



Moral communication and legal uncertainty in SMEs

Jan Winczorek (University of Warsaw)

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Background

Access to justice

A field in socio-legal studies inquiring into the actual use of law by people and the barriers they encounter.
Not exactly theory-oriented, but...
...(I argue) the approach may cross-fertilize systems theoretical thinking in sociology of law

SMEs

Prior research indicates that running a small business coincides with scale of access problems.
Findings in the UK, the Netherlands, Australia, Hongkong indicate that most justiciable problems are not resolved using law
Possibly a universal issue
Problematic discourse on SMEs

Inclusion/exclusion

Inclusion mechanisms in the legal system differ from those in some other systems (no semantics that describes exclusion from the legal system apart from procedural exclusion)

Legal system and ...

The economic system
Broader research agenda



JAN WINCZOREK



KAROL MUSZYŃSKI

FINDINGS IN FIVE WORDS

MORALITY HELPS MANAGE
EXCESSIVE UNCERTAINTY

MAIN POINTS

SMES PROCESS UNCERTAINTY FOR PROFIT

SMEs are organizations which produce chains of decisions to participate in communication in function systems, with the main objective of producing profit. Being undercomplex, they must cope with uncertainty generated by complexity of function systems.

LEGAL UNCERTAINTY IS PREVALENT

46.9% of SMEs (which translates into 920.000 firms) reported a justiciable problem during 3 years preceding the study. This only concerns serious events.

SMEs are unable to recognize justiciable problems or react to them or prevent them due to their insufficient complexity (lack of economic resource, legal capacity, ability to adapt to timeframes of function systems etc)

LEGAL UNCERTAINTY IS TRANSLATED

In about 40% of all justiciable problems legal communication is actually initiated.

In majority of cases, the potentially legal issues are resolved non-legally. In this way legal uncertainty becomes uncertainty related to other function system, danger, or risk.

This is one type of uncertainty translation, doing which is the condition of SMEs' survival

MORALITY CONTRIBUTES TO STEERING THE TRANSLATION PROCESS

Translations of uncertainty, including legal, presupposes steering mechanism. It is usually based on strictly economic logic, but oftentimes other intervene, including morality.

MORALITY IS SECONDARY BUT HAS A SYSTEMIC EFFECT

Formative moral communication contributes to proactive, risk-oriented management of uncertainty, usually along with "instrumental" systemic logic. Absorbing moral communication facilitates reflexion stop and is instrumental in finalization of translations when resources are limited.

ACCESS TO JUSTICE IN SMES

a research project

Quantitative data:
survey of 7292
owners and managers of
SMEs using
a paths to justice
questionnaire

Qualitative data:
101 IDIs with owners and
managers of SMEs,
semi-structured

Theory:
Luhmannian
interpretation of
mobilization of legal
communication
in SMEs

Overall picture

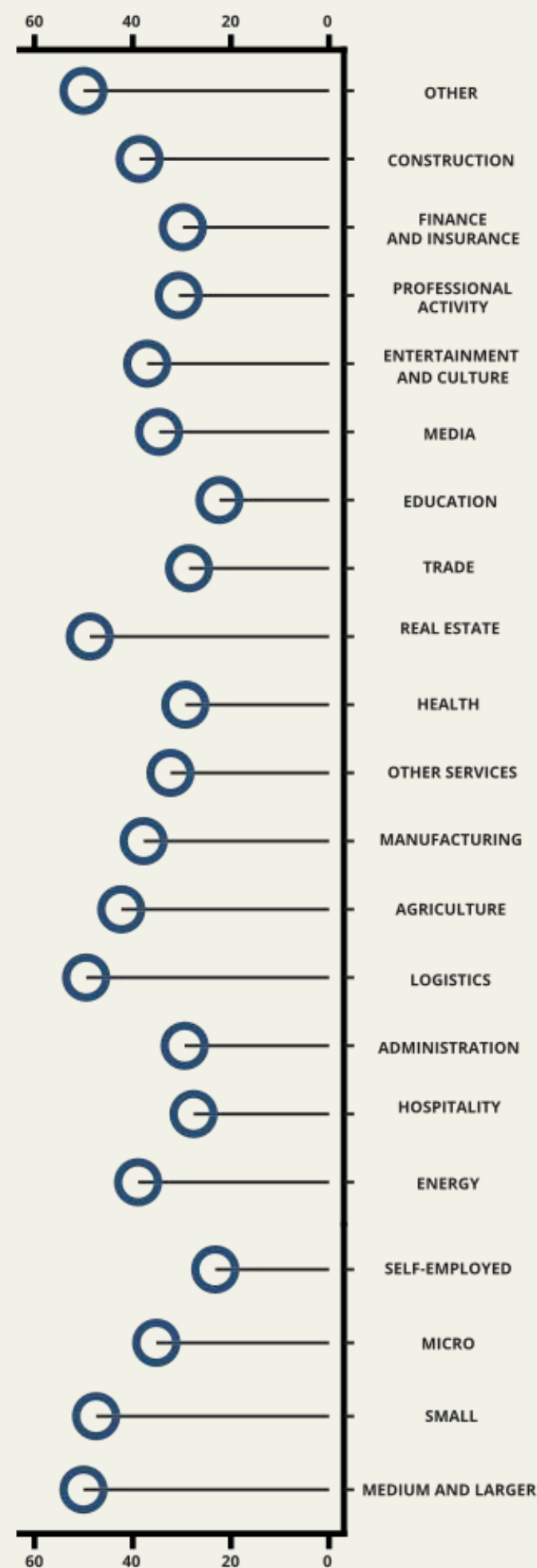
Within 3 years before study a significant problem of legal nature was experienced by 46,9% respondents.

