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**Gordon Institute  
of Business Science**  
University of Pretoria

**Beyond contract drafting and enforcement: The future of  
contracting in emerging markets**

Tafadzwa Priscilla Sithole

13397347

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Tafadzwa Priscilla Sithole MBA 2013/2014

## **Abstract**

The purpose of this study was to explore and gain insight into the current purpose of contracting and, in the main, the future of contracting in emerging markets. The study aimed to explore the nature of contracting in emerging markets in order to understand what the future of contracting will be in emerging markets. The study was a qualitative study and a sample of ten participants was interviewed. Findings of the study indicated that the emerging market environment is risky due to unfamiliar local nuances; and local laws are preferred over international law. Technology and innovation are not a strong focus in emerging markets but relationship frameworks allow for some degree of flexibility and innovation. Relationships and their importance were the biggest finding of this research prompting an exploration of the Confucian concept of *guanxi* highlighting relational networks within social settings. The research further identified that contract professionals need to firstly be both competent and globally literate. Relationships and links between skills, knowledge and the operating environment are intertwined in determining the future of contracting.

The research concluded by making recommendations to Chief Executive Officers of multinationals, lawyers, contract professionals and consultants in emerging market firms in light of the findings of this research. The research highlights the legal and both internal and external contextual considerations of contracting and also suggests variables for further research that are crucial for a deeper understanding of contracting in emerging markets.

## **Keywords**

Contracting; contract relationship management; globalisation; *guanxi*; interconnectedness and interdependencies; institutional voids.

## **Declaration**

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration at the Gordon Institute for Business Science, University of Pretoria. It has not been submitted before for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

Tafadzwa Priscilla Sithole

10 November 2014

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## Chapter 1: Introduction to Research Problem

### 1.1 Introduction

Unprecedented levels of globalisation are taking place and transforming global economies; this impact of has been investigated in Western markets and in emerging economies such as China and India but less attention has been paid to Africa (Chironga, Leke, Lund, & van Wamelen, 2011). This paper seeks to fill this gap in knowledge on contracting in Africa. The specific goal of this research is two-fold; it is to, firstly, understand the role and purpose of contracting in emerging markets and to, secondly and in the main, understand the future of contracting in emerging markets between emerging market firms.

A small body of literature is emerging on how contracting and the law can be used for competitive advantage (Barton & Anderson, 2012; Evans & Gabe, 2014). This literature, however, fails to take into account that within the international landscape not all institutions are similar (Evans & Gabel, 2014). Within emerging markets contracting parties need to take into account factors such as institutional voids (North, 1990). This research is placed within the context of emerging markets where there are institutional voids, characterised by the absence of specialised regulatory systems and contract enforcing mechanisms (Khanna & Palepu, 2011). The focus of this research as proposed above is necessary as contracting and current literature “*assumes a high rule of law backdrop* [emphasis not mine], and in particular takes for granted the presence and correctness of Western institutions” (Evans & Gabel, 2014, p. 2). This research is placed within emerging markets as current literature shows that the law does not favour low institution regions and this is useful for this researcher’s modest enquiry on contracting in Africa as it highlights the role of contracting and its interaction with legal systems, business opportunities, and systems within emerging markets jurisdictions.

A major limitation and gap of this research has been the lack of relevant literature on practical commercial contract practice in emerging market journals. The concepts analysed are Western and Eastern concepts, to a lesser extent, and by conducting this research, the researcher aims to contribute to the literature in emerging markets.

## 1.2 Background of the Study

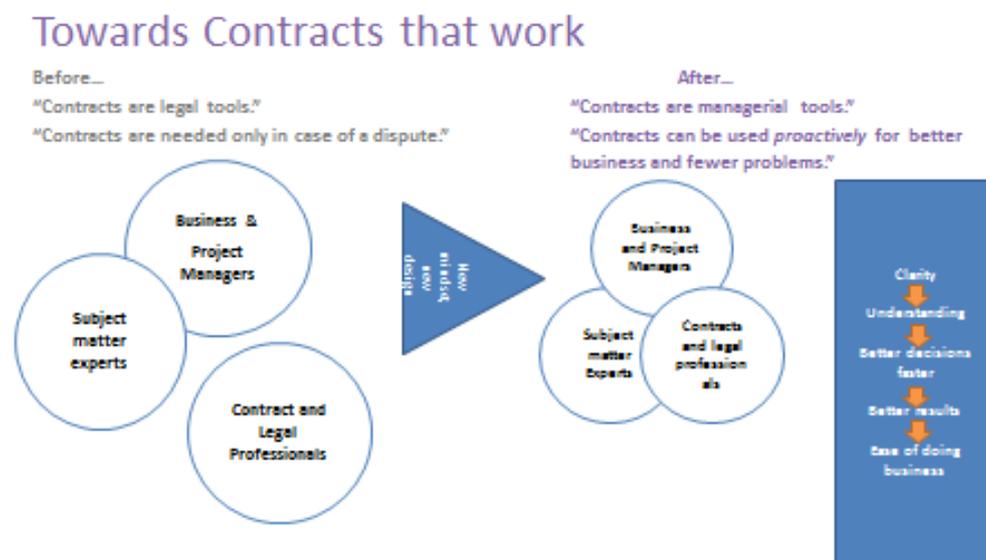
Contracts are central to commercial operations and are inseparable from all economic activities. Business transactions such as task allocation, price, payments, milestones, rights, responsibilities and remedies revolve around underlying contracts. When these contracts fail, business performance inevitably suffers (Haapio, 2010). Proactive legal teams can innovate around contracting by becoming designers, mentors, coaches and strategic business partners that add to the company's bottom line. Success in business transactions and business relationships are required to go beyond the contract document and cross-functional collaboration ensures that the contract is not the end goal; contract implementation should be the end goal (Haapio, 2010).

Contracts are defined as agreements intended to be enforceable in law (Wilken v Kohler, 1913; Christie & Bradfield, 2007). The concept of contract law in Sub-Saharan Africa is mainly dictated by English law, Roman-Dutch law and country specific laws. There are three theoretical bases for contract law – the subjective consensual theory, the objective declaration theory, and the reliance theory. The subjective consensual theory dictates that enforceability is dependent on concurrence of subjective wills. The objective declaration theory dictates that enforceability is dependent on the concurrent declarations of the parties. Lastly, the reliance theory postulates that enforceability is dependent of the reasonable expectations conveyed in the mind of each party by the words or conduct of the other (Christie & Bradfield, 2007). The different theories affect enforceability of the contract.

The law is fallible and open to criticism. The fallibility of the law can be viewed through one-sided contracts, unfairness in the making of contracts; imbalanced contracts and contract terms; partial enforcement of contracts; and in contracts contrary to public policy (Christie & Bradfield, 2007). In addition, contract law is compounded by drafting and interpretation problems due to the ambiguity of language (Cornelius, 2007). The famous legal fable is instructive on the ambiguity of language. When Pyrrhus made a decision to wage a war against the Romans, he consulted the Oracle Delphi and was informed: "I believe, Pyrrhus, that you the Romans can conquer" (Camilla, 2009, p. 1821). The prophecy was ambiguous in its language and this is the issue same ambiguity that presents itself with contracts and contractual language. The language of contract is not a vehicle to meaning but a beginning to an enquiry (Cornelius, 2007). Law can be used to exploit opportunities through the persuasion of authorities to embrace the firm's interpretation of the law (Evans & Gabel, 2014).

Most contracts are written in specialised legal terms and are drafted by lawyers for lawyers but their implementation is mainly by non-lawyers (Passera & Haapio, 2013). In addition, all contracts are inherently incomplete and can, therefore, lead to opportunistic behaviour. Contracts are not always user friendly and in commercial endeavours, contracting and legal principles need to respond to the demands of global business. The contracts should be based on drawing out successful business outcomes and one-sided standard terms and conditions do not serve this purpose (Barton & Anderson, 2012). Effective contracting can be achieved through the concerted efforts of proactive lawyers and business managers through processes that serve business purposes.

**Figure 1 Towards Contracts that Work**



Source: (Haapio, 2010, p. 5) Towards Contracts that Work.

The research is partly premised on the recent study by the IBM Corporation (Barton & Anderson, 2012) which carried out a study in the United States of America in 2010, which identified that Chief Executive Officers' (CEOs) biggest challenge as the volatility of the environment within which they operate. The results showed that many organisations are not equipped to deal with this complexity. As a result creativity has become the most important leadership competency to navigate this complexity (Barton & Anderson, 2012). The rapid change and volatility of the economy has led to uncertainty in successful financial outcomes of contracts (Wang, 2013). Most of the

factors confronting CEOs are hard to quantify and must be rationalised with local narratives especially in countries with opaque systems (Bartlett & Beamish, 2014). The International Association of Contracts Management (IACCM) in 2012, drawing on the IBM Corporation study, acknowledged that the role of contracting in business has to change to address the complexity by shifting contracts from being a source of complexity to a process that reduces complexity (Barton & Anderson, 2012).

The IACCM conducted a study in 2012 entitled “The Future of Contracting” (Barton & Anderson, 2012) building on the IBM study above. The study called for urgent thinking in the approach to trading relationships and the results of these relationships. It also focused on the shift of business from the West to the East and the impact of contracts on those business relationships. This exploration was based on the shift in global power balances, international trade patterns and the conflicts that exist between law and economics and the allocation of risks. The study pointed out twin challenges of global businesses, the two challenges are interconnections and interdependencies (Barton & Anderson, 2012). The business environment has become more globalised and the risk more unpredictable. This means that many businesses and their CEOs are not equipped to cope with the complexity of the global environment. Contracting must move from being a source of complexity to overcoming complexity through becoming a living instrument that offers flexibility and stability to manage relationships and living instruments through which risks are shared (Barton & Anderson, 2012).

Standard companies’ contracting strategy in many ways means the ability to operate off standard terms and conditions and contracts are viewed as crystallised non-negotiable instruments. Apple, for instance, is a company that has great products and their products negate the need for commercial negotiation or flexibility; a position that was similarly held by IBM in the 1980s and Microsoft in the 1990s. This had the impact of reducing contracts to administration of contracts and the imposition of standard terms and conditions. These contract processes have led to rigid processes that are not aligned to the changing environment and the changing needs. Barton and Anderson posed these questions: Are businesses imposing standard terms on a market that calls for a revised approach? Or are businesses being too flexible in their approach at a time when technology, regulation, cost pressures make this approach both unaffordable and leave organisations vulnerable to performance risks (Barton & Anderson, 2012)?

There is a great need for a fresh approach to contracting. Contracts reside in the realm of the law and the law is a regulatory institution. Regulations are meant to address

information inadequacies, minimise externalities, remedy unequal bargaining power, and, controversially, to promote powerful private interests plus to promote the concerns of the political incumbents (Evans & Gabel, 2014). Research shows that there is a misalignment between contracts and the business environment with contracts and the contracting process lagging behind. This leads to missed revenue, stark competitive pressure, missed opportunities (Barton & Anderson, 2012). Contracting and legal functions must be globally literate and must understand extra-legal motives such as incumbent officials' motives – this is a dance between legal systems and outside legal systems (Rosen, 2000).

### **1.3 Research Motivation**

The primary motivation for this research was inspired by the studies done by the IBM and the IACCM highlighted above. This research will draw on the study by the IACCM to explore the role of contracting emerging markets. There is a gap in the IACCM research in that it has not focused on emerging markets in Sub-Saharan Africa. Strategies that apply in the developed world are dangerous in emerging markets due to contextual differences. Firms need to be able to manage this tension and have strategic agility (Fourne, Jansen, & Mom, 2014). There is a gap within emerging market literature as the focus on contracting research is focused on the legality, drafting and interpretation of contract law and not on strategic contracting. This exploratory study will rely on literature and the insights that will unfold from the literature in order to discover contracting in emerging markets (Punch, 2002).

This study will be useful for business executives in order to ensure that the contracting process and contract terms do not undermine business purpose and are aligned with the changing environment that businesses operate in. This study will further be useful and instructive in ensuring that the contracting strategy of the business does not lag behind the strategy of the organization. This research will provide a deeper understanding of the interaction of contracting and business strategies and to maximize on trading relationships.

Research has shown that corporations are losing revenues of up to 9.2% of their annual revenue through contracting process weakness (International Association of Contract and Commercial Management, 2012). This avoidable loss shows there is a need for contracting to move from being transactional to being more strategic based on risk analysis and relational contracting (Barton & Anderson, 2012). 30% to 35% of

organisations' contracts underperform and there is room for improvement for contract models to support the agenda of the business.

Passera and Haapio (2013) point out that in the past contracts were viewed as legal tools and contracts were needed only in cases of disputes. The contracts and legal professionals were separated from the business managers and subject matter experts. The new thought is that contracts are managerial tools that can be used proactively with legal professionals, business managers and subject matter experts for better and faster business decisions, better results that facilitate ease of doing business (Passera & Haapio, 2013).

Contracts enable the new world of commerce. Contracting is critical to managing complexity in emerging markets and different cultures. CEOs require a way to manage complexities that they encounter. A high performing contract process is necessary to achieve this.

#### **1.4 Relevance of Field of Study**

The Economist has referred to Africa as the hottest frontier (The Economist, 2013). Over the past decade it has supplied six of the world's ten economies with the fastest growth (Deloitte & Touche, 2013). Those doing business across Africa are confident about the continent's progress and prospects (Ernst & Young, 2013). Many assumptions that are appropriate in the developed world are inapplicable and treacherous in emerging markets due to the presence of institutional voids with different contract enforcing mechanisms and the differences in how contracts are honoured. This, therefore, means that global business' growth in Africa and contracting strategy has to develop alongside these realities (Khanna, Palepu, & Sinhu, 2005; Fourné, Jansen, & Mom, 2014).

The IACCM researchers opine that contracts in the future will be designed to meet the needs of the people who commission them and will be fit for purpose and adaptive. Contracts will support mutually successful outcomes giving value for money. The risks and responsibilities will be apportioned accordingly to meet the capabilities of the parties and the nature of the transaction (Barton & Anderson, 2012).

This research will contribute to the existing body of knowledge and add to the work done by researchers and organisations such as the IBM and the IACCM. This research

will further assist CEOs in emerging markets to manage their risks and respond to the needs of global business.

### **1.5 Relevance of Unit of Analysis and Assumptions**

The research is exploratory and will be of an unfolding nature with insights being gleaned from the interviews and literature (Punch, 2002). This research will draw on some assumptions on contracting in emerging markets. The assumptions being made will be drawn from the IACCM research and literature. The main assumption is that current contracting and legal principles do not always respond to the demands of global business, which is characterised by interdependencies between organisations and a growing interest in emerging markets. Commercial relationships are ever-shifting and require flexible relationship structures. Contracting has, therefore, become a key contributor in managing the complexity of international business and as trade patterns shift to emerging markets and in particular Sub-Saharan Africa so does business complexity. Economic conditions are moving business into unfamiliar cultures and business practices (Barton & Anderson, 2012).

The research draws on the assumption that there is a convergence of contracting terms and structures between developed and emerging markets, which draw on best business outcomes and commercial endeavours and not just on legal outcomes and associated rights and obligations. The parties have the responsibility to reduce the probability of risks through increased collaboration. This contracting relationship requires interaction and flexibility throughout the term of the relationship. In short, the assumption is that a high-performance contracting process and contract management are critical for the new world of commerce, a world often characterised by institutional voids.

