environments that featured extreme physical hazards...[and] in which agents’ survival was particularly threatened.”⁴⁶ By pooling capital, camels, expertise, and labor, itinerant traders could finance, and sedentary merchants could invest in caravan expeditions. Profits were shared in accordance with investment shares or a prearranged understanding.

The following tables three summarize the different contractual forms that I identified in Saharan and trans-Saharan trade.⁴⁷

Table 1 Saharan Agency and Commission Contracts	
<i>Wakāla</i>	A basic contract whereby a traveling agent (<i>wakīl</i>) is given power of attorney by a sedentary party to represent, act, speak, buy or sell on his or her behalf. These contracts were generally one-shot deals for the duration of a single trip mainly used in trading but also for mandating agents to deliver or collect dues, debts or inheritances.
<i>Ibdā‘</i>	Partnership agreement between a sedentary investor and a traveling agent for the sale of an item or a bundle of goods in a distant market <i>without commission</i> . The trade agent was not liable in the eventuality of loss or seizure of the mandated property. Also known as a sale through a non-commissioned agent (<i>bay‘ al-fudūlī</i>), contracts were common among family members, including husbands and wives.
<i>‘Aqādīm Contract</i>	Contract between a sedentary merchant and a caravan worker for the transportation, sale, and purchase of camel-loads, including wage payment per trip. The <i>‘aqādīm</i> caravan worker was usually of lower social status, such as a former slave.

⁴⁶ Williamson, “Transparency,” 4.

⁴⁷ For a full discussion of these contracts, see Lydon, *On Trans-Saharan Trails* and “Contracting Caravans.”

Table 2. Saharan Partnership Agreements	
<i>Muḍāraba (Qirād)</i>	Limited-liability company so-called sleeping partner agreement, between an principle investor and an itinerant agent. Profits were shared according to pre-arranged percentages. All losses were incurred by the investor, except if proof of negligence on the part of the agent was demonstrated. Said to be the origin of the <i>commenda</i> .
<i>Mufāwāḍa</i>	Joint-investment and joint-liability partnership between two parties whereby one partner confers full authority or delegates (<i>yafawāḍa</i>) the other to dispose of their joint-capital. This was a flexible contract typically used by sedentary and itinerant merchants who pooled resources (camels, slaves, goods, cash). Partners split the profits and losses according to their share of the investment in labor, capital and equipment. This partnership most often was called <i>wakāla al-mufāwāḍa</i> to distinguish it from a simple plenipotentiary agency contract.
<i>Sharika</i>	Joint-investment company involving two or more parties engaged in ongoing transactions with joint liability and mutual sharing of profits and losses. The capital investment, decision making, and management were jointly shared. Each associate had power of attorney to act on the behalf of the others with their joint capital, but could not purchase on credit or add a new partner without the consent of all partners. The profit sharing of associates was proportional to their investment. This contract is the equivalent to the <i>collegantia</i> or <i>societas</i> .

Table 3 Other Saharan Contracts	
Debt Contract (<i>'Aqd al-qarḍ</i>)	Simple debt contract whereby oftentimes the interest or value of the service was disguised in the value of the currency of repayment.
Lease Contract (<i>'Aqd al-kira</i>)	Lease contract that was in effect similar to a debt contract with interest rates disguised as rent. These were used for goods as well as slaves, but most commonly negotiated for salt-bar loans.
Financial Transfer or Debt Swapping (<i>Hawāla</i>)	Financial mechanism to transfer funds through the purchase or sale of a debt or credit contract to a third party. This was a popular strategy to render valuable services, travel in safety or otherwise access finance in foreign lands.
Entrustment or Deposit (<i>'Aqd al-waḍī'ā</i> or <i>amāna</i>)	Agreement between a sedentary and an itinerant trader whereby the latter entrusted the former with goods in the form of a deposit. The purpose of this contract was the secure storage of merchandise in a foreign market, and/or its sale on consignment.