This is approx. **974,000** companies.

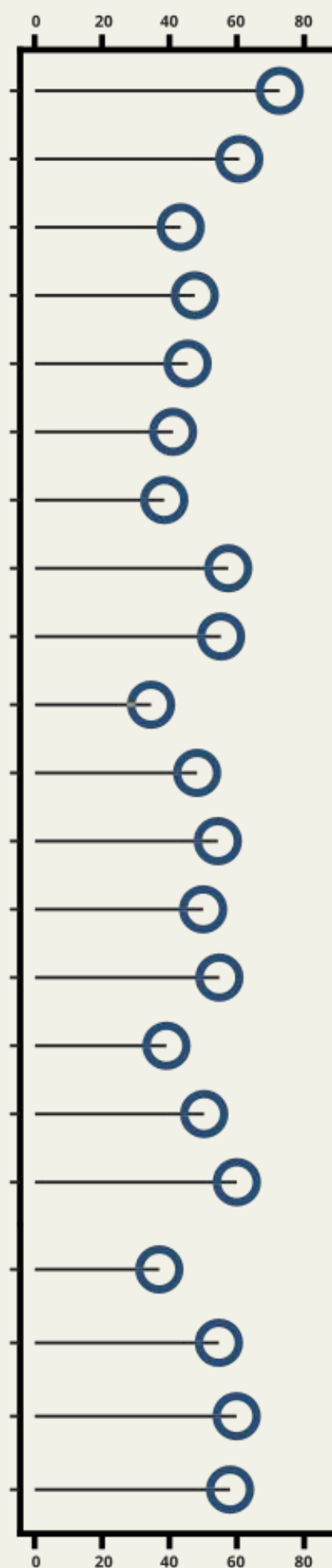
Most often it was related to **finance and payments** (29.2% of all the problems) and to **contracts and contractors** (17.6% of them).



FREQUENCY OF USING LEGAL ASSISTANCE



FREQUENCY OF JUSTICIABLE PROBLEMS



The most common reaction of entrepreneurs, who have experienced a significant legal problem was to seek unassisted contacts with the other party (42,8% of situations). **33.5% entrepreneurs used the help of a lawyer.** Most often such actions were undertaken in industries not included in the classification where the help of a lawyer was used in 50% of problems, and in logistics where such services were used in 49.5% of problems.

MAIN FINDINGS - QUANTITATIVE STUDY

JUSTICIABLE PROBLEMS (JPS) ARE VERY COMMON

46,9% businesses reported a justiciable problem within 3 years prior to the study

JPS HARD TO PREDICT

In multiple logistic regressions, incidence of JPs in general, as well as specific types of JPs are poorly correlated with any explanatory variable available. More JPs in more active and bigger firms

LESS THAN 40% OF JPS RESOLVED BY LEGAL MEANS

Including using formal redress (courts, in-court mediation), legal assistance, informal references to law in communication. Instead, JPs are resolved informally, by business rather than legal means, and lumped.