### **1.6 Research Scope**

The scope of the research is to explore the role of contracting and the future of contracting in emerging markets from members of the IACCM in Sub-Saharan Africa. The study will be limited to members of the IACCM who are employed as commercial managers, contract managers, negotiators, supply-chain managers and in-house attorneys in Sub-Saharan Africa in order to understand the research objectives set out herein. The study, furthermore, seeks to understand from a theoretical perspective how

the role and purpose of contracting and opine on what the future trends will be in emerging markets given the international trade patterns shift.

### **1.7 Research Problem and Objectives**

The aim of this study is to gain insight into the purpose of contracts in emerging markets and to understand the future of contracting in emerging markets. In conducting this study the law and the shifting nature of international trade patterns in emerging markets will be explored taking into account the literature on international landscape including legal, economic, political and market influences, institutional voids, and contracting skills required in the contracting process. The research enquiry on practical contracting will explore contracts and relationships; contracting terms and negotiations; automation and technology; global influences; and skills inform the future of contracting in emerging markets.

### **1.8 Research Questions**

The research questions to address the aforementioned contracting objectives will be as follows (Barton & Anderson, 2012, p. 4):

- Is there integration between contract management and contract relationship management?
- Is there alignment between trading partner management and the strategic goals and business making decisions of the business?
- Have negotiation techniques been transformational and enabled an improvement in partner selection?
- Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?
- Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?

### **1.9 Research Bias, Limitations of the Research and Problems Foreseen**

There is a general assumption within this research that in emerging markets there are institutional voids in that there is an absence of specialised regulatory systems and

contract enforcing mechanisms. This cannot be generalised across all jurisdictions within Africa as this may apply differently across different geographies.

Bias will always be a part of the research process. Throughout the research process, the bias must be discovered through intellectual self-awareness and thorough self-examination (Pierce, 2008).

The researcher is a member of the IACCM and has working knowledge of the contracting process in emerging markets. This may have an influence on the information received and may result in biased findings.

The research will be limited to members of the IACCM in Sub-Saharan Africa. This means the study cannot be extrapolated across all commercial or contract managers in emerging markets as the sample selected will not be representative. The role of contracting and the future of contracting may manifest itself differently across the different sectors. Furthermore, the respondents are qualified by being IACCM members and are not at the same level within their respective companies. This will make it difficult to compare the results with certainty from the different respondents. Lower level employees may also not be able to influence the contracting strategy or decision making process in the company. The sampling technique used may not allow for balanced insights.

Companies that have privacy concerns may not readily give information and this information will have to be concealed without losing the information that is pertinent to this research. Non-disclosure agreements will be signed to protect the privacy of the companies.

The researcher is resident in South Africa and IACCM members sample chosen is in Sub-Saharan Africa, this will make access difficult. Most of the interviews will be conducted over the phone and the lack of personal interaction may influence the results received. The researcher may also unconsciously influence the interviewees that will be interviewed face to face.

## **1.10 Roadmap**

This first chapter has captured the motivation behind the research problem. The objective of this research is to understand the role and purpose of contracting in emerging markets and to understand the future of contracting in emerging markets.

The second chapter will be the literature review whose aim is to distil the research that has already been done around the topic, including the dissenting views. The literature review will also identify the gaps that exist and the meaningful contribution that the researcher can add to existing literature. The third chapter will draw from the literature review in chapter two in order to arrive at the research questions that will adequately address the research objective as set out chapter one. The methodology will be discussed in chapter four. The methodology chapter will outline the research approach research design, methodology, and the rationale for the selection of the qualitative research design and methodology. Chapter five will present the results of the interviews based on the research questions in chapter three. This will be followed by chapter six, which will discuss the findings in chapter five in line with the literature review and the research questions. Lastly, chapter seven will be the concluding chapter that will address whether the research objectives set out in chapter one were met and if the research questions were answered. The implication of the findings, recommendations, and future research areas will also be highlighted in this concluding chapter in order to contribute to the literature.

## **Chapter 2: Literature Review**

### **2.1 Introduction**

This chapter will review the future of contracting in emerging markets through understanding the purpose of contracting in an unstable global world. The role of law as an inextricably linked sub-theme will also be explored. The researcher's focus is on emerging markets in Africa due to the growing interest in Africa. Africa's role in the global economy remains an under researched area (Chironga, Leke, Lund, & van Warmelen, 2011).

### **2.2 The Current State of Contracting**

Research shows that the beginning point of the analysis of the state of contracting in emerging markets is the contracting environment's level of uncertainty in the stability and predictability. Secondly, the thicknesses of the market – determined by how many people in the environment are engaged in similar contracting strategies. The more uncertain the environment, the more difficult it is to draft the contracts. The greater the trading patterns or thickness of the markets the more interpretive the contract regime is. This interplay is important (Gilson, Sable, & Scott, 2013).

Some scholars have differing views and argue whether it is necessary to have contracts (Geis, 2009). There have been debates in the literature on whether the use of formal contracts to establish business relationships is necessary as formal contracts foster mistrust and do not mitigate commercial threats or opportunistic behaviour (Weber & Mayer, 2011). Formal contracts may further have the impact of creating distrust, and where there is relational governance, contracts are an unnecessary expense and counterproductive as they do not create effective alliances (Frankel, Schmitz, & Frayer, 1996; Hofenk, Schipper, Semeijin, & Gelderman, 2011). Other research argues that formal contracts are essential as they lower alliance risk and promote close and collaborative long term relationships. Close collaboration can be fostered by a tightly written contract with clearly defined expectations; the higher the formality, the more effective the contract enforcement (Hofenk, Schipper, Semeijin, & Gelderman, 2011).

Developing research opines that what is important is the interplay between relationship building, as the soft aspect, and contractual aspects, as the hard aspect. Contracts are important both in legal and relationship terms. Geis (2009) avers that legal sophistication and collaboration are cornerstone of contracting. Other researchers, however, point out that the impact of contracts is more nuanced. Some contract clauses play a coordination role and some pose barriers to trust development (Vanneste & Puranam, 2010). Contracts complement relational governance which dictates the framework of a cooperative relationship (Ryall & Sampson, 2009). There is reluctance by managers to rely on contracts due to their costly and adversarial nature. The opposite view is that contracts are a necessity as they allow for a degree of certainty and predictability in their commercial interactions (Schwartz & Scott, 2009). The future role of contracting in emerging markets must address these diverse views.

Where contracts exist, contract framing is important and Weber and Mayer (2011) propose through their research that: firstly, the design of the contract impacts the behaviour of the parties and the development of the relationship; secondly, trust and formal safeguards in prevention framed contracts cannot co-exist as the formal safeguards create negative emotions and a business-like relationship. Promotion framed contracts written with elements of creativity and flexibility encourage cooperative behaviour. Promotion framed contracts give suppliers behaviour autonomy as they are not prescriptive resulting in positive emotions and trust. The researchers do warn that where one contractant has a reputation for opportunistic behaviour, a preventative contract is more suitable than a promotion contract (Weber & Mayer, 2011).

A further hurdle within contracting is that contracts should address written and unwritten parts, standard terms, flexible terms and relationships (Selviaridis & Spring, 2010). These written parts include (i) products and services to be delivered; (ii) how and when delivery will take place; (iii) payment terms; (iv) liquidated damages; (v) access to information; (vi) authority; (vii) conflict resolution; and (viii) key performance indicators and monitoring mechanisms (Webb & Loborde, 2005; Hofenk, Schipper, & Semeijn, 2011). Contracts are not as simple as recording standard terms. Research shows that contracts are incomplete documents by their very nature and, therefore, in multi-year agreements, there is a need to build in flexibility into these terms. While the written agreement is important, the unwritten part agreement of the agreement is equally important as this is where the strength of the relationship lies (Webb & Loborde, 2005).

According to Selviaridis and Spring (2010) it should be investigated whether contracts are important in relationship management. They suggest that contract and relational factors should act in tandem as they are important for inter-organisational relationships (Hofenk, Schipper, Semeijin, & Gelderman, 2011). Current literature affirms that conflict can be avoided through a tightly written contract as it minimizes risk of breach and non-performance by the parties (Platz & Temponi, 2007). It is important to establish the best form of contract with the correct terms to ensure contract performance and to maximize the value of the relationship (Platz & Temponi, 2007).

The key written contractual elements to ensure this are:

- Performance elements: Key performance elements should disclose predetermined performance standards, incentives and penalties for underperformance, and communication and confidentiality.
- Financial elements: Key financial elements include costing and pricing based on profit-based pricing and compensation.
- Human resource elements: the human elements must include training, hiring, compensation of vendor company staff and managerial functions. This will ensure that there is no gap in expectations.
- Legal elements: these include intellectual property rights, warranties and liabilities.
- Termination elements: these will include termination for breach and termination for convenience when the relationship ceases to be unprofitable. Within this, non-disclosure and non-compete clauses protect the companies from gaining unfair advantages over another.
- Dispute resolution elements: litigation is costly and will lead to a deterioration of the relationship. Alternative dispute resolutions methods may be used through mutually appointed third parties (Platz & Temponi, 2007).

The above elements have been researched to be instructive in the success of contracting relationships, however, these terms are an initial first step and there is no single contract that can cover for all contingencies (Platz & Temponi, 2007). The greatest risk that is posed by contracts is non-performance. Contracts merely ensure that performance remains within acceptable limits and many contractual relationships do not live up to this expectation (Hofenk, Schipper, Semeijin, & Gelderman, 2011).

Embedded options are important in business dealings as they represent how contingencies in contracts are dealt with as businesses consider what happens when they do not perform as promised in the agreement. This results in companies paying

damages for breach or as defined in the agreement (Geis, 2009). On the other hand, this may not be viewed as breach damages but as an exercise of option not to perform (Richard, Breakley, Myers, & Allen, 2006). This analysis gives new insights as it expands the contract view from a purely legal agreement to a cost and benefits analysis of performance. Contracts have explicit and implicit option rights. This creates a disjuncture between a transactional legal drafter, focused on practical concerns and a litigator interpreting the transactional structure based on contract law analysis (Geis, 2008). Contracts have hidden incentives. Strict contract standards and interpretation may force unduly harsh outcomes and flexible standards and interpretation make create ambiguity (Geis, 2008). Some other standard may need to be applied.

The debate on the usefulness of contracting is varied. Contracts remain the instrument through which relationships are established. The interplay between the richness of the context, the certainty of the modern legal context, the legal sophistication of the parties, and the role of the courts in the market is crucial. What then is the future of contracting?

### **2.3 The Future of Contracting**

Contracting and the future of contracting have become a topical legal and economic issue (Cummins, 2009). There is no single cohesive seminal theory that has been developed as the exploration is tackled from different legal and contracting concepts. New age thinkers like Haapio (Haapio, 2009; Haapio, 2010) are advocating for proactive law versus protective law. This goes against the grain current scope of how the law is traditionally defined (Christie & Bradfield, 2007; Cornelius, 2007).

Barton and Anderson's (2012) research explored current commercial practice. The research revealed that contract management has morphed in response to the volatile business environment. Similarly, contract management in organisations is moving from being governed by pure legal instruments to an economic focus (Geis, 2008).

The principles of contracting in practice have been highlighted most comprehensively in the study by the IBM Corporation in 2010 (Barton & Anderson, 2012). This study revealed that the biggest challenge faced by chief executives officers is the volatility of the environment within which they operate. The research further shows that many organisations are not equipped to deal with contractual and international trade complexity. Creativity and proactivity have become the most important leadership

competences to navigate this complexity (Barton & Anderson, 2012). The rapid change and volatility of the economy has led to uncertainty in successful financial outcomes of contracts (Wang, 2013).

The IACCM set out five goals in contract management to address the shifting needs of business. The goals were: improving integration and contract management and relationship management; ensuring the alignment of trading partner management with the strategic goals of the business; transforming negotiation to enable improved partner selection through alignment of goals; shifting the focus of terms and conditions to a framework that looks at relationship frameworks that reduces redundancy in low value review and negotiations; and mastering technology for proactive management of risk. The above five goals address a strategic driven contract management solution based on risk analysis and relational contract structures (Barton & Anderson, 2012).

Executives need to address and align the way they do business with the volatile global environment. Dilts (2005) argued that contract interpretation is the main source of commercial litigation based on the language that is used in the construction of terms in the contract (Shepherd, 1954; Dilts, 2005). This brings rise to different interpretation styles and contract management strategies needs to be aligned accordingly to this changing environment. If there is misalignment, the contracting process can be a source of inhibition in the business resulting in delays and missed opportunities for the company (Barton & Anderson, 2012). Great attention has been paid to legal sophistication has moved contracts from being purely transactional to being include bespoke contracts that are drafted ex ante to place sophisticated clients in the best position should any eventualities arise (Schwartz & Scott, 2010). Legal sophistication can be gleaned from the work of Hofenk and others (Hofenk, Schipper, Semeijin, & Gelderman, 2011) who explored the complementary nature of contracts and relational elements and concluded that relational effectiveness can be ensured when the contract is drafted to include relational elements. Other literature propounds that less sophisticated parties will be at a distinct disadvantage and are easily exploited (Eisenberg, 2014).

The proposed research seeks to understand how contracting and contract terms can complement business purpose in emerging markets and to ensure contract alignment with the changing environment that businesses operate in. Miller (2010) notes that sophisticated contracting embeds as much or as little context in the contract either to supplement or exclude context within contract interpretation. This allows the parties to effect efficient contract designs that exclude the courts' erroneous interpretation post

ante, should the parties litigate (Miller, 2010). On the other hand, unsophisticated parties are at the mercy of the courts to investigate beyond the four walls of the contract to prevent exploitation. This further complicates contracting especially where there is an adoption of a hodgepodge of formal explicit terms and underlying practice. Legal scholars argue that the measure and background for interpretation is the commercial context, which may supersede the written words (Burton, 2013; Eisenberg, 2014). This presents a false choice in contract drafting as the contracts may not be based on free will as parties draft contracts to avoid erroneous interpretation by the courts (Eisenberg, 2014). Parties need to transact efficiently and the future of contracting depends on the breath of understanding of contractual experience and the factors that serve to shape the design of the contract and, additionally, the role that the courts play (Miller, 2010; Kim, 2013).

## **2.4 Global Influences**

This section on global influences seeks to address the context within which firms are operating and highlights the institutional differences between the Western world and emerging market economies. It further highlights the impact of institutions on the law, compliance, and contracting regimes.

Unprecedented levels of globalisation continue to transform the world's economies (Lysonski & Durvasula, 2013). This has spurred a convergence of cultures and laws (Siedel & Haapio, 2010). Research shows that Africa has experienced immense economic growth and dramatic changes in the last decade (Lysonski & Durvasula, 2013). Myer and Geschiere (1999; Lysonski & Durvasula, 2013) aver that there is no political, social or cultural boundaries that are unaffected by globalisation. And globalisation has created cultural interdependence and interconnectedness. These interdependencies create market economies that are fluid and ever-changing and this sometimes has the unintended consequence of homogenising economies, cultures and common codes of practice (Lysonski & Durvasula, 2013).

On the other hand, Kjeldgaard and Askegaard (2006), similar to Evans and Gabel (2014) argue that the presumption of globalisation and homogeneity is misguided, patterns in different localities acquire own different meanings within the context of the local socio-cultural conditions. What is trite, however, is that global influences will continue relentlessly and economies will become transformed. Some researchers also challenge that this convergence has taken place as cultural differences are expected to

remain influential in business as the law of nations is far from converging (Hofstede, 1981; Evans & Gabe, 2014).