Enforcement Mechanisms in Saharan Trade

Access to written contracts offers the historian important insights into the inner dynamics of commercial organizing, as North rightly recognized. A fundamental problem of evidence arises, however, in that for the most part there is no way in knowing on the basis of contracts alone the outcome of agreements, whether they were abided by or not and the overall productive function they served. Sometimes contracts were modified along the way, when, for example a portion of a loan was reimbursed or the contract was amended to transform the transaction. Furthermore, the fact that contracts circulated in secondary markets, as in the case of the use of secondary contracts for the repayments of contractual obligations, is an indication of their effective use as financial instruments.⁴⁸

Debt acquittals were also documented in writing, such as the case of a debtor exonerated of a final installment of a loan contracted six years prior in the 1870s, consisting of some unspecified amount of gold and six bales of cotton cloth.⁴⁹ Properly witnessed and dated, the acquittal contains the expression “may God reward him for this act;” an example of the compliance with the Qur’ānic recommendation enjoining creditors to be lenient with their debtors and even recommending that they generously forgive debts.⁵⁰ Sometimes the contracts themselves were scratched out to indicate their termination. Moreover, it was not uncommon for contracting parties to present themselves in front of the *qāḍī* who attested to the annulment of a contractual obligation.

⁴⁸ Example of estate liquidations and creditors being repaid with debt contracts (Tishit case).

⁴⁹ Ibrahim Khalil Family Archives IK 12 (1286)

⁵⁰ II:283 “If your debtor is in straits, grant him a delay until he can discharge his debt; but if you waive the sum as alms it will be better for you.”

Letter-writing, as many scholars have pointed out, served a variety of functions.⁵¹ They enabled merchants to share information, transfer funds, and the like, but also to monitor the whereabouts and actions of trade agents and debtors, and to resort to putting pressure on debtors and defaulters. Writing to the most reputable trader residing in a particular distant market, to a family or clan member, or to the head member of a trade network including those or the one targeted for defaulting, was a common strategy to deal with the problem of contract enforcement. Alternatively, directing letters to the widest membership possible, including the debtors, their family members, their sub-clan, or even the entire tribe, guaranteed that a particular claim became known to the community and to the wider public. One last resort was to address an informative letter to the local *qāḍī* who could put pressure on the defaulting party.

In such letters, but also in litigation records, when dispute arises between contracting parties, contain negative evidence documenting failures to meet obligations, dispute about contractual terms that shed light on the breaking down of contractual commitment. In the Saharan case, local service providers, namely *qāḍīs*, mediated and ruled on disputes, but they did not hold registers and rarely does one find written evidence documenting this activity. The collections of fatwas produced by Saharan jurists (*muftis*) called upon to deliberate cases of dispute and produce a consultative legal opinion or fatwas, offer rare glimpses into cases of contractual noncompliance.

In the late nineteenth century a trader from Tīshīt entrusted merchandise, by way of an agency contract, to a caravaner traveling to the commercial center of Guelmīm in the Wād Nūn region. When he finally returned to Tīshīt after an absence of four years, the caravaner denied having been entrusted with some of the goods, and he declared that the *qāḍī* (judge) of Guelmīm had taken possession of one portion. As for the rest of the merchandise, he claimed that it got

⁵¹ Goitein, *Medieval Letters*; Trivellato, *Familiarity*; Aslanian (forthcoming)

“lost along the way” (*ḍā‘a fī al-ṭarīq*).⁵² The original owner of the merchandise asked a qāḍī of Tīshīt to mediate the dispute, but he found no proof that the caravaner had lied to, or otherwise cheated, him. So he called upon the services of a *mufī* (jurist), Muḥammad b. Ibrāhīm of the Awlād Bū al-Sibā‘ clan, who probably himself was from Wād Nūn, for the issuance of a fatwa. He was to deliberate whether the caravaner should “be fined for what he claimed was lost because of his apparent betrayal, or is he to be believed because of his *trustworthiness* (*amānatihi*)?”⁵³