PROPENSITY TO USE LEGAL MEANS BETTER PREDICTABLE

This appears to depend the strongest on the type of JP and on actions taken by the opposing party. Little or no correlation with variables describing income, legal form of operation, employment, legal capacity etc

IT FOLLOWS THAT

INITIATING LEGAL COMMUNICATION
IS LESS A MATTER OF CHOICE,
AND MORE A MATTER OF NECESSITY.

IF A JP CANNOT BE RESOLVED BY OTHER MEANS
THAN BY LEGAL MEANS, IT SO HAPPENS, BUT
RARELY MORE.

LEGAL ABSTINENCE IS USUALLY PERFECTLY
RATIONAL REFLECTION OF THE FACT, THAT
THERE IS TOO MUCH UNCERTAINTY RELATED TO
LAW

BUSINESS RESOLUTION OF A JP

OWNER OF AN ACCOUNTING FIRM

Tekla is a tax advisor. She operates an accounting firm with several employees in a mid-sized town in the south of Poland. Tekla has decided not to go to any extra effort to collect small debts. By Tekla's estimate, she loses approximately 10 000 zlotys annually in this manner. She chooses to just take it in her stride: "At the farmer's market, the seller dumps the carrots, and the same thing happens here just in a different way"

IMPORTER OF PRODUCTS IN FOOD INDUSTRY

"Well, you must call lawyers, talk to them... I just do not have the time, I'm neglecting so many things I have planned because... there is simply too much to do. I have too many duties, and if I have a nice contact, who is looking for something, nice business potentially, then I just go for it [instead of asking a lawyer]. I just avoid trading with China and India, even if that's hardly possible, because I have insufficient funds to risk prepayments, waiting for shipment and so on"

JEWELLERY DESIGNER

Describes difficult relations with her supplier: "We do not have a written contract with her. We would like to, but you just can't sign contracts with her. It's all oral, which is a difficulty, because sometimes I just feel like hanging up and telling her a few unkind words. I can't because we depend on her. But now we start second production line, to diversify."

LEGAL RESOLUTION OF A JP IN A CORPORATION (3000 EMPLOYEES)

SERVICE SUPPLIER FOR HOSPITALS

IRefers to extreme conditions of underfunding of public health services and abnormal debt management in hospitals: "But the average time it takes to receive the payment from a hospital is 180 days. Now previously, with regard to this gap between the 180 days that a hospital needed to pay and the 30 days I had to pay my workers, that gap was to a large extent filled by companies that professionally traded in debts. At present, this is prohibited by the law. [...] We made a decision quite a while ago to go to court with each invoice. (...) We have a contract signed with the hospital for 5 years, we are not allowed to sell the debts, and so the only avenue that is available to us is by pursuing our claims, which are 100% legitimate and so we always get the court order exactly as expected. And the hospital fully expects it too, but it just takes a very long time. These costs are huge. [...] It also has to be said that because of that, smaller companies are knocked out of the market. [Small firms] do not have, you know, a room full of legal counsels to take care of all the lawsuits. [...] We hired a company to go through the first stage. There are companies that do debt collection over the phone. (...) Apart from that we currently employ I think 4 counsels, and they have to have a secretary as well. This is further interconnected with the financial and accounting department, to pay for the lawsuits, to track the amounts that get settled, to pay the court enforcement officers' fees and so on [...] [We hire in-house counsels to work full time for us, rather than retaining lawyers for law firms, because] it is a calculation. Simply when you hit a certain volume, it makes better financial sense. It is just cheaper to do it in-house than to outsource it. [...]"



Does it follow that...