Further research shows that what may be illegitimate in one jurisdiction may be considered legitimate in other jurisdictions (Webb, Tihanyi, Ireland, & Sirmon, 2009). International firms need to immerse themselves in the institutional context they find themselves in. North defines institutions; “[f]ormal institutions refer to laws, regulations, and their supporting apparatuses ... Informal institutions refer to norms, values and beliefs that define socially acceptable behaviour” (North, 1990, p. 204; Webb, Tihanyi, Ireland, & Sirmon, 2009). Within emerging markets, the legal context has been defined as rule by men as opposed to rule by law. Legal traditions within the different geographies are impacted by these divergent global commercial experiences. Companies in emerging market economies should take into account existing institutions into account as these economies are still evolving (Mann & Gotz, 2006).

Contracting is mainly driven by common law and an amalgamation of the hybrid legal systems of the local jurisdictions. The contracting process needs to be integrated with both business requirements and opportunities in the market (Barton & Anderson, 2012).

Evans and Gabel (2014) argue that the majority of the research on the law and legal jurisdictions is skewed in favour of high rule of law institutions, which impose and imply that Western traditions are correct. They opine that rather the rule of law is a “fluid, qualitative process” (Evans & Gabel, 2014, p. 2). Within the emerging markets there is generally a low rule of law due to legal flexibility and these opaque systems systematically create both legal uncertainties and legal opportunities. In lower rule environments the design of the legal system calls for creative compliance as a necessity as cultural differences and local influences are highly influential in international business. When contracting, it is wrongheaded to impose Western ideals on emerging markets (Nelson & Cabatingan, 2010). Managers need to take into account this view in international business strategy.

Legal contracting strategy has to align with these global influences. Within organisations, there is a dissention between business managers and legal and the law is neglected as a strategic business source (Evans & Gabel, 2014). The contracting function needs to fit neatly into the company strategy and add value by staying abreast with the company strategy. Research has revealed that the contracting function and strategy (if it exists) lags behind the company strategy (Cummins, 2009). Global influences, company strategy and contract strategy have to be complimentary because

for every risk that is created by the law, there is a corresponding opportunity that is created (Evans & Gabel, 2014).

## 2.5 Contracts and Relationships

In recent years there has been abundant research on relational contracting. Relational contracting was developed in 1974 by MacNeil (MacNeil, 1974; Mouzas & Bois, 2013) who argued that contracts lacked utility. He highlighted that relational contracts are not a fixed list of rights and obligations they instead represent a starting point of negotiation and re-negotiation. Pandemonium ensued from the legal fraternity as to the legitimacy of relational contracting. This view point was divisive as it questioned contracting as an institution and the proper nature of contract law. MacNeil (1974) opined that contracting goes beyond the law per se (McLaughlin, McLaughlin, & MaElayadi, 2014). Relational contracting has been widely accepted by business scholars today reflecting a leaning towards relational contracting in the evolving business (Chen & Miller, 2011).

Relational contracting in its formulation fosters trust versus an exhibition of when to litigate. Relational contracting is a governance mechanism that looks at a long-term view that minimizes opportunistic behaviour (Mouzas & Bois, 2013). In MacNeil's words behaviours facilitating exchange must be flexible enough to support change within the relationship. Relational contracting roots lies in sociology and collaboration through exchange as people cannot contract outside society and a contract reflects social behaviour. Societal values shape behaviours (McLaughlin, McLaughlin, & MaElayadi, 2014). This view seems naïve in view of the corporate behaviours of AIG and Enron. The seminal researcher's view on this is that right action can be enforced via external values such as codes of professional conduct to ensure right action. However, his work contained thick descriptions, definitions and unsubstantiated claims that opened MacNeil's (1974) theory to heavy criticism. He had too many constructs and his theories were not sufficiently developed (Mouzas & Bois, 2013).

Relational contracting implies that cultural factors have to be taken into account as culture affects the way we do business (Anedo, 2012). Research on contracting in Africa by Anedo (2012) reveals that while the Chinese are highly cognisant of not losing face in their business dealings, Africans do not necessarily think of the losing face relationship aspect of business. The research shows that there are some similarities in the relational orientation of Africa and China through the Chinese Confucian concept of *Guanxi* which loosely means "intricate relational networks that

connect mutual responsibilities, trusts, and understanding with relevant people within social settings” (Anedo, 2012, p. 95). This concept applies to the African business setting as Africa similar to Chinese culture as both cultures share a sense of collectivism and the cultures will cooperate for risk avoidance (Shou, Guo, Zhang, & Su, 2011).

On the other hand, some research disputes the above opinion that as business becomes more competitive, *guanxi* or relationship systems are abating (Shou, Guo, Zhang, & Su, 2011). Additionally, globalisation is mainly driven by the West and this Eastern concept of trust, relationship and reciprocity may not readily transfer. However, Anedo (2012) closes his research by stating that *guanxi* is valid because when you take the time to understand people that you deal with – business success is the ultimate ending.

Increasingly, contracts are becoming about business outcomes and less about scope and transition. The world of business has changed and contracts have not kept in pace with this as litigation is mainly about scope and transition (Cummins, 2009). Continuing research shows that it is not commercially viable to hard-code standard terms and conditions into policies as this creates delays and stumbling blocks in negotiating and building relationships. Such practice is counter the business world that revolves around services and is indicative of old practices. Smyth and Pryke (2008) explored the positive relationship approach within project execution and contracting and the importance of soft management skills from the initiation of the projects, planning, design and execution phases. Cheung (2010) supports Smyth and Pryke (2008) view by further highlighting the need for cooperation within contracting.

It is trite that relational contracting is useful in emerging markets where new processes are permitting global interactions and new forms of contracting need to be able to support this in a way that is sensitive to societal customs and norms and allowing for long term planning. Contracting requires the adoption of new hybrids of interaction especially with the shifting perspectives in business especially where contracting is culturally defined (Abraham, Gibson, Novicevic, & Robinson, 2009).

In instances where there is high uncertainty within the business environment and where the market is thin, the parties have to collaborate to create opportunities for bilateral interactions that do not open them up to mutual vulnerability (Gilson, Sable, & Scott, 2013). In such cases, there is no room to create prospective rules to govern the contract and conduct and the emerging contract is an innovation that will be an iteration of each party’s efforts (Geis, 2009). Moreover, research shows that this uncertainty is

ongoing and the contract process will be an unfolding process as new elements come to the fore. The ante and ex-post contracting is not definitive. The view for contracting in this environment is for both parties to make transaction-specific investments; establish a framework for collaborating iteratively and the uncertainty that exists; and limit the risks of opportunism by making relation-specific investments (Gilson, Sable, & Scott, 2013). Collaboration in this instance is the ongoing review and exchange of information over the contract period.

Mouzas and Blois (2013) advocate for framework agreements when dealing with transactional agreements that do not rely on relationships. Framework agreements relate to contracts with boilerplate clauses drafted by lawyers but without an obligation to contract immediately. Framework agreements are an important form of agreement as they constitute a mutually negotiated contract. The parties have room to create their own flexibility within the contract with negotiation left to annual or periodical reviews (Mouzas & Bois, 2013). Framework agreements serve to reduce opportunistic behaviours.

Research shows that a relational culture that is collaborative and consistent leads to better deals. Unfortunately contracts and contract management lags behind the business practices and business models. Contracts are incompatible with business and new attitudes have to be adopted (Cummins, 2009).

## **2.6 Skills for Contracting**

The role of commercial managers, contract managers and contract management is not a heavily researched area in academia. The role of contract manager within this research has been mainly gleaned from the work of the IACCM and the evolving role of legal counsel.

Research shows that the contract practitioner needs cultural awareness, great competency and process management. They need to support the end to end process and apply outcome based measurement and management. A further demand is that they must have the ability to manage change, apply judgment, understand value and consequences of non-compliance (Barton & Anderson, 2012).

Contracting is complex and requires dedicated practitioners and places the practitioners in positions where they must balance competing interests and tensions in the business otherwise there is value seepage. The risk of failures of contracts is quite

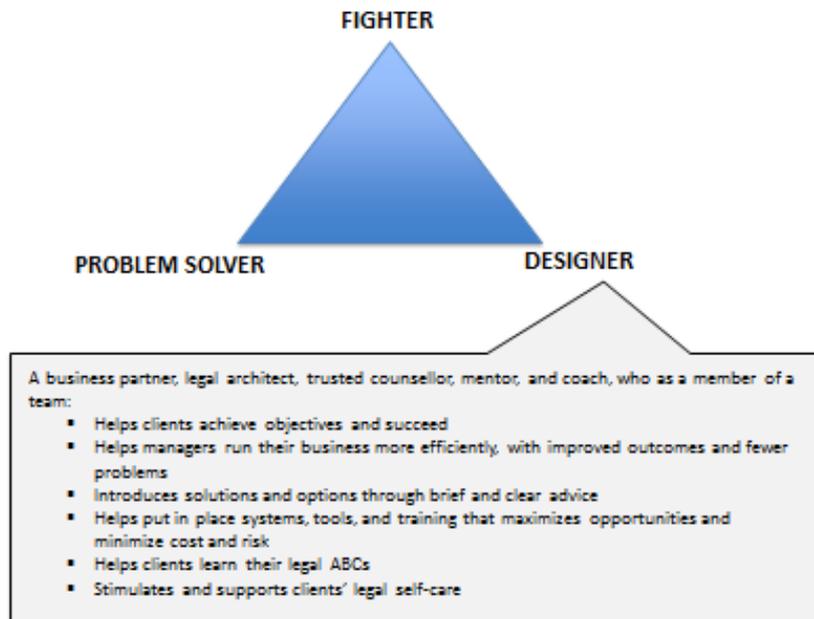
high and the role of the contract manager is, therefore, emerging as a critical competence (Cummins, Kawamoto, & Mallory, 2011). Most contract managers are legal experts and legal astuteness is a valuable managerial capability. The issue is that legal minds are trained to fervently avoid risks. There is a great call for entrepreneurial lawyers as a new breed of attorney. Conventional lawyers are not strategic thinkers. In low rule of law markets often the risk moves from the market place to the legal realm (Evans & Gabe, 2014).

Lawyers draft and interpret the contracts. Lawyers are, therefore, an intrinsic part of the contracting process. Within firms, managers and lawyers view the world differently. Lawyers recommend actions with less risk if there is ambiguity. Where there is no apparent ambiguity, the lawyers recommend inaction. On the other hand, managers tend to act with the view that the lawyers will sort things out later. Managers and lawyers need to find common ground and entrepreneurial lawyers can help the business understand the strategic opportunity in the law and contracting (Masson, 2010).

Lawyers within the commercial sphere should not be about the business of law but rather the practice of law (Evans & Gabe, 2014). These capabilities are harnessed in the entrepreneurial lawyer who is able to link law and strategy and craft firm specific competitive advantages. Within international business the entrepreneurial lawyer needs to be inventive and innovative. Language is central to contracts and language may sometimes be vague and weak enforcement mechanisms in low rule of law jurisdictions leave more room for mediation than jurisdictions with strong enforcement (Edelman, 1992; Evans & Gabe, 2014). The entrepreneurial lawyer has to strike this balance and recognise how to operate in an international realm with complexities and foreign legal systems. Entrepreneurial lawyers are able to tap into legitimate avenues beyond litigation to influence outcomes (Masson & Shariff, 2010).

Lawyers are riddled with stereotypes of being a necessary evil and such associative words as “authoritative” “conservative” “arrogant” “intimidating” “know it all” (Haapio H. , 2010). This view of a lawyer represents a missed opportunity. The role of lawyers is:

**Figure 2 The Role of Lawyers**



Source: (Haapio, 2010, p. 30) The Role of Lawyers

A proactive lawyer works strategically with the client and helps prepare contracts that reflect the goals of the client. Global counsel must have fluency in cross-cultural law, work effectively with outside counsel, manage risk or the apparent absence of risk well, be entrepreneurial, recognise opportunities in the law, remedy unequal bargaining power, and anticipates and identifies legal opportunities with legal advantages. Global literacy involves mobilising the organisation to contract in culturally mindful ways (Mann & Gotz, 2006).

Contracts remain at the core of the functions of firms. In fact, the essence of a firm is a nexus of contracts (Bird, 2010). The manager, who can extract maximum value from contracts will get better returns. On the other hand, a legal or contracting strategy without discipline or values will lead to a rudderless managerial attitude towards the law. The contract manager and company strategy must work hand in hand to allow for the firm, as a nexus of contracts, to succeed (Masson & Shariff, 2010).

Functional integration has been a key development in innovative contract management. Commercial competence has to be holistic and most companies are consolidating this role with their legal functions. An admirable trait in a contract

executive is holding their function as a corporate asset versus a personal asset (Cummins, 2009).

The IACCM defines the role of a contract professional as spanning over pre-award, post-award, and strategy and enablement. The skills and knowledge portfolio of the practitioner is demanding. The practitioner on a personal level has to be committed to change and personal development, negotiation skills, team work and problem solving skills. They have to understand the organisation, management system and business processes. They have to commit to understanding the business of the clients and industry and market norms. Legal awareness and proactive lawyering are critical skills within contracting (Haapio, 2010). Within multinationals, it is pertinent that people are able to work in multi-cultural teams, understand local business and geopolitical conditions (Cummins, Kawamoto, & Mallory, 2011). The role of the legal team in contracting becomes that of the problem solver, fighter and designer (as per Figure 2) in that they help the business achieve its objectives, helps managers run their business more efficiently and place systems, tools and training in place to maximise opportunities and reduce cost and risk (Susskind, 1998; Haapio, 2010).

The above reads as a comprehensive list and, therefore, the hiring of and the job of contract professionals should seem easy. However, there are factors that have been identified as causing variability such as maturity of the practitioner; the reporting line; geography; culture; industry and complexity (Cummins, Kawamoto, & Mallory, 2011).

Warren (2014) explored the role of the contracting officer and noted that as their workload increases, contracting officers write less complete contracts. Composing a carefully constructed contract is a time consuming exercise both in planning and execution. These less complete contracts have to be renegotiated. The more firms contract, the more contract officers they need as the effect of high workloads is the incomplete-contracting framework. It is not enough that the contract manager be qualified, there has to be enough contract managers to manage the workload. Workloads impact on the usefulness of contracts as busy contract professionals produce incomplete contracts (Warren, 2014). Workload and value delivery are inversely proportional and contract managers have to balance keeping costs under control while maintaining or improving service levels by focusing on the deals where there is the greatest returns (Cummins, 2009).

In another survey, contract management failure was cited as being caused by failure to establish and communicate clear contracting objectives. Contract managers complained about the late engagement of contract professionals in the negotiation

process and a misunderstanding of industry standards led to a lack of adequate key performance indicators. Failure to properly define the project scope resulted in contract disputes, problems with change management and payment terms. Another failure was that the traditional legal documents used did not adequately capture the requirements of the contracting parties (Cummins, 2009). Procurement contracting was also weak in its failure to capture lessons learned. Contract management as a discipline has some way to go to be future contracting fit (International Association for Contract and Commercial Management, 2012).

The research above shows that contract professionals are highly skilled individuals with a pertinent role to play in the organization. In the changing global environment contract management is a source of eliminating complexity and a competitive advantage for those firms that are future fit (Barton & Anderson, 2012). Contracting skills should support the business and its ability to drive change, adapt, and create value.