In a brilliantly crafted fatwa discussing the obligations of legal service providers and the insurmountable challenge of bringing betrayers to justice, the muftī reasoned that the caravaner was innocent until proven guilty. Here he applied the dictum that the claimant produces the testimonial evidence while the defendant takes the oath (*al-bayyina ‘ala al-mudda‘ī wa al-yamīn ‘alā man ankar*). In accordance with the rules of contractual agreements, the agent was not responsible for the loss of the principal in the event of an accident, “such as a runaway or stolen camel.” The muftī concluded that it was up to the claimant, the local trader, to find proof of the wrongdoing or presumed betrayal of the defendant, the caravanning agent. Moreover, he warned that the former was hindering the law by rallying the public against the caravaner.

To conclude, one can divide the mechanisms for enforcing contracts into prevention and remediation. Prevention of contractual failure required literacy skills and legal knowledge (contractual models and principles), resources (writing paper in sufficient quantity for making copies) and connections (witnesses with impeccable reputations and authority (merchants, *muḥtasibs*, *qāḍīs*).

⁵² Fatwa issued by Muḥammad b. Ibrāhīm al-Sbā‘ī on entrusted trade goods (MA1), Library Muḥammad Wuld Aḥamdī (Tīshīt), lines 3-7.

⁵³ Ibid, lines 9-10 (emphasis mine).

Remediation took various forms, such as the mediation of third-parties (contract witnesses, *qāḍīs*), pressuring contracting party directly or via correspondence (threats to tarnishing their reputation, their client-base and instilling them with the fear of ex-post consequences to future transactions, pressure on family members), engaging in costly litigation, recourse to violence or threat of violence.

Enforcement mechanisms are the bedrock of efficient institutions. Typically, historians of the economy differentiate between two forms of enforcement. The first is self-enforcement, what Grief terms “private-order enforcement mechanism,” where the “credible” threats to reputation and the threat of market exclusion induces contractual compliance.⁵⁴ This environment is characterized by “optimal contracts” that are “fundamentally self-enforcing” and “institutions do not matter.”⁵⁵ The focus is on the *ex ante* conditions to drafting contracts with water-tight clauses that supposedly render them self-enforcing. The second is third-party enforcement, where agreements are drafted between parties in the presence of an independent individual (strongmen, chiefs or other local authorities) or entity (state, court). Claude Ménard, but also Williamson calls these “incomplete contracts” because their enforcement requires public enforcement institutions.

The Muslim case presented here does not fit into either of these distinct scenarios.⁵⁶ Here, the act of drafting a contract in a “session” following (*grosso modo*) formal prescriptions emanating from the Muslim holy book of law, required third-party enforcement through the use of witnesses. In Arabic the same word used for witnesses (*shāhid; shuhada*) is derived from the

⁵⁴ Yoram Barzel, In Ménard, *Institutions*, 212.

⁵⁵ Ménard In Ménard Ed., 234.

⁵⁶ Cf. Trivellato’s argument for the “interdependence rather than the mutual exclusion of social norms codified rules” (*Familiarity*, 13).

shahāda or attestation to the faith, the first pillar of Islam.⁵⁷ At the same time, representatives of the law, namely judges often acted as witnesses, scribes and intermediaries contributing to contractual enforcement through information sharing and pressuring services. In other words, not only did private-order and public institutions work in tandem, they often were indistinguishable.

⁵⁷ This is not unlike the case in many early modern societies, across cultural traditions. In English *to witness* and consequently assume the role of witness through the act of attesting or testifying to an event based on personal knowledge (from *wit* mind, knowledge, confirmation, proof), was an act indistinguishable from that of professing one's faith, since in theory a believer's first witnessing act/experience is the attestation of the existence of God, or bearing witness to the faith.