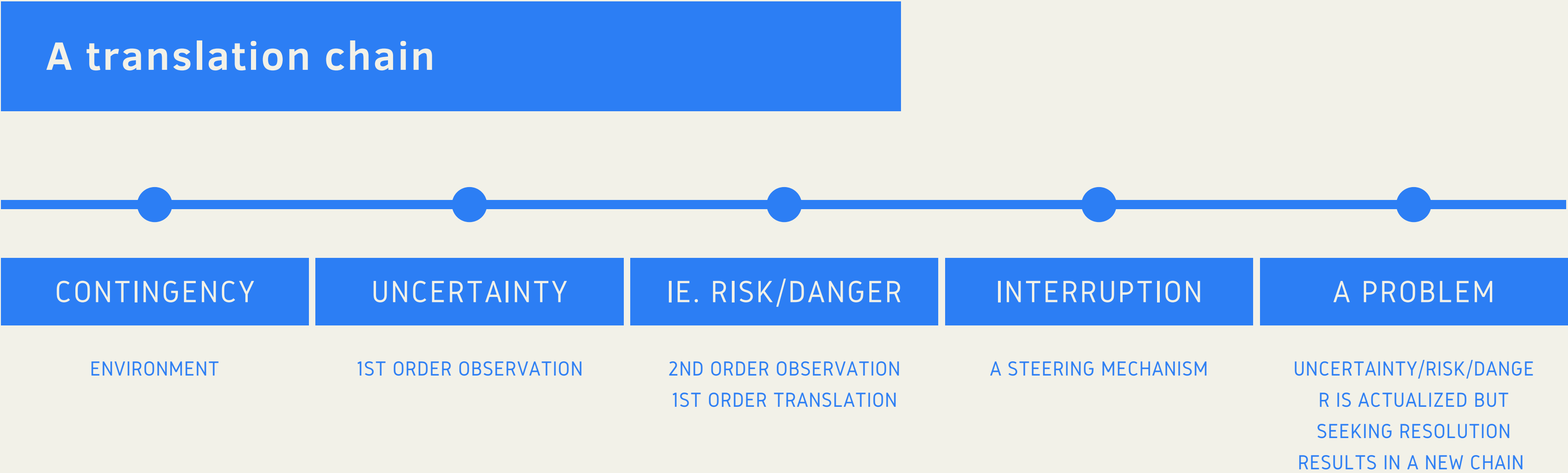
SMEs just reproduce function systems' communication because they have insufficient capacity to "oppose"? Are they merely reactive?

...yes, but not quite.



It is not just that they have insufficient capacity to map uncertain function subsystem 1:1, but also that they must do that with multiple subsystems, as a result of which, they must choose the proper set of uncertainties which cannot be addressed simultaneously

UNCERTAINTY TRANSLATION



WHY MORALITY?

MORALITY IS "CHEAP"
BECAUSE IT NOT A SYSTEM,
NOR A MEDIUM
USING IT DOES NOT
PRESUPPOSE OBSERVING ANY
SYSTEMIC REQUIREMENTS
(IE. PROGRAMS)