## **2.7 Terms and Negotiations**

The law of contract does not have a descriptive theory which is complete and fully explains what the law is or a normative theory that explains what the law should be. Contract terms should not undermine business processes and any terms in an agreement must focus on business outcomes, the achievement of success and risk allocation (Barton & Anderson, 2012). Some research shows that the courts develop contract law and terms (Kim, 2013) and some research argues that it is incumbent on the contracting parties to develop contracting rules (Gilson, Sable, & Scott, 2013).

Negotiating across borders is different from negotiating in domestic markets as there are different languages, cultures, legal systems and different business practices to contend with (Hum, 2007). This is coupled with the environment's level of uncertainty, stability and predictability of the contracting environment and the thicknesses of the market (Gilson, Sable, & Scott, 2013). The ideal contract negotiator, therefore, has to have "great listening skills, sensitivity to cultural differences, orientation towards people, willingness to use team assistance, high self-esteem, high aspirations and an attractive personality" (Hum, 2007, p. 355). These qualities must be coupled with economic, market and political intelligence. Cultural review is important as it helps to avoid intercultural hazards. It is important to learn cultural sensitivities, the preferred communication style, decision making styles, choice of language to be used; determining monochronic or polychronic attitudes to time, business etiquette,

importance of saving face, non-verbal signals and attitudes to hierarchy, seniority, age and professional status (Cohen, 1999).

Two types of agreements exist in negotiations the first being explicit and the second being implicit. The explicit agreement is a very detailed agreement that covers all contingencies and requires no cooperation in the future. Obligations may change but the contract remains rigid (Martin & Herbig, 1997). New and implicit agreement places the relationship above the substantive issues with a strong leaning towards the relationship. Communication in this agreement is important and obligations are unlimited and unmeasurable. Implicit agreements cover those contracts whose future is unknown (Martin & Herbig, 1997; Gilson, Sable, & Scott, 2013).

In the US culture, contracts are lengthy as they cover for all eventualities, variation is only allowed if provided for in the agreement; the end goal is to get the contract right. In Anglo cultures signature of agreement symbolises the intention to abide to the contract terms. In Chinese culture, the contract signature is not representative of finality but the beginning of negotiations; the main focus is on human relationships in order to create friendship. The Chinese will turn to the contracting party when there is a dilemma in the contract. A lack of understanding of cultures creates uncomfortable disagreements if parties are not *ad idem* on the fact that the contract and contractual obligations are definitive rights and duties (Martin & Herbig, 1997). The Mexicans treat the contract as more of an artistic exercise and do not expect the agreements to apply consistently. While there is limited research on contracting in emerging markets of Africa looking at Hofstede's dimensions (Hofstede, 1981), Hofstede's seminal work has valuable insights in the exploration of cross-cultural relationships based on the five bipolar dimensions of culture – Power Distance; Individualism/Collectivism; Uncertainty Avoidance; and Masculinity/Femininity. The African culture may be similar to the Chinese or Japanese culture with the parties accepting their rightful due and negotiating based on the spirit of the contract. The contract may be viewed as being secondary to the business transaction with disputes to be worked out mutually (Tu, Lin, & Chang, 2011).

Efficiency, speed and simplification are critical ingredients of negotiations that are focused on things that matter (Cummins, 2009). However, it is critical in new markets to negotiate and write contracts in simple understandable terms. Contract terms and negotiation styles are closely interlinked. Sensitivity to cultural norms is a great guideline for companies operating in different cultures (Martin & Herbig, 1997).

The IACCM studies the most negotiated terms each year with the most recent publication being based on the 2012 top negotiated terms (juxtaposed with the 2011 top negotiated terms). These terms show that the volume of negotiation is on the rise and the contract professionals are calling for greater collaboration. The increase in negotiations is due to the volatility of the markets and the business relationships. This stance is due to the tactical nature that is adopted in negotiations and in contracting. Contract terms and models reflect firms' priorities. The 2012 most negotiated terms are a call for senior management to rethink how they form and manage trading relationships (IACCM, 2012). The terms that are negotiated are mainly influenced by the fragmentation of markets and major companies are being forced to shift negotiations in international markets and standard templates are being challenged.

Discourse shows that there has been an increase in the frequency of negotiation and of post-award claims and disputes motivated by rapid shifts in power within industries and between countries and economic conditions. This has led to adversarial and cost-cutting behaviour. Research on the most negotiated contract terms reveals the need for "intelligent contracting" (IACCM, 2012, p. 3). Contract negotiators need to remain alert and vigilant to the changing landscape with regards industry and geography changes and regulatory risks that affect contracts.

**Table 1 2011/2012 Top 10 Negotiated Terms**

<b>Top 10 Negotiated 2011</b>	<b>Top 10 Negotiated 2012</b>
Limitation of Liability	Limitation of Liability
Indemnity	Indemnification
Price / Charge / Price Changes	Price / Charge / Price Changes
Intellectual Property	↑ Scope and Goals
Payment	Liquidated Damages
Liquidated Damages	Payment
↓ Performance / Guarantees / Undertakings	↑ Data Protection / Security
↓ Delivery / Acceptance	Intellectual Property
↓ Applicable law / Jurisdiction	↑ Service Levels and Warranties
↓ Confidential Information / Non-disclosure	↑ Warranty

Source: IACCM (IACCM, 2012) Top Negotiated Terms

## **2.8 Innovation and Technology in Contract Law**

Common law contracting models dominate international trade and in global business these are incorporated into hybrid legal systems and these pose challenges to global contracting (Barton & Anderson, 2012). Modern contracts have developed alongside a growing sophistication of a market economy whose enforceability encouraged wide ranging transactions with strangers (Kim, 2013). This is the context within which contract innovation and technology use should take place.

### **2.8.1 Innovation**

Research has shown that that contracting should be based on quality, innovation, and predictive modelling. This means that innovation will have a greater role to play in contracting coupled with contracts that have pictures and diagrams and not only word language based (Barton & Anderson, 2012). There has been a lot of attention on proactive law. Proactive law seeks to provide business certainty by avoiding pitfalls and avoiding disputes before they occur. Proactive law further seeks to promote and strengthen ways that the law can be used to create value, right actions and build a solid foundation for business through forward planning, dispute avoidance and dispute management (Haapio, 2010). Disputes can add to the contract cost and nullify benefits received. However, other research on the law seeks to maintain the sanctity of the law and contracting outside of contract and legal principles may seek to further create opportunistic behaviour especially in low rule jurisdictions and where the market is not thick to create precedent of issues (Evans & Gabel, 2014; Gilson, Sable, & Scott, 2013).

The challenge is to make the law more fully integrated with business life (Susskind, 1998; Susskind, 2000). Contract innovation is possible through benchmarking and external international standards that set the standards for both incentives and penalties. The role of lawyers, legal managers should shift from protective lawyering to that is reactive to problem solvers and designers focused on being a legal architect who as part of a team, help the business achieve objectives and succeed; help managers run their business more efficiently and put in places systems, tools, and training that maximise opportunities and minimise costs and risks. Proactive lawyers merge business and legal foresight and they need to understand the business, strategy and people. In other words, a lawyer should be a designer (Haapio, 2010). A forward thinking legal designer integrates the concept of inter-firm co-operation and long term

orientation that spans the sequence of exchanges into contracts. This business relationship can be supported by a long-term contract or a looser agreement (Arrighetti & Reinhard, 2007) and tools of quality control, contract innovation, and predictive modelling (Barton & Anderson, 2012).

Contracts are only useful if they are responsive to the marketplace needs and realities. The digital age has brought about new forms of contracting. However, researchers are not in agreement as to who initiates change in contracting. While society's definition of contracts as a legally enforceable promise has not changed, Kim (2013) argues that the courts need to adapt and evolve with the changing contract dynamics. She emphasises the role and wisdom of the courts in being dynamic and flexible and adaptive. On the opposite end of the spectrum, Gilson and others (Gilson, Sable, & Scott, 2013) assert that the courts must merely follow the instructions of the contracting parties in responding to innovations that are driven by the changes in the parties' business. It is the parties that must drive the change. The opposing views in innovating in law and the assertion that law is not law per se (McLaughlin, McLaughlin, & MaElayadi, 2014). Where there are dysfunctional institutions, innovation can be problematic and serve to cause further contracting confusion. The law requires stability in order to be followed (Kim, 2013).

Work has been done on benchmarking what a visually appealing contract would entail. This research was gleaned from user feedback and academic research. The visually appealing contract encourages certain type of behaviour. Contractual visuals should be based on cognitive capacity (Miller G. , 1956), strategic reading (Paris, Wasik, & Turner, 1991), affordance (Gibson, 1977) and schemata (McVee, Dunsmore, & Gavelek, 2005).

- Cognitive capacity (Miller G. , 1956) is a psychology term that refers to the limits of what the human mind can digest.
- Strategic reading (Paris, Wasik, & Turner, 1991) is the service level cues that readers respond to.
- Affordance (Gibson, 1977) is the quality of the design that encourages certain kind of behaviour from recipients based in the quality of the design.
- Schemata (McVee, Dunsmore, & Gavelek, 2005) are the mental models that are applied.

The above can be distilled into the following 16 benchmarks based on four criteria:

**Table 2 Benchmarking for Visual Documents**

<b>Language criteria</b>	<b>How easy it is for people to understand the document.</b>
Directness	Use direct language; make sure it is clear who is doing what.
Plain Language	Extent to which the vocabulary is easily understood.
Grammar and Punctuation	Conformity with the practice of good standard English.
Readability	Ease with which the reader can follow the argument of the text.
<b>Design criteria</b>	<b>The visual impact of the document and how its design influences usability</b>
Legality	Use of legible fonts and text layouts.
Graphic elements	Use of tables, bullet lists, graphs, charts, diagrams, etc.
Structure	Quality of documents organisation in relation to its function.
Impression	Attractiveness and approachability of the document overall appearance.
<b>Relationship criteria</b>	<b>How far the document establishes a relationship with its users.</b>
Who from	Is it clear who is communicating?
Contact	Whether there are clear contact points and means of contact.
Audience fit	Appropriateness to the skills and the knowledge of the users.
Tone	Matching the style and language to the context.
<b>Content criteria</b>	<b>How the content and the way it is organised deliver the document's purpose</b>
Relevance	How relevant the context is to the recipient.
Subject	Whether it is clear what the communication is about.
Action	Clarity about what action is required from the user.
Alignment	Compliance with the organisation's intended aims and values.

Source: Walter (April 2011 Technical Paper 2, p. 5). 16 Benchmarking Criteria for Visual Documents.

The user-friendliness of contracts has been taken for granted. Contracts should be interfaces for collaborations and communication tools, after all pictures avoid ambiguity of interpretation (Passera & Haapio, 2011).

### **2.8.2 Technology**

Technology has made way for these new forms of interaction (McLaughlin, McLaughlin, & MaElayadi, 2014). Research shows that it is imperative for organisations to have distinct technological competences as they assist with competitive advantage and assist in the creation of new opportunities. It is incumbent on top management to implement a culture that supports technology in all its dealings (Rojas, Garcia, Morales, Mihi, & Sanchez, 2011b). The role of technology within companies and in contract management cannot be overemphasized as it assists firms in their achievement of competitive advantage. The IACCM's research shows that contract automation assists contract managers by freeing their time to focus on non-routine contracts and to give added value to contracting partners (International Association for Contract and Commercial Management, 2012). While technology has evident advantages, research shows that the benefits need to match the context (Fourne, Jansen, & Mom, 2014).

Other research on technology avers that while contract law must adapt to changing social and economic circumstances, technology gives rise to problems in contracting. Electronic signatures have given way to unforeseen opportunities of fraud; technology remains untested and it is not standardised (Broderick, Gibson, & Tarasewich, 2001). Technology has given rise to new forms of contracts, which has created a new set of problems and legal puzzles (Moringello & Reynolds, 2013).

Technology delivers data that the business should interpret into useable metrics. Technology also allows for transparency between data and contract performance. Research shows that the effects of technology in the varying markets are varied as there are different nuances that exist (Arrighetti & Reinhard, 2007). Berchicci (2013) argues that innovations and technology are interlinked rapid technological changes dictate that the timing of innovations, the acquiring external innovations and in-house innovations must be aligned (Berchicci, 2013). Countries operating both in developed and in emerging markets have to integrate their systems and have to share complimentary resources (Fourne, Jansen, & Mom, 2014). Emerging markets are at a disadvantage if they do not share the same technology and innovation for contract enablement.

Differences in contracting innovation and technology are dependent on the maturity of the practitioner; the reporting lines; geography; culture; industry and complexity (Cummins, Kawamoto, & Mallory, 2011). For instance, electronic signatures are heavily dependent on the legal regime with the European Union's Electronic Commerce Directive (Electronic Communications Act of 2000) being the leading directive. Similar laws exist in several countries such as South Africa's Electronic Communications and Transactions Act (Electronic Communications and Transactions Act, 2002). The enforceability is called into question as there has to be an exploration of whether the signature will be enforceable or whether it will be an outlier of local practice. Risk and resistance has to be investigated (Cummins, 2009).

Innovating in contracting and the use of technology are invaluable tools. Local conditions have to be taken into account for the effectiveness of these tools. Hybrid systems need to be matched with international and external benchmarking standards to address the risks of global contracting. Contracting innovatively and with technology is a balancing act.

## **2.9 Conclusion**

CEOs main struggle is to understand the complexities brought by the interdependencies and interconnectedness that global businesses present (Barton & Anderson, 2012). Corporate leaders need to become better appraisers of the myriad of information they encounter in order to navigate globalization (Bartlett & Beamish, 2014). Global businesses operate in contexts of high rule of law and low rule of law; and functioning institutions and institutional voids (Evans & Gabe, 2014). Western contracting and business models cannot be transposed to emerging markets. However, research shows that proactive and preventative contracting can simplify this complexity of interdependencies and interconnectedness for CEOs (Barton & Anderson, 2012; Haapio, 2009).

Well drafted contracts guide and encourage desired performance; clarify, allocate and manage responsibilities, remedies and risk. This is achieved by avoiding invisible or implied terms by defining all terms explicitly and by addressing all parts that were important in the negotiation in the contract (Haapio, 2009).

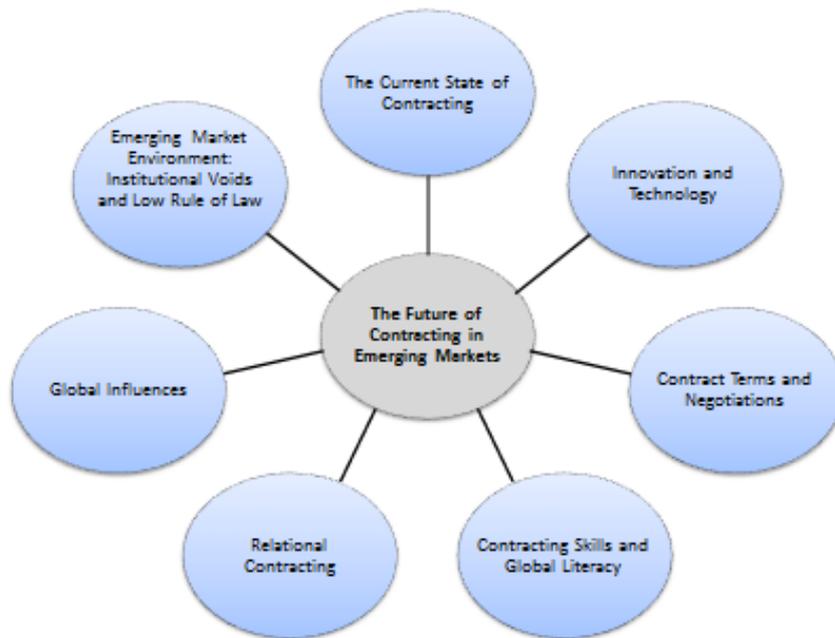
Contracts of the future will be designed to be fit for purpose and should deliver value through the fair apportionment of risks. Contracts can become a source of great

competitive advantage and differentiation as they express the capability, commitment and relational values. The research shows that contracting is critical in managing complexity in a global business especially as economic conditions are pushing organizations into new and emerging markets that are rife with unfamiliar cultures and business practices (Chironga, Leke, Lund, & van Warmelen, 2011). A consideration of institutional voids and the differences in legal regimes should be central considerations. Strategies that apply in the developed world are inapplicable in emerging markets due to contextual differences. Multinationals need to be able to manage this tension and have strategic agility (Fourne, Jansen, & Mom, 2014).

The research indicated that there are certain key drivers for change in contracting. Current contracting principles are not responsive to global business demands. Businesses have to adopt greater responsibilities for outcomes within contracting and the contract should not be the end goal. Technology is challenging the boundaries of business and creating greater interdependencies and interconnectedness. In addition, the speed of change and frequency of change requires that relational contracting should be adopted (Gilson, Sable, & Scott, 2013). Contracting strategy should have integration with market strategies, product development and service design to ensure that commercial terms support business goals and the obligations of the business (Barton & Anderson, 2012).

The contracting future lies in the choice of trading partners grounded in well-thought commercial terms and an amalgamation of international and hybrid legal systems (Cummins, Kawamoto, & Mallory, 2011).

**Figure 3 Summary of the Literature Review**



## **Chapter 3: Research Questions**

### **3.1 Introduction**

This chapter presents the research questions that will be used to understand the future of contracting in emerging markets. Zikmund, Babin, Carr and Griffin (2011) state that a research question is a statement that looks at the logical relationship that exists between concepts. This relationship can be explored either in the negative or affirmative. The literature review has been instructive in formulating the research questions stated below.

The literature suggests that the biggest challenge for chief executives is the volatility of the environment within which they operate and this leads to uncertainty in the successful financial outcomes of contracts (Wang, 2013). Contracts are central to the establishment of both legal and relationship terms. Other researchers view contracts as being more nuanced in that some contract clauses play a coordination role while some pose barriers to trust development (Vanneste & Puranam, 2010). The IACCM, as the main contracting board, opines that the role of contracting has to change to address the complexity of global businesses by shifting contracts from being a source of complexity to a process that overcomes complexity (Barton & Anderson, 2012). The present study is concerned with the role of contracting in Sub-Saharan Africa and intends to specifically address the future of contracting. This will be explored through the research questions posed below. The questions seek to understand the current state and the future of contracting in emerging markets. The participants will be requested to draw on their current knowledge to project what the future of contracting will be.

### **3.2 Research Questions**

#### **Research Question 1**

Is there integration between contract management and contract relationship management?

### **Research Question 2**

Is there alignment between trading partner management and the strategic goals and business making decisions of the business?

### **Research Question 3**

Have the negotiation techniques been transformational and have they enabled the improvement of partner selection?

### **Research Question 4**

Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?

### **Research Question 5**

Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?

## **3.3 Conclusion**

The research questions above will aid the exploration on the role and future of contracting in emerging markets. The next chapter will justify the methodology chosen in order to address the questions above.

## **Chapter 4: Research Methodology**

### **4.1 Introduction**

The research questions set out in the last chapter were answered in the manner set out in this chapter. This chapter further sets out the rationale that led to the research design, methodology, the reasons for choosing the design and the limitations of the chosen research.

The research was exploratory in nature in order to determine the current state and future state of contracting in Sub-Saharan Africa. This research was undertaken to build on the study by the IACCM to determine the future of contracting (Barton & Anderson, 2012). The original study was done on companies in the West and how they contracted with companies in the East. The present study was based on contracting in Africa, Sub-Saharan Africa in particular. At the time of the research limited research had been conducted in this area in African markets.

### **4.2 Research Method and Rationale for Selection**

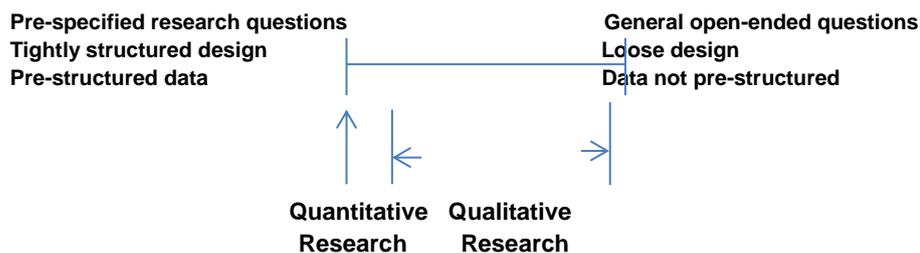
This research was of an unfolding nature and was, therefore, more suited to a qualitative study (Punch, 2002). This study had a loose design and open-ended questions were asked. The study was emergent and was guided by existing theory with questions identified from the literature. As the study progressed the role and purpose and the future of contracting in emerging markets was revealed by the qualitative analysis. The new revelations added to the existing studies and research on contracting in emerging markets.

Qualitative research allows for in-depth interviews where the perspectives of the people being interviewed are a vital source of information. Language is the data of in-depth interviews (Patton, 2002). Language allows for the capturing of complexity and perceptions. In-depth interviews allow for spontaneity and flexibility in the capturing of complex information (Thyer, 2001).

A further reason for qualitative analysis being more suitable was premised on the fact that qualitative analysis is suited to research that focuses on interpretations, meaning and the significance of behaviour. This research seeks to answer the “what” and the “how” (Punch, 2002). On the other hand, quantitative study is more suited to studies where there are clear variables, data sets, and is pre-structured and seeks to answer

“how much” and “how many” (Punch, 2002). This makes the reductionist approach of quantitative analysis unsuitable for this exploratory study. Qualitative work is suited to facilitate the comprehension of phenomena not well understood and to develop existing theory and beginning to fill these gaps (Mair & Marti, 2009). Additionally, the IACCM study was a qualitative study and this allows for the comparison of data obtained.

**Figure 4 Pre-specified versus Unfolding: the Time of Structure**



Source: Punch (2002, p. 41) Pre-specified versus unfolding: the timing of Structure

Leedy and Ormord (2001) further recommend that the qualitative design approach is appropriate when the researcher needs to delve deeper into the subject at hand. This method is suited to events that need to be traced over time rather than looking at an incident. Daft (1983) notes that research is a well-honed craft wherein the researcher undertakes a deep of exploratory study in order to continuously question the data presented. The asking of the “why” question leads to the discovery of the real issues and depth of knowledge. The nuances of contracting in emerging markets are only discoverable if this journey is undertaken through qualitative research.

Criticisms have been levelled against qualitative research in that it lacks the rigour of quantitative research. Qualitative research relies on issues and concepts that are influenced by prior learning and the scope for misinterpretation is huge. However, researchers have defended qualitative research by acknowledging the central role of the researcher and how this provides high quality data and findings and deep meaningful insights only possible with the central role of the researcher (Pierce, 2008).

In this case, the exploration of contracting and the future of contracting in emerging markets, an area with limited research and little existing theory in emerging markets, exploratory research was deemed appropriate.

The researcher collected publicly available secondary data on the companies before the interviews to glean into the challenges that the company faces in emerging markets and to understand the context.

### **4.3 Population and Sampling**

The population of this study was all the Sub-Saharan Africa members of the IACCM who represent different companies. The IACCM is a worldwide membership driven organisation that is committed to ensuring that public and private sector organizations and professionals achieve world-class standards in their contracting and relationship management process and skills. The main aim of the IACCM is to provide insight to the leading-edge contracting and commercial skills, policies, procedures and methods for managing enterprise and individual risks so that the contract professionals can implement best practice governance of contractual commitments and trading relationships (IACCM, 2014).

This study included all IACCM members in order to give added depth to the research. The members of the IACCM are contract managers, commercial managers, negotiators, in-house attorneys and supply chain managers (collectively the IACCM members or contract professionals). Additionally, these members are able to use their discretion and make decisions in their respective workplace, which makes them ideal participants of this study.

### **4.4 Sampling Method and Size**

Non-probability sampling techniques were used together with quota and convenience sampling. This ensured the population was representative of the IACCM contract professionals in Sub-Sahara Africa. The interviewees further needed to be operating regionally within Sub-Saharan Africa. Quota sampling was used (Saunders & Lewis, 2012) to increase representativeness of the IACCM members in Sub-Saharan Africa. The researcher ensured that the quota requirements were met and that participants were selected based on the convenience of ease of access of the contract professionals and to ensure that the participants were from the different countries in Sub-Saharan Africa. The five categories as further defined below were chosen to represent the majority professions within the IACCM.

In qualitative research, sample specificity rather than a representative sample is more important. It is more important within qualitative research to locate people who fit the sample than to have a large sample size (Thyer, 2001).

An initial sample size of fifteen participants was chosen in order to gather rich data. However, ten interviews were conducted in order to be representative of the categories of the individual members in the IACCM being commercial managers, contract managers, negotiators, or in-house attorneys, and supply-chain managers. Punch (2002) notes that qualitative samples tend to be smaller than in quantitative studies and sample size is a function of both the purpose of the study and practical concerns.

McCracken (McCracken, 1988) opines that eight interviews are adequate for the long interview technique. A total of ten interviews were conducted to include all quotas, which meant two interviews were conducted per quota. The quotas were selected to represent and to compare data across members of the IACCM. The similarities and the differences of the data from the quotas were also compared. Saunders and Lewis (2012) harangue that quota samples ensure that the chosen sample is characteristic of the population. The researcher was aware of the fact that if data saturation (Saunders & Lewis, 2012) was not reached, then more participants would have to be added.

**Table 3 The Quotas were Named as Follows:**

<b>Title</b>	<b>Category</b>	<b>Number of Respondents</b>
Commercial Managers	A	2
Contract Managers	B	2
Negotiators	C	2
In-house Attorneys	D	2
Supply Chain Managers	E	2

Source: Researcher's interpretation

#### **4.5 Unit of Analysis**

The unit of analysis is the future of contracting in emerging markets from a contract professional's perspective based on their first-hand knowledge. The researcher made a comparison of different professionals in different countries and whose companies operate regionally within Sub-Saharan Africa in order to obtain more reliable information.

## 4.6 Questionnaire Design

Five thematic questions were asked based on the questions that were developed by the IACCM. The main questions were retained as they were tried and tested and adequately answered the research problem. The rest of the questionnaire with a total of 30 questions is attached as Appendix C and these questions were gleaned from the literature. As the research was also on the future of contracting, the participants' responses are a speculation of how contracting will develop over the next five years. The questions asked were under the following themes:

1. Is there integration between contract management and contract relationship management?
2. Is there alignment between trading partner management and the strategic goals and business making decisions of the business?
3. Have your negotiation techniques been transformational and enabled you to improve partner selection?
4. Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?
5. Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?

The participants were asked to consider what the future of contracting would be over the next five years as they responded to the questions. The questionnaire contained general questions such as industry, roles, job titles, the primary geography within which your company operates, and years of contract exposure and contract values.

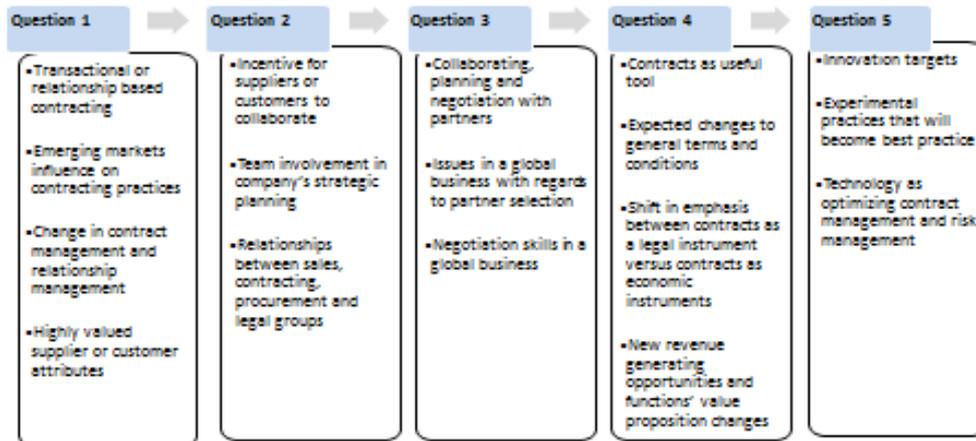
General questions geared at directing the thinking of the professionals to project into the next five years were as follows:

1. Common law versus international contracting.
2. International standards application to contracting.
3. Focus on simple language versus legalese.
4. Use of visual techniques.

The five themes informed the clarifying questions that were asked under each theme.

## Figure 5 Researcher's Questionnaire Design and Five themes

(further detailed in Appendix C)



Taking into account all the answers above – skills required in the future were explored. This included skills and skill types, top key performance indicators (KPIs) that will determine your team's success, and use of outside contracting resources from outside the firm.

The researcher in the beginning assured the participants of confidentiality and took steps to assuage any fears. A consent letter with a non-disclosure clause, which is attached as Appendix A was signed. General revelatory questions were also asked and these included work experience, qualifications, frequency of negotiations, once-off negotiations versus ongoing negotiations, and the types of contracts that they deal with. The researcher undertook to share the findings within the final report with the participants.

### 4.7 Data Collection

As the research was open-ended individual in-depth face-to-face or telephonic interviews were deemed appropriate. Saunders and Lewis (2012) state that semi-structured interviews are instructive where there is uncertainty about the answers and

where only some questions can be predetermined. The questions set by the researcher were open-ended as prescribed by Punch (2002) as open-ended questions allowed for further probing and the development of rich data for analysis.

The questions that were used in the survey were designed based on the literature review and the work of the IACCM. As the questions were semi-structured, further questions were asked based on the emergent themes and were informed by the answers as proffered by the participants (Punch, 2002). This allowed for rich descriptions and in-depth collection of data.

The interviews themselves were recorded in paper format (handwritten notes) and in electronic format (recorder). This dual recording was done in order to ensure the accuracy of the data. The researcher used thick descriptions as part of the data collection method. This allowed thick interpretation as well and the intended end result was to enable the reader of the research to obtain contextual immersion (Patton, 2002).

As the research was of an unfolding nature, additional questions were asked in order to glean more into the responses. The responses showed that doing business in Nigeria lends itself to different rules and that relationships were critical to contracting. Additional questions and full responses are attached as Appendix D (Contracting in Nigeria) and 5 (The importance of relationships).

#### **4.8 Piloting the Questionnaire**

The interview questionnaire was piloted firstly with four business associates in a similar field and with a similar profile to the intended participants. One belonged to the IACCM and three did not. This enabled the researcher to test comprehension and relevance of the questions based on the feedback received (Riege, 2003). Piloting also enabled the researcher to check for errors in the design on the inquiry (Saunders & Lewis, 2012). The second pilot was done with two contract professionals outside the chosen sample. The pilot led to no removal of questions but the addition of questions and a clarification of question five. The detailed description of this pilot study is attached as Appendix B.