UNCERTAINTY TRANSLATION

provider of senior care services



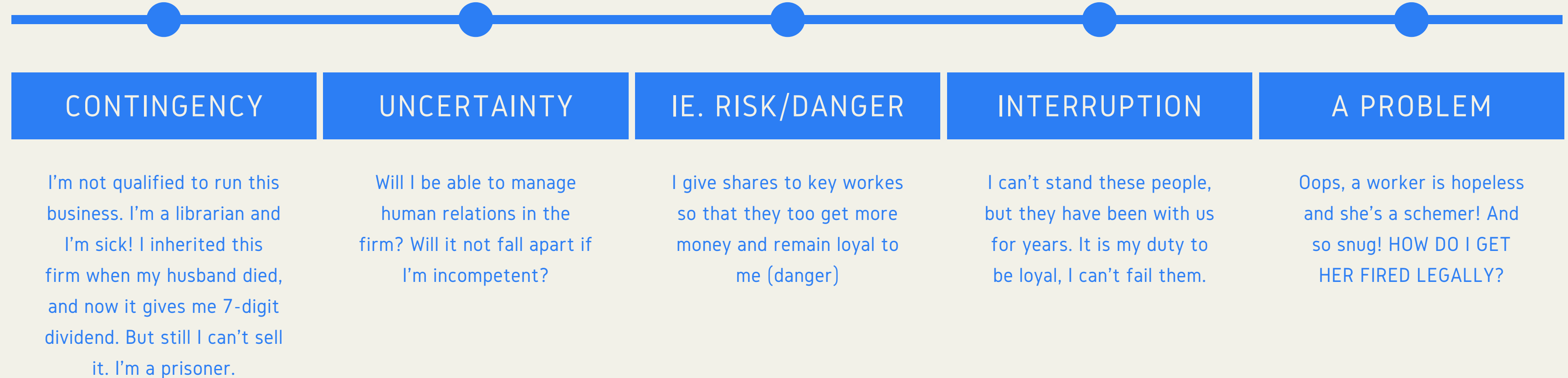
UNCERTAINTY TRANSLATION

provider of senior care services



UNCERTAINTY TRANSLATION

a software developer



UNCERTAINTY TRANSLATION

a software developer



UNCERTAINTY TRANSLATION

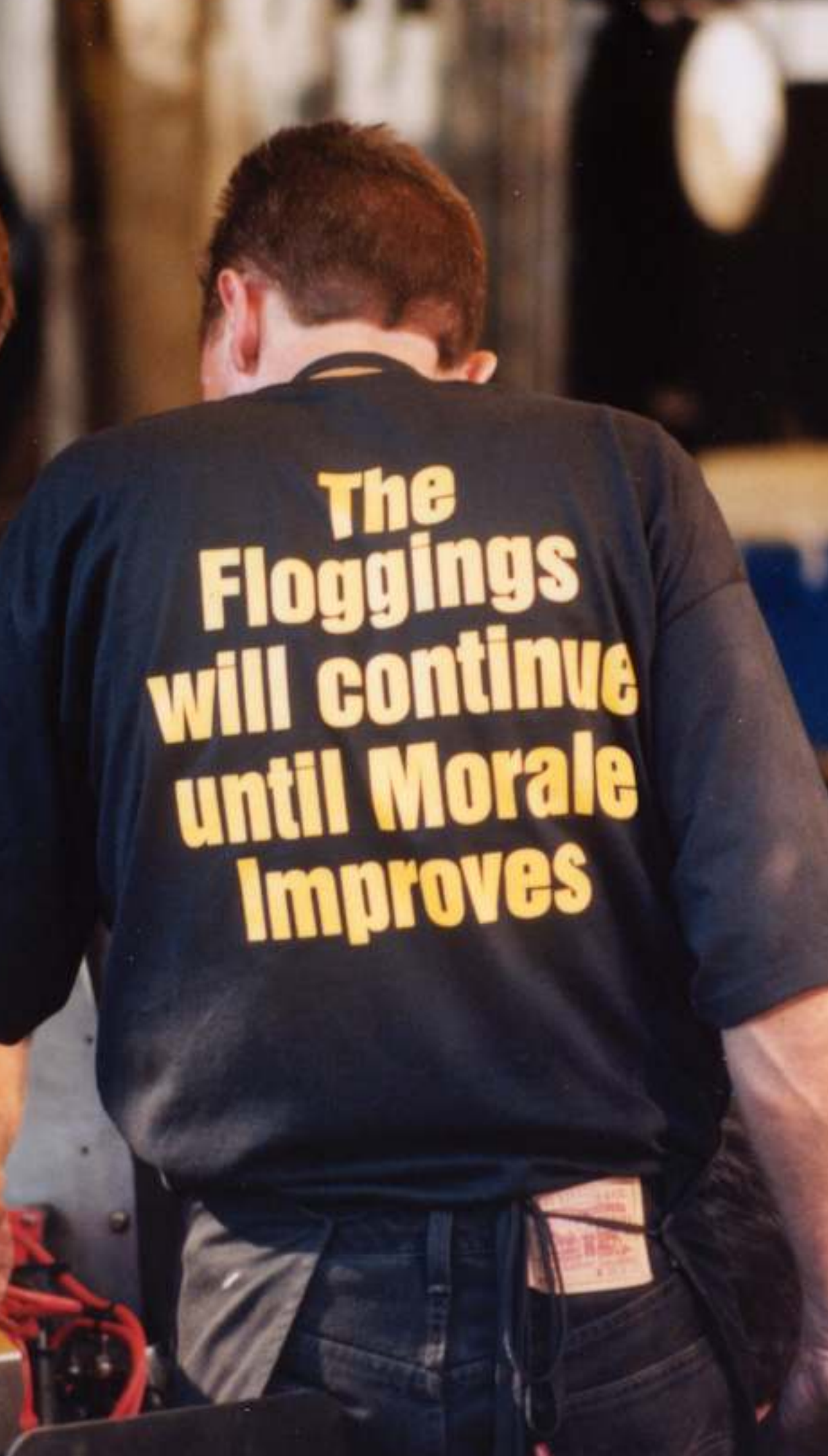
industrial systems maintenance firm



UNCERTAINTY TRANSLATION

industrial systems maintenance firm





OTHER TYPES

AN ELECTRONICS MANUFACTURER

"With big companies and big money, you hire lawyers, you have a whole system of procedures, and you are able – to a smaller or bigger extent – to get your money. But with small companies, if somebody doesn't pay me, say, several hundred zlotys, or a few thousand, I don't really have any effective measures at my disposal to get that money"