#### **4.9 Problems encountered**

The researcher foresaw that there would be an issue with data collection due to the geographical dispersion of the participants. Some of the interviews had to be conducted over the phone and some face-to-face. This possibly had the impact of influencing the answers received and the descriptions proffered. The face to face interviews provided for thicker descriptions.

One interview that was conducted over the phone was inaudible on the recorder. The researcher had to rely on handwritten notes. This research had valuable insights but did not allow for rich descriptions.

There was an overwhelming majority of IACCM members in Southern Africa with some countries lacking representation or having one identified IACCM member, which made access to members outside of Southern Africa quite difficult. Access was an issue for the researcher. A representation of different countries allowed for greater representation of contracting in emerging markets.

#### **4.10 Data Analysis**

Data needs to be interpreted as all knowledge needs to be imbued in theory (Silverman, 2001). This process of analysis needs to be transparent. The data further needs to be interpreted in such a way that it is proportional in depth and to the extent to the information to which it will be applied. The method of analysis has to be relevant to the research question that was asked. Any information that is discounted must first be identified, considered, other explanations must be justifiably discounted before any firm conclusions are reached (Pierce, 2008).

The analysis was done methodically. The interviews were recorded in audio format and they were transcribed by an expert transcriber. The researcher double-checked the quality and accuracy of the transcription. The analysis of the data was dependent on the thick descriptions from the data collected, which led to a deep analysis (Patton, 2002).

The data was analysed in the same week that it was collected while the information was still fresh in the researcher's mind. Technological advances have allowed for processing and analysis of data, though the maxim still holds true – rubbish in, rubbish out (Pierce, 2008). The researcher took a conscious decision to analyse the data

manually in order to get intimate with the data. Saunders and Lewis (2012) affirm that qualitative data can be analysed manually. They further state that you can start analysing data before you collect all data as this allows you to note when you have reached saturation. Saturation was noted by interview seven.

The data was separated into categories as identified in the literature review (Saunders & Lewis, 2012). The researcher then searched for similarities and differences across the interviews, in particular similarities and differences across all the quotas. Outputs were analysed to see if there was meaningful patterns emerging – such as the frequency of themes (Yin, 2009). Saunders and Lewis (2012) call the analysis of qualitative data completing a jigsaw puzzle – it is an exercise in looking for patterns by categorising data that is similar to get a complete picture. Literature is used to review how the puzzle pieces fit together (Saunders & Lewis, 2012, p. 191). The researcher used both deductive and inductive reasoning. Deductive reasoning was gleaned from the literature review and inductive reasoning was garnered from the data that presented and had no clear link to literature review or clear framework (Saunders & Lewis, 2012).

Yin (2009) states that in order for the analysis to be of the highest quality, the following principles are important:

- (i) The evidence should leave no loose ends and the analysis should show how it used all the evidence available.
- (ii) It must analyze alternative explanations.
- (iii) Display knowledge of current thinking about the topic.

The researcher ensured the steps were followed to assure the quality of the analysis.

#### **4.11 Data Validity and Reliability**

Qualitative research inevitably presents reliability and validity issues. It is important for the researcher to determine the quality of the data that is presented. This is an integral part of the research process. Thyer (2001) avers that qualitative research should not overly concern itself with generalisability of the study findings or external validity as qualitative study is meant to reveal experiences and not to test them.

The rigour within qualitative research should aim for trustworthiness and credibility. Threats to trustworthiness are contained within the data collection method itself as the

participants may be unwilling to reveal certain information. Furthermore, the interviewer may interject with their own views. This can be combatted by asking specified questions as this allows for the elimination of human error. The researcher bore in mind that too much structure may be too restrictive and as a result would compromise both the credibility and trustworthiness as researcher bias may become too embedded in the research instrument (Thyer, 2001). The solution for ensuring credibility is researcher self-monitoring and coming up with questions that are “open-ended, neutral, singular and clear” (Patton, 2002).

Healy and Perry (2000) have established six criteria to specifically judge the reliability and validity of research within the realism paradigm. Riege (2003), however, contends that there is little guidance proffered on how to conduct the tests. In response, Riege (2003) developed a comprehensive test to establish validity and reliability, which entails a confirmatory audit that examines the data, findings, interpretations and recommendations; triangulation; researcher self-monitoring; thick descriptions; and specific procedures for coding and analysis. These will be applied throughout the research process from research design, data collection to data analysis.

The collection, analysis and interpretation of data is inevitably reliant on the personal bias of the individual conducting the research. In order to minimise this, the data was triangulated (Patton, 2002) using a variety of methods. Triangulation is the use of a variety of sources of data to either confirm or disconfirm consistency with what people have revealed during interviews. Contradictions in information may reveal hidden patterns and may reveal a need for a more focused study (Thyer, 2001). The researcher was alert to the need for triangulation.

Patton (2002) suggests different ways of triangulation. The first is corroborating evidence by gathering information from different sources. Data from multiple sources has a greater overall quality. This includes using both interviews and the analysis of archival records. Open-ended questions should not be solely relied on and documentary evidence has to be added to the analysis for corroboration. Each research report should contain enough data so the reader of the report can draw independent conclusions. Given the time frame of the study, the researcher compiled a limited database with own notes being the main source. Additionally, in order to increase the reliability of information, the researcher linked the questions to the protocol topics and reverted back to the research questions (Yin, 2009).

If the above is achieved, then construct validity and reliability would have been achieved and qualitative research study methodological problems overcome. The steps above ensure that the final results will justify construct validity and reliability.

#### **4.12 Ethical Considerations**

Punch (2002) states that data collection needs to revolve around maximising data quality and dealing with the issues of access and ethics. This admittedly required permission from the participants and it is a requisite part of voluntary participation that participants be informed that they may withdraw at any time (Thyer, 2001). Miles and Huberman (1994) point out that the main recurrent ethical issues need to be considered for the overall integrity of the research and these include informed consent, which is freely given; privacy issues in how the research will be an intrusion into people's lives; confidentiality and anonymity through ensuring the safeguarding of information of the interview participants and their organisations; the ownership of the data and conclusions after data is collected and analysed; and, lastly, there is an obligation not to misuse the results.

Above are the frequent ethical issues. However, there are other ethical considerations which are less frequent but equally important. These include – honesty and trust based on the relationship with the interviewees; reciprocity with what the participants wish to gain from the research; intervention and advocacy in choices to be made on hearing potentially harmful or illegal behaviour during the process of the research and considerations as to whether the research has the potential to hurt the people involved (Miles & Huberman, 1994, pp. 290-297).

Within the research process, the researcher obtained the informed consent of the participants. The participants signed a consent form before the interviews and the researcher signed non-disclosure agreements at the request of the participant. The participants were further informed that they could withdraw at any time. Due to the potential sensitivity of the nature of the proprietary information being collected from the participants, the participants' names were not requested or recorded. Any information that was proprietary was masked without losing pertinent information. The researcher further made a point to share the results of the research with those participants who wished to have access to the research findings and conclusions. There was no threat of the secondary ethics issues as identified by Miles and Huberman (1994) and the researcher kept these potential ethical issues in mind at all times.

#### **4.13 Research Limitations**

Bias is a part of the research process as the research topic choice is personal; therefore, there will be a danger of self-fulfilling prophecies through inferring into people's conclusions. Beatrice Webb states that, "Finally [the researcher] must realise that he is biased and somehow or other he must manage to discover the bias" (Pierce, 2008, p. 45). Minimising bias requires flexibility and intellectual awareness.

The researcher is a member of the IACCM and has knowledge of the contracting process in emerging markets. This previous knowledge may have sensitised the respondents and influenced the information received and may have resulted in some biased findings.

The research was limited to members of the IACCM in Sub-Saharan Africa. The study is limited to IACCM members and cannot be extrapolated across all commercial managers, or contract managers, or negotiators, or in-house attorneys in emerging markets as the sample selected will not be representative.

The role of contracting and the future of contracting may manifest itself differently across the different sectors. The exploration is on the future of contracting and this calls for speculation into the future based on current understanding. Furthermore, the respondents were qualified by being IACCM members and were not at the same level within their respective companies. This made it difficult to compare the results from the different respondents with certainty. Lower level employees may also not be able to influence the contracting strategy or decision making process in the company. The sampling technique used may have impeded balanced insights.

The companies had privacy concerns and did not readily give certain information. This information was concealed or masked without losing the information pertinent to this research. Non-disclosure agreements were signed to protect the privacy of the companies.

The researcher is resident in South Africa and IACCM members sample chosen is in Sub-Saharan Africa, this made access difficult and resulted in some interviews being face to face and some being telephonic. Most of the interviews were conducted over the phone and the lack of personal interaction may have had an influence on the results received. On the other hand, the researcher may have unconsciously influence the interviewees that will be interviewed face to face.

This study covered Sub-Saharan Africa and different laws of the regions and professional nuances within the professionals in the different countries may have had an influence on the answers received and the views on contracting. Furthermore, the literature that was relied on by the researcher was mainly developed in the West and may not be readily transferrable to emerging markets.

## Chapter 5: Results

### 5.1 Introduction

The purpose of this research was to explore the current and future state of contracting in emerging markets. The future of contracting was juxtaposed against five questions that were identified from the literature review in order to understand and answer the identified research. This chapter contains the findings of the ten in-depth interviews conducted. The findings of the in-depth interviews will be categorised by the respondents being: Commercial Managers (**A**), Contract Managers (**B**), Negotiators (**C**), In-house Attorneys (**D**), and Supply-chain Managers (**E**). The five categories of participants will be explained in detail and thereafter the results will be arranged in the sections below (Table 4), which will include demographic detail of the chosen sample including the company descriptions; the responses and the summary of common trends.

Respondent 7 was interviewed and was chosen deliberately (purposively) as a local advisor to the IACCM and resident in Nigeria as prior interviewees had indicated that Nigeria was an interesting territory to do business given its identified nuances. The responses showed that doing business in Nigeria lends itself to different rules and influences how external parties deal with Nigerian firms. The additional questions and with full responses are attached as Appendix D.

**Table 4 Summary Description of the Demographics of the Interviewees/Respondents**

<u>Job Description and Quotas</u>	<u>Respondent number</u>	<u>Years' Experience</u>	<u>Main Contract Types</u>	<u>Contract Exposure</u>	<u>Average Contract Size</u>	<u>Country Exposure (Sub-Saharan Africa)</u>	<u>Level in Company</u>	<u>Buy Side/Sell Side/Both</u>
<b>Commercial Manager</b>	1	12	Engineering; Service exchange; Mining.	Several a month	US\$12 million	Southern Africa cluster: Botswana, Mozambique Namibia, South Africa, Zimbabwe	Functional manager	Sell Side
<b>Commercial Manager</b>	2	13	Service agreements for	Several a month	US\$10 million	African footprint	Director Level	Buy Side

			long-term ongoing business.					
<b>Contract Manager</b>	3	7	Buy-side contracts; Content; and Distribution Agreements.	Several a month	US\$5 million.	All countries in Sub-Saharan Africa	Functional manager	Both Sell and Buy Side
<b>Contract Manager</b>	4	2	Investment agreements	Several a month	US\$5 million	All countries in Sub-Saharan Africa	Executive level	Both Sell and Buy Side
<b>Negotiator</b>	5	39	Mining, Maintenance and Repair Contracts, Man On Site Contracts	One a month	US\$70 million	All countries in Sub-Saharan Africa	Executive level	Sell
<b>Negotiator</b>	6	15	Power Generation Sales and Purchase Agreements	One a month	US\$10 million	Angola, Madagascar, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Zambia, Zimbabwe	Functional Manager	Both Sell and Buy Side
<b>In-house Legal Counsel</b>	7	7	Agreements of Sale; Distribution Agreements	Several a month	US\$10 million	Sub-Saharan African countries	Functional Manager	Both Buy Side and Sell Side
<b>In-house Legal Counsel</b>	8	3	Agreements of Sale of Shares, Rights Issue and Mining.	Several a month	US\$9 million	African footprint	Functional Manager	Both Buy Side and Sell Side
<b>Supply-chain Manager</b>	9	12	All types of Vendor Agreements	Several a month	Over US\$100 million	African Footprint	Executive Level	Both Buy Side and Sell Side

<b>Supply-chain Manager</b>	10	3	Manufacturing Agreements.	Several a month	Over US\$200 000	South Africa, Namibia, Mozambique , Botswana.	Functional Level	Both Buy Side and Sell Side
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Source: Researcher's own interpretation of data

The interviewees have a total of 113 years' experience and average deals of US\$43 million and predominantly operate within emerging markets in Sub-Saharan Africa.

**Table 5 Summary Description of Companies**

<u>Company</u>	<u>Description of Companies</u>
1	Engineering company providing various services and mining equipment to mining concerns within Sub-Saharan Africa.
2	Fund management company buy and sell listed equities on the various exchanges on their behalf.
3	Digital and technology company providing services to Sub-Saharan Africa.
4	Financial services and investments management.
5	Engineering company which supplies diesel engines, complete propulsion systems and power systems; including on-site and off-site maintenance services and training. This company provides services in Sub-Saharan Africa.
6	Power generation and generator sales global company.
7	Fast Moving Consumer Goods (FMCG) with a great footprint in West Africa and the highest net sales of its product in the region.
8	Service delivery company.
9	Finance services with a footprint in Africa.
10	Manufacturing company with African footprint and head office in Zimbabwe.

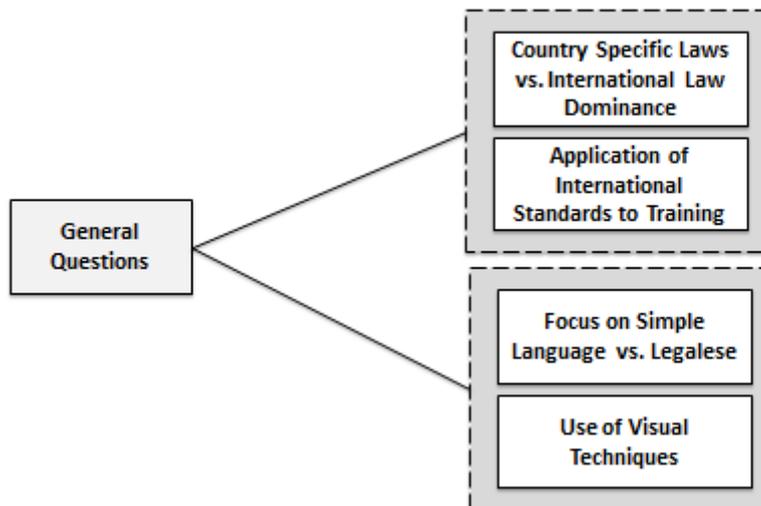
Source: Researcher's own interpretation of data

The companies and respondent descriptions above were numbered 1 to 10 in order to keep to the sequence of the allocated quotas by job titles.

## 5.2 General Questions

The general questions set the tone of the external environment within which firms in Sub-Saharan Africa contract. The questions in this regard were focused on local laws, local influences and international standards within contracting. This was juxtaposed with the most recent thinking on the structure and content of actual contract documents; these questions were directed at the desirability of using simple language and visual techniques within contract documents. The questions were meant to elicit forward thinking responses from the respondents and to set the scene for the five research questions and sub-questions. The researcher also used the questions to understand how the contract professionals framed contracting in relation to rule of law and institutional voids and whether this was in line with current literature.