A PRODUCER OF FOOD PRODUCTS

After I made another call to one company, I think it was my third phone call to them, because they dragged their feet paying each and every invoice, I was told: <<If you keep calling me like that, I will have to change suppliers, I don't feel like talking to you, if you keep just telling me the invoice is unpaid. When I have money, it will get paid >>. What can you do?"

PRODUCER AND SUPPLIER OF FINISHING MATERIALS

R: [About fraudsters tricking out his products] "People like this must be punished by criminal law"

JW (sarcastically): "Do you think that when they face the horror of a criminal sentence they will be more eager to return you what they owe you?" R: "Sure I do! [claps his hands in excitement]"

WHAT MORALITY?

VIRTUE, RELATIONS, JUSTICE,
HARM

LITTLE STRUCTURE BEYOND
ACTUAL EXPRESSION

LITTLE S



FORMATIVE



ABSORBING

FORMATIVE MORAL COMMUNICATION

HARDWARE DISTRIBUTOR

R2: [We take part in] World's biggest trade fair in [name of industry]. And when it's over, a party is hosted by [name of well-established large company whose products R firm distributes in Poland]. And we are the only distributor in the world who gets an invitation. I think it means something that we are on such terms with them. Ok, they are Germans... they do business their own way.. but... We are the best when it comes to payment ethics... This what Germans told us. Right in the face. Guys, your payment [regularity] commands respect.

(...)

R1: But you know... For instance General Motors knocked on our door. They wanted to buy a [type of product offered]. This cost... I don't know, like 10000 złoty [2200 Euro]. Ok, we checked the availability and, we saw there were no prior transactions. So I say: „Good, will send you a pro forma invoice [requesting prepayment]” - „What? What pro forma? Just give us payment deadline [and deliver the product before payment]” - „Excuse me, sir. Why should we do that?” - „Because we are the GM!” - „So what!?”.

KM: That's quite a lot of a safeguard, right? A bit on the risky side, this kind of customer relationships...

R1: Risky? Well, let's make it straight.. When you're strict, you're respected.

ABSORBING MORAL COMMUNICATION

SPA & BEAUTY PARLOR OWNER

That company owned some space, a restaurant and conference rooms in the city center, a mall and an office building. On the last floor there's a club of sorts. Members only (...). Including a spa for club members. But the owner was only experienced with running a restaurant, not a spa. (...) So he leased that to me. So I renovated the place, it all started to work well. And when it started to work well, they terminated the lease agreement on a formality. (...) So they kicked me out just because they wanted that, they took over the spa, and of course... they hired all my workers! I went on to consult this with a lawyer because... it happened over night, they changed the locks, and just kicked me out. [They told me] that I have two days to collect all this equipment, because if I don't, they make me pay for storage. So I hired a lawyer, who... yes... he first filed a lawsuit [respondent means pre-trial summons]... but then it all ended up with just a lawyers' scuffle... Well, because the lawyer asked me, what do I want to achieve? Then I realized that I do not want to return there if the atmosphere is like that. Even if I won the case, I don't. Perhaps I could demand compensation, but I was most hurt by disloyalty of workers who terminated their contracts with me and then took jobs there. (...) The lawyer said that I must file a lawsuit. With a court, right. So I said I give up.