**Figure 6 General Questions and Composition of the Findings**



Source: Researcher's own interpretation of data

**Table 6 General Questions External and Internal Influences**

<b>Externalities: Forces influencing contracts</b>	<b>Responses</b>	<b>Frequency</b>
<p>Country specific law dominance versus international law dominance.</p>	<p>This section depicts a summation of the law of choice as preferred by the contracting professionals in cross-border negotiations.</p> <p><i>“Preference is country specific laws but you do find yourself experimenting outside of these bounds. Take into consideration country specific laws otherwise it makes nonsense (sic) of your agreements”</i> (Respondent 9).</p> <p><i>“We use local law. So what we do is we have a small branch office to make sure we are complying with each of those laws”</i> (Respondent 1).</p> <p><i>“There are two sides. With local suppliers we use local law. If contracting with people outside Nigeria we look at international contracting law and choose a neutral venue such as English law. If it will be a dealer breaker then we use their venue of choice”</i> (Respondent 7).</p> <p><i>“There is harmonization and you will find that most of your investment laws are cut and paste but you get one or two little peculiarities especially where governments do not want to be big-brothered but it will be harmonized”</i> (Respondent 4).</p> <p><i>“You first and foremost subscribe to the laws in your home country and the laws in the country where they are regulated”</i> (Respondent 2).</p>	<p>Seven out of ten (7/10) agreed to country specific laws</p> <p>Three respondents said it was an amalgamation of laws to facilitate international trade. Local nuances will always present themselves.</p>

<p>Application of international standards to contracting</p>	<p>The consideration of international standards in contracts represents the application of best practice within contracting.</p> <p><i>“We were essentially applying best practice from overseas and we are still behind the curve”</i> (Respondent 3).</p> <p><i>“Yes. We are listed on the stock exchange so whatever we do here in Southern Africa has to be in line with what our head office sets for us”</i> (Respondent 1).</p> <p><i>“You always want to approximate to the highest standards, which are more (sic) stricter”</i> (Respondent 2).</p> <p><i>“You would look at what is applicable from international law; you do not want to over-boil the ocean”</i> (Respondent 9).</p> <p><i>“Best practice can be customised for the region. So it’s not to say that you just take the solution and apply as is, you have to understand the environment that you are rolling it out to. You have to understand the challenge that you face in that environment”</i> (Respondent 3).</p> <p><i>“I hope it will be more international, however, five years I don’t think Africa will be quite there given that a few African countries are very resistant to moving with the times ... this keeps them far behind the international standards”</i> (Respondent 10).</p>	<p>Eight out of ten (8/10) agreed to international standards as best practice.</p>
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Internal: Applicable to actual contract documents	Responses	Frequency
Use of simple language versus legal jargon.	<p>Simple language represents the move towards user-friendly contracts and contracts that are utilitarian.</p> <p><i>“There is a movement away from the old legalese. I’ve found in my experience that simpler language actually helps when there is cross-border contracting as certain terms may carry a certain meaning in other regions. However, what I have also observed is that in certain regions they tend to prefer the old English especially in Nigeria”</i> (Respondent 3).</p> <p><i>“We use simple language. Jargon and old laws and legal jargon are too airy fairy. The simpler the language, the better”</i> (Respondent 7).</p> <p><i>“I think most contracts other than the recital and warranties etc where mostly simple and expressed an intention of what the parties wanted”</i> (Respondent 8).</p> <p><i>“We always say that we want our customers to read that contract and to understand what is being said. 80% of it is fine but there is that 20% you may need to refer to your legal department”</i> (Respondent 1).</p> <p><i>“Legal language only helps the lawyers”</i> (Respondent 4).</p> <p><i>“I just find that you have to keep attorneys and drafters at work because that is what they do. And yet when it comes to contract execution it</i></p>	<p>Seven (7) respondents agreed that there has been a shift towards the use of simple language.</p> <p>Three (3) respondents disagreed and preferred legal language.</p>

	<p><i>doesn't really help the people who have to work with that document on a day to day basis. I just find that precedent is unnecessarily complex...But it does not suit attorneys because it keeps them busy and it becomes a point of litigation"</i> (Respondent 9).</p> <p><i>"From my view is this contract legal, does it protect us enough? If legal is happy with it, it is ok and let's go ahead"</i> (Respondent 10).</p> <p><i>"Simple language I don't find. The language is depicted by legal purpose and legal purpose and legal language goes hand in hand"</i> (Respondent 6).</p> <p>Those who agreed that there was a move towards simple language highlighted that the legal jargon was necessary to a certain extent and there are clauses that require legal jargon.</p>	
<p>Use of greater visual techniques within contracting.</p>	<p>None of the respondents make use of visual techniques within the contract document. In the future this may be a consideration. The respondents noted that some visuals were present as part of appendices or supporting documents.</p> <p><i>"It's a vision that I am trying to sell. There is I wouldn't say resistance, it is taking a bit longer than I anticipated"</i> (Respondent 3).</p> <p><i>"Now we don't the visuals come up when we are you are negotiating otherwise you translate it into numbers"</i> (Respondent 9).</p>	<p>0 in the boiler plate contract clauses.</p>

	<p><i>“We do, we basically put pictures of (because we manufacture machinery) the machinery ... and also some tables giving you more information on the machinery” (Respondents 1).</i></p> <p><i>“In addendums but they won’t put it in their contract. What I have found is they do appreciate visuals better than tables and schedules ... when they see the picture they understand it better. If it is just a text it is not as sinking in” (Respondent 6).</i></p> <p><i>“Our contracts are very very wordy” (Respondent 10).</i></p> <p><i>“As lawyers for self-preservation reasons, if we simplify it any person on the street can decipher it easily” (Respondent 8).</i></p>	
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Source: Researcher’s own interpretation of data

### **5.3 Research Question 1: Is there integration between contract management and contract relationship management?**

In order to assess the integration between contract management and contract relationship management, research question one explored the four sub-questions below. In the discussion with the interviewees on the integration between contract management and contract relationship management the respondents generally averred that contracts, contract execution and relationships were inextricably intertwined. The contracts premised on the relationships formed by the parties. The contract is a last resort and should not be used as a leverage to build or destroy the relationship. There should be trust built between the parties and the derivation of maximum value. This was the opinion of seven out of ten (7 out of 10) respondents.

*“You cannot have a good contract without a good relationship you need to look at both areas. If people trust you then you get a lot of further because people trust you and if*

people trust you then you get a lot of emotional capital that you can bank and if make mistakes you make use of your emotional capital if you have a proper relationship” (Respondent 6).

The premise of relational contracts is based on trust and an actual relationships with bankable emotional capital and two of the nine (2 out of 9) respondents opined that the more you move away from your geographical comfort zone, the more important the contract becomes.

*“There has to be, when we did contracts in Africa we used to do it verbally then we realised when you do business outside your home country, the contract becomes more important because you do not know these people, you don’t trust them, and they really do not trust you. Before we discuss anything we sign... Contracts become more important the further you move away from your own country”* (Respondent 10).

Two respondents (Respondents 2 and 4) opined that it is useful to separate relationship management and contract management practitioners in order to limit the cases of fraud and to ensure accountability.

*It’s like giving the student his own homework to mark* (Respondent 4).

### **5.3.1 Sub-question 1: Trading activity transactional or relationship based contracting.**

This sub-question aimed at establishing the preferred mode of contracting between transactional contracting and relational contracting. Nine out of ten (9 out of the 10) respondents indicated that there move is towards relational contracting. Only one respondent gave a counter-view citing breakdown of trust.

*“We are moving to this relationship way of doing business and sometimes we do it very well with some of our customers. There are cases where we have signed the contract and we put it there and for the next two years we never talk about because we are working together and we sit down every month. We are proactive”* (Respondent 1).

*“Your transactional content does not count if there is no relationship. You have to have to have both but ultimately the relationship is more important”* (Respondent 2).

*“Very big as it is the focus through which relationships are formed. This is a consumer management process”* (Respondent 7).

*“Contracts should just be a piece of paper in a drawer and should be referred back to when things go wrong” (Respondent 6).*

*“It has to be more strategic and relationship based because that is where you extract maximum value” (Respondent 9).*

*“The sort of money will deal with cannot just be transactional and sail off into the sunset. It has to be a relationship. The relationship is important but equally important are the safeguards” (Respondent 4).*

The consensus was that for once-off customers and small transactions, a transactional contract base would suffice. More energy is spent on the bigger customers and with the bigger customers this was more relationship based.

*“We will always have some of those transactional customers, they buy and put goods in their bakkie there will always be there” (Respondent 1).*

One respondent was of the view that as long as there is a contract in place, the relationship should always be transactional.

*“Once the contracts are in place, it is always that rules are rules and we can’t start the work before you have seen the proof of payment. Rules are rules ... People have had fingers burnt so I am not sure why it would be about relationships” (Respondent 10).*

### **5.3.2 Sub-question 2: Influence of emerging markets on international contracting**

All the respondents noted that no one country or region can claim to be superior or best in class. International standards do not imply best practice. The focus is moving towards accommodating emerging markets nuances especially where indigenisation laws such as those found in Zimbabwe and South Africa have an impact on contracting in emerging markets. The lack of flexibility by larger firms to accommodate emerging market rules has been the biggest deal breaker. Mature firms were viewed as taking advantage of the smaller immature firms who present as open targets for exploitation.

*“When you are a global player, you must be cognisant that there are different rules in different parts of the world ... but there are boundaries and you have to move within the boundaries but to go outside that you have to engage head office” (Respondent 1).*

Where international standards have been copied from developed markets, variation is present through different ways of enforcement:

*“Everyone has copied best practice such as the New York Stock Exchange Act, the key is in enforcement and the individual country nuance is beginning to come through. Everyone has this standard type contract when it comes to enforcing it the countries apply in their own way that makes sense for them”* (Respondent 2).

*“Western and emerging markets are totally different. From emerging markets is a sense of ignorance so you really need to bring your customer along and up to your level and at the same time be prepared to climb of your throne. Prescriptiveness is not going to bring you anywhere”* (Respondent 6).

*“It has to be a balance of what country specific is and what are their needs and what can we leverage from their country and blend it. It has to be a blend of the two because if it is not, you are going to pay penalties and you are going to undo all the work that you have done. We’ve been burnt where we actually thought we could go and impose. We have had to undo those particular arrangements. In actual fact they end up not being hugely beneficial, commercially and legally”* (Respondent 9).

As markets become more sophisticated, emerging markets become stricter and more imposing of their own rules:

*“I suppose you will call Africa the last frontier and depending on the laws of the country and with empowerment laws, it comes with the territory that the respect will be given”* (Respondent 4).

*“Yes, the more Namibia grows the less of a pushover they are”* (Respondent 10).

*“We have to be seen to have considered their position as opposed to just ramming the contract. My last company was international and it was very staunch and rigid and I found that it was not a very successful approach as we can in with the attitude that we know better than you. A lot of the times we were not welcome unless we were engaging with other multinationals. But if you were engaging with locals and trying to superimpose your way of doing things, in my experience it does not work well”* (Respondent 3).

There was a general consensus that Zimbabwe and Nigeria were exciting places to do business and the approach to Nigeria has to be distinct. This was in reference to the stark institutional voids in that country and the apportionment of risk to combat the institutional voids befalls the more powerful parties.

*“Our region affects the way we do business. For instance, a contract with a supplier is difficult. Payment terms are difficult and they transfer all that risk to you” (Respondent 7).*

### **5.3.3 Sub-question 3: Changes in contract management and relationship management**

The majority of the respondents were of the view that this is dependent on the maturity of the organisations and there is tremendous value in businesses opening up to contract and relationship management. The trend is towards companies adding value to each other:

*“How do we work with you to make sure that you are the leader in your sector? Companies stick their necks out to that extent because they know the potential upside” (Respondent 9).*

*“There is room for improvement as we have cases where one party wins and one party loses in some of our contracts. I think in future the contracts will be structured to be a win-win or pain will be taken as a lose-lose” (sic) (Respondent 1).*

*“People will focus less on the terms and will move more to focusing on the relationship aspect and will be similar to a gentleman’s agreement where people shake hands on the golf course” (Respondent 8).*

*“The change is already taking place as business people the last thing on my mind is to get bogged down with the details of the contract. I think contract management will become more important and I’d rather someone else do that for me while I concentrate on the relationship with the person that I want to do business with” (Respondent 10).*

There was a revelation that there is general confusion between contract management and contract administration. *People are not always aware of the need for contract management (Respondent 3).*

### **5.3.4 Sub-question 4: Highly valued supplier and customer attributes**

There was no consensus on highly valued supplier and customer attributes. Different aspects which point to relationships and collaboration were listed.

**Table 7 Highly Valued Supplier Attributes**

<b>Valued supplier and customer attributes</b>	<b>Frequency</b>
Solution focused	1
A partner who will walk the strategic route with contractant and willing to invest for future reward	2
Reputable and reliable customers	1
Firms with processes in place to ensure smooth relationships	1
Honest in business dealings and can commit to an agreement and keep their side of the bargain especially in long term relationships	1
Advisory skills	1
Flexibility in trading	2
Humility	1
Integrity	2
Execution / Know-how	1
Business partners who stick to the contract rules without being cumbersome.	1
<i>“Who can you connect me with? What else can you offer the client beyond what they are paying you for? Creating value for the client” (Respondent 4).</i>	1

Source: Researcher’s own interpretation of data

**5.4 Research Question 2: Is there alignment between trading partner management and the strategic goals and business making decisions of the business?**

Nine out of the ten (9 out of 10) respondents agreed that there has to be alignment between the management of trading partner relationships and the strategic goals of the business. Partner management filters down from the strategic goals of the business. Contractual arrangements have to be in line with company strategy and parties have walked away from contract arrangements that did not match their strategic goals.

*There has to be otherwise we wouldn’t have a business (Respondent 1).*

*The most important part is that when you have strategic goals you also need to carry your strategic partners along with you (Respondent 7).*

*Yes, the two work hand in hand (Respondent 10).*

The one respondent who disagreed cited the role of shareholders:

*“There is a certain kind of disconnect because there are certain decisions that have to be made by directors and some decisions have to be made by shareholders and shareholder who are not always educated want to safeguard the money” (Respondent 8).*

**5.4.1 Sub-question 1: Incentives for suppliers or customers to collaborate to achieve mutual profitability and other synergies**

Seven out of ten (7 out of 10) respondents agreed that incentives have to be created for collaboration without falling into the scope of bribery and dishonest dealings. However, some incentives do lead to some disadvantages if there is a lowering of quality in products provided. The respondents averred that incentives should not lead to a compromise of quality.

*“Yes, we do provide incentives such as buy one get one free. We even encourage that if they can grow up to this amount we can support you with e.g forklifts with a length of time to pay up or we can provide you with warehouse space. We also agree to pay early if we get discounts” (Respondent 7).*

*“Yes. Especially when we are trying to do business with black suppliers” (Respondent 1).*

*“Our business incentive is the philosophy, long term loyalty result in above average returns for the suppliers and clients” (Respondent 2).*

*“We have to. We are playing a David and Goliath game” (Respondent 4).*

There is a downside to incentives as was noted by 2 respondents.