SOME IMPOSING INFRASTRUCTURAL PROJECTS

have a common denominator

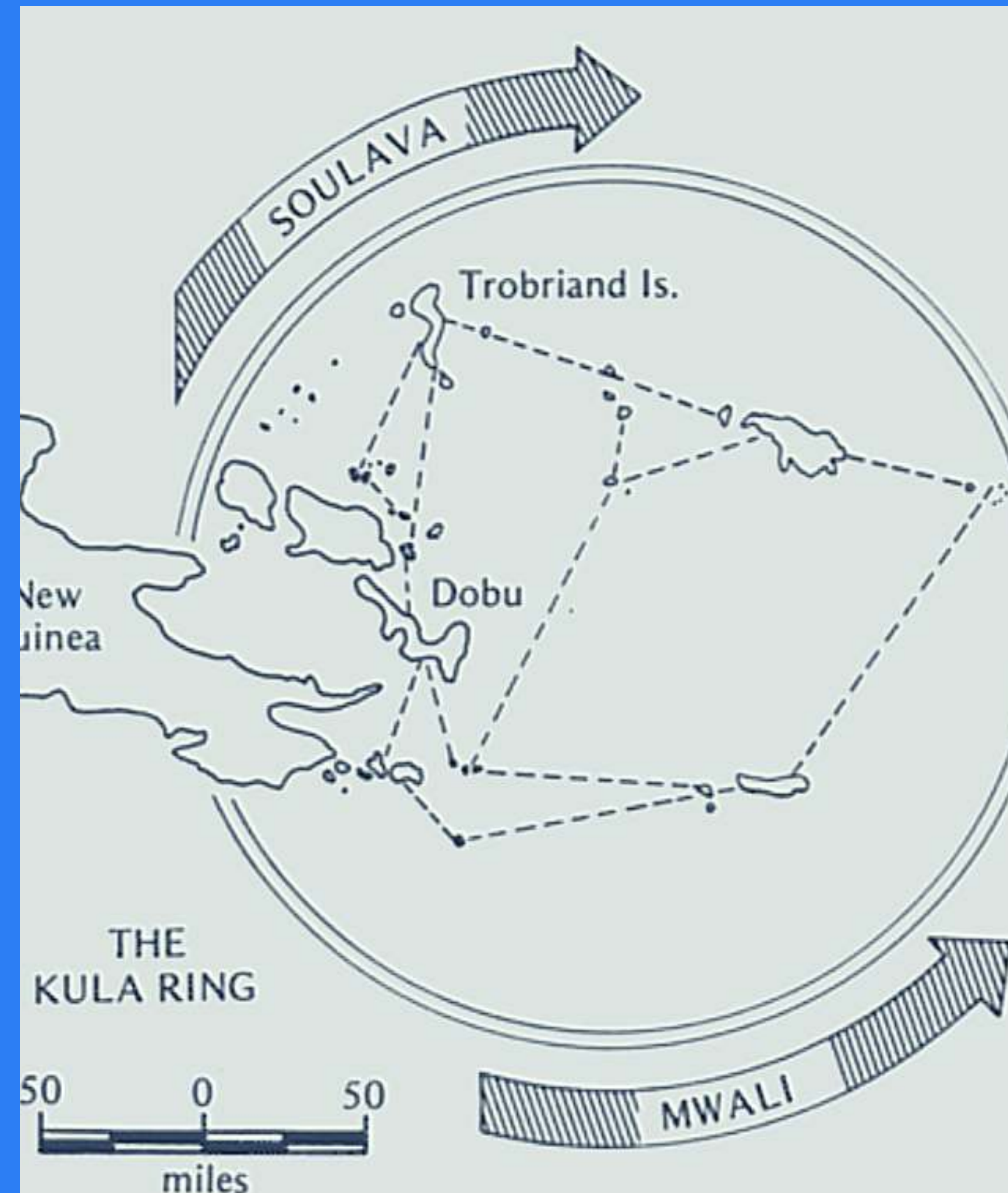
THE OUTCOME

KULA RING OF PAYMENTS

When contractors must accept "trade credit", uncertainty of payment gets "underwritten", This boosts the chances of survival in times of

Absorbing moral communication contributes to this, because it facilitates the process by enabling reflection stop.

MORAL COMMUNICATION AND LEGAL UNCERTAINTY IN SMES



UNDERLYING ISSUE

...legal regulation of economy, fool.

HOW MAY ECONOMY WORK, WHEN THERE ISN'T LEGAL CERTAINTY?

This is against Weber & Habermas!

A functional equivalent emerges - the "unlocking mechanism"

How resilient is this arrangement?

MORAL COMMUNICATION AND LEGAL UNCERTAINTY IN SMES