*“Dealing with the Chinese, they say let’s form a relationship and we will do whatever you want us to do but that doesn’t always come across as positively as envisaged. They sometimes say let me give you good price (sic) but they reduce the granulage and that does not necessarily work for my business. It looks attractive on the outside” (Respondent 10).*

#### **5.4.2 Sub-question 2: Team involvement in company's strategic planning**

The contracting teams work at realising the company's strategy. Half of the respondents stated that the contracting teams set their team strategies based on company strategy. The other half gave direct input into the company strategy.

*"We are involved as we come up with ideas of how we see ourselves growing and what we are trying to achieve and what our suppliers will be willing to give. Some strategies are organic so all parties contribute"* (Respondent 7).

*"That is not ours. That is the executives. Having done that, how do you turn it into realisable goals? It has to filter down. We have a role to play commercially for the organisation. All the functions together and someone in relationship management has to pull that together and say are we fulfilling the function with our external parties. It has to pull from both directions"* (Respondent 9).

*"Strictly speaking because our company is owned by an individual, the company strategy is the strategy of the CEO. It does not matter what the rest of us think. The strategy therefore becomes irrelevant"* (Respondent 10).

#### **5.4.3 Sub-question 3: Changes in the internal relationships between sales, contracting, procurement and legal groups.**

The respondents agree that while group strategy is clear and aligned the company key performance indicators (KPIs) are not. This leads to silo mentality and a misalignment of internal goals and these affect the internal relationships between sales, contracting, procurement and legal groups.

*"While we have well defined structured roles, there is in-fighting because people like passing the ball even though they know their roles ... there is KPI misalignment"* (Respondent 7).

*"No. the barriers are we all have to earn our keep and you know as an example, what are each of our KPIs and deliverables...It is not about individual scorecards and yes we do find units that are mature that will say this is your core competence, I want you in there because you are going to make me look good"* (Respondent 9).

*"In my company we have a lot of rules but I think it comes from the fact that my boss has a legal background. Our roles are very well documented everything is in black and*

*white and a lot of people, therefore, do not take responsibility for their actions or take risks” (Respondent 10).*

### **5.5 Research Question 3: Are negotiation techniques becoming transformational and are they enabling the improvement of partner selection?**

This sub-question addressed negotiations as a way of getting to know your business partners and selecting who to do business with. Six out of ten (6 out of 10) of the respondents agreed that the negotiation techniques were transformational:

*“With our negotiation techniques we always try to put something on the table because we have higher power. We try to help smaller parties grow. What I have learnt in the past is you can’t take all their profits otherwise you do not always get good quality” (Respondent 7).*

Three (3) respondents were not in agreement as they operated from rigid risk-averse procedures:

*“I don’t think it makes a difference because we operate from our standard contracts” (Respondent 10).*

*“In the African market it will always boil down to who has more power and which party can easily walk away” (Respondent 8).*

An unexpected answer from one respondent was from Respondent 2 who had no way to measure whether the negotiation techniques were transformational and it would be too costly to deploy resources to understand this transformation within negotiation.

Sometimes issues external to the negotiation and the contract such as service provision by the business affects partner selection and who will continue doing business with the contracting firm. Inconsistencies in other departments affect contract negotiations and limit partner selection.

#### **5.5.1 Sub-question 1: Collaborating, planning and negotiation with partners**

The general consensus by the respondents was that collaboration, planning, and negotiation is possible with mature business partners.

*“Out of all the companies that we deal with, they are at different stages of collaboration with how they work with their suppliers so now some are much further down the road” (Respondent 1).*

Respondent 7 pointed out that the smaller entrepreneurs are collaborative as this enables them to grow.

While there was consensus that there will be more future collaboration will change, there was a view that it would take time.

*“It will take time simply because rules and contracts that are being negotiated have been in place for so many years that it is very difficult to start moving away from it. The contract can be a barrier because you do not know that if by changing a contract you are making it illegal so you end up being afraid as you do not know where the line is” (Respondent 10).*

### **5.5.2 Sub-question 2: Global business and partner selection**

All the respondents agreed that partner selection had become more critical in global business with parties looking for partners who share similar organisational values, have clear ethical standards, clean reputations and are willing to strategically contribute to the relationships.

*“Bin Laden messed it up for everyone!” (Respondent 4)*

*“But what I find is that those that have been stratified as strategic partners will fly you to China or America to see the next best thing that has hit this particular commodity at their own expense ... How do we work with you to make sure that you are the leader in your sector? Companies stick their necks out to that extent because they know the potential upside” (Respondent 9).*

*“We are global and this makes it more interesting for us. For partner selection you need to get a referral, internet sources are dangerous” (Respondent 7).*

*“We actually need to spend more time carefully scrutinising who are going to be our suppliers, are they mature? Can we do business with them” (Respondent 1)?*

*“I’m not sure of the laws of that country and if they are restrictive in the way that people do business. You cannot separate government with business, I mean look at Zim (sic) that is exactly why Zim (sic) went down” (Respondent 8).*

### 5.5.3 Sub-question 3: Skills negotiators will need in a global business

In a global business a blend of legal and commercial skills are critical. The best negotiators are able to find common ground or *sweet-spots* (Respondent 5) to start and continue the negotiations.

*“You need to have knowledge of the operating environment, knowledge of the competitors, knowledge of the trends and the options available to you”* (Respondent 2).

Lawyers do not necessarily make the best negotiators: *Sometimes legal just breaks down that negotiation* (sic). *“They scream, ‘No, limitation of liability! No! No!’ you get stuck on limitation of liability when commercially it is such a great deal. Why not negotiate on penalties, cap the liability”* (Respondent 9)?

*“Negotiators need basic negotiation skills and to know what they are negotiating for”* (Respondent 7).

*“People who can see the bigger picture, hold the bigger and be able to connect random dots. More often than not it is in the solution* (sic) *that your client is looking for lies”* (Respondent 2).

*“You need to find the sweet-spot and that is when the negotiation begins. They need to understand what the value is that the other party brings...Clearly defining and demonstrating what is the value* (sic) *for the other party”* (Respondent 5).

*“A lot of patience and perseverance and you get a lot of slaps in the face as doors”* (Respondent 6).

*“They need to understand legalities in their own country and legalities in the next country thereafter they can confidently switch things around for the benefit of the other party”* (Respondent 10).

## **5.6 Research Question 4: Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?**

The relationship framework was the most discussed and influential aspect of contracting. Contracting in emerging markets is relationship based and this focus will continue into the future.

*“You have to. Again I keep going back to Nigeria. It is one of those environments where relationships are very important. In my view, agreements are actually secondary. You can have whatever you want in the agreement but if you do not actually form the relationship, with the external party, it is never going to work”* (Respondent 1).

In response to Respondent 1’s view above the importance of the relationship was emphasised by Respondent 7 from a Nigerian firm:

*“You need to take your strategic partners along with you. And you allow them opportunity to supply you with enough as you grow. As you grow then your partners grow. Allow them to share their vision with you...It is a marriage that can go wrong where we share up and downs together”* (Respondent 7).

*“Relationships are premised on those contracts. You don’t want to leverage the contract to develop or destroy the relationship. This should be the last resort. You should be trying to build elements of trust and deriving maximum value without reverting to the stick”* (Respondent 9).

*“It might be a cliché but we always say, we want a long-term relationship. We use the term quite a lot to see if the other party is also interested in this long term relationship”* (Respondent 1).

A directed question (the full response is attached as Appendix E) was asked to a global business coach on the value of relationships based of the Confucian concept of *guanxi* and the response proffered was as follows:

*“Building relationships before contract formation is important. When you get to the contract it is easier to get things done and with good *guanxi* you are less strict. Spend time together at company level then at personal level, you can do things like going to dinner together. Local subsidiaries should play that role. You should bring gifts that are a cultural representation.*

*As you contract it is important that the other party does not lose face, you need to give respect. Shameful feelings are not good and they do not want to be embarrassed in front of their juniors” (Global Business Coach, not part of original sample).*

#### **5.6.1 Sub-question 1: Contracts as useful tools**

Contracts will continue to govern contract relationships and are useful tools especially in cases of breach and dispute. All the respondents were in agreement, however, there was a greater focus on contract terms and relationships working mutually.

*“I think I find 2 extremes. So there is an extreme where it is tightening and where it is easing off... Again where you think more risk resides with souring of this agreements you want to be more verbose and have this 50 page agreement” (Respondent 9).*

*“Yes. The more you are growing the more you want to regulate the relationship if there is no contract you so not get optimal gain and you have no measure when you have to penalise” (Respondent 7).*

*“We need them when something goes wrong” (Respondent 1).*

*“The purpose of the contract is the purpose of the contract and that is still hard legal” (Respondent 6).*

*“Those Ts & Cs are always important” (Respondents 4).*

#### **5.6.2 Sub-question 2: Significant changes to general terms and conditions**

The role of law and the drafting of contract terms and conditions is the realm of the legal professionals. The majority of the respondents (6 out of 10) opined that general terms and conditions will remain as is and the legal function will preserve that. Organisations will retain terms and conditions for risk mitigation.

*“Contracts will remain as is but the tone will change in terms of the threats that are normally in a contract. Maybe the tone will change” (Respondent 8).*

*“The way I see it, if things are going well business is going well. No-one really goes to refer to the contract. But one day, if something goes wrong that is when generally people rush back to the contract. Keep the terms and conditions there that is the lifeline” (Respondent 1).*

*“They are concrete, one has to accept they are concrete”* (Respondent 6).

*“No, no these things don’t move as fast as technology or everything else”* (Respondent 10).

Four out of ten (4 out of 10) of the respondents opined that contracting has to be more vibrant and adaptive.

*“I think as the law develops, certain clauses will have to adopt accordingly. In certain jurisdictions some clauses have no value and you have to adapt accordingly. So you don’t want to be seen as a South African entity doing business in Nigeria. I believe you are likely to get people on board if they have a feeling that this is like any other Kenyan company. Whereas if your organisation always has the South African tag you are always on a back foot”* (Respondent 1).

*“The market is evolving. You have to be dynamic in terms of your company terms. You have to evolve. Adapt them to suit the dynamics of your market”* (Respondent 7).

*“Terms and conditions are definitely being negotiated more and more now”* (Respondent 4).

### **5.6.3 Sub-question 3: Shift in emphasis between contracts as a legal instrument versus contracts as economic instruments**

The majority of the respondents (seven out of ten) were of the view that contracts are a mainstay of commercial dealings and contracts will remain as legal instruments that the parties will use should something go wrong with the agreement.

*“For as long as lawyers exist, there is little room. I see in agreements commercial terms are a tiny little appendix and it is still lawyers who reign supreme and I guess it depends on where the function resides”* (Respondent 9).

*“Contracts will remain as legal instruments I will never see them as economic instruments”* (Respondents 10).

*“The contract in its own right does not have economic value”* (Respondent 2).

*“It is a dual purpose. It is a legal vehicle”* (Respondent 6).

Two respondents were of the view that contracts should be solely used as an economic instrument while one respondent agreed that it will be a balance but with a greater leaning towards being an economic instrument:

*“You only litigate where you have disputes. This does not bring value to the table. It is an economic instrument and you make concessions”* (Respondent 7).

*“It really has become more of an economic instrument as it goes before the activity”* (Respondent 4).

#### **5.6.4 Sub-question 4: Identifying new revenue generating opportunities and change in your functions’ value proposition**

Seven out of ten (7 out of 10) respondents were of the view that their value proposition will change when there are new revenue generating opportunities within a framework of what the company allows, what company procedures and policies dictate, in particular head office mandates for multinationals.

*“We go where the money is”* (Respondents 2 and 4).

*“Yes. New opportunities are risky. There are risks legally. I would rather think about opportunity versus risk. I see more lawyers getting commercially savvy. People who have been in legal practice must adapt to commercial reality* (Respondent 7).

*“We want to do business and grow our revenue and grow our profitability, so we push for that. So in doing that we try as much as possible to meet a customer’s expectations. We are willing to be flexible. It is not one size fits all”* (Respondent 1).

The responses highlighted that companies are flexible within their values and company guidelines. It was a popular sentiment that companies are treated according to size, with bigger companies getting more leeway.

Internal company dynamics prevented renewal of value propositions.

*“I think it is best to stick to what is on your business card. Anything beyond that is seen as a threat”* (Respondent 6).

## 5.7 Research Question 5: Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?

Technology is used by the interviewees extensively in particular to segment strategic partners and to capture the value of the agreement. However, technology is not used to capture the transactions, portfolio analysis and the management of risk. All respondents do not use technology for analysis and risk management.

*“In terms of in-putting data we do it to see what criteria they [customers] fall into and risk management falls into that criteria”* (Respondent 7).

*“We have a financial system where we analyse our contracts by value online”* (Respondent 1).

*“We have a normal diary system to remind us but it is manually done. It is not a programme”* (Respondent 8).

*“We don’t use technology we adopt a wait and see strategy”* (Respondent 4).

### 5.7.1 Sub-question 1: Innovation targets for your team

Key performance indicators (KPIs) are important for ensuring contract professionals meet targets. Innovation targets were noted by some respondents to be critical for operating in emerging markets. The majority of the interviewees were of the view that creativity is not strictly necessary for operating in emerging markets. Two respondents had innovation targets. For the balance of the respondents the concept of innovation was more product related than contracting related.

*“Yes. Innovation is jointly shared with the service providers. So innovate, innovate, innovate because particularly in a procurement sphere, the cow has been milked dry. You can’t find savings as easily as that. You have to think outside the box”* (Respondent 9).

*We are constantly thinking of innovative solutions to what we encounter. One of the things that I have been trying to drive is that we have to be creative* (Respondent 1).

Seven out of ten (7 out of 10) do not have innovation targets.

*“No. but we can start”* (Respondent 7).

*“No. I will stay with reality and proven stuff let’s not invent new things. The application of your product is where you should be innovative” (Respondent 6).*

*“Innovation is we have a new machine that does 1, 2, 3 but we want one that can do 4, 5” (Respondent 1).*

*“No because ultimately what we sell has not changed and ultimately the relationships we need have not evolved” (Respondent 2).*

*“Our targets are monetary” (Respondent 8).*

### **5.7.2 Sub-question 2: Shift on focus on innovation**

Innovative and ground breaking ways of doing business are being considered in the different enterprises as a function of what can possibly be implemented in the future as there is a realisation of value and potential competitive advantage for the organisation. There is no great emphasis on this within the different businesses.

*“Ah! Those people are so conservative even the legal sphere is. At the top, at the pinnacle is an old guy. People do what they know and what has worked. In the next ten years that old guy is still going to be there” (Respondent 8).*

### **5.7.3 Sub-question 3: Experimental practice becoming best practice**

The drive for experimental practice which will later become best practice was a main consideration for how the service is delivered and how products are sold and to a lesser extent with contracting methods. Six respondents were of the view that there was some consideration that in the future experimental practices will be encouraged within the organisations.

*“Yes, currently we are experimenting with how we supply our products to the market place” (Respondent 3).*

*“I think that the entire relationship function is experimental and the reason I am saying that is we are very territorial. We represent the interest of the wallet holder and we represent the interest of the suppliers. You show the extra value and look for value in a much broader sense” (Respondent 9).*

*“Admissibility of electronic evidence had been outlawed in 1920s or 1940s. It has been amended and it makes it easier now to have electronic signatures...Most of the guys we are dealing with are not technologically savvy, they are not adapting fast. The adaptation will change very soon. You cannot afford to ignore things around you”* (Respondent 7).

#### **5.7.4 Sub-question 4: Technology to optimize contract management and risk management**

The respondents did not use technology extensively. There is pervasive use of spreadsheets and note taking to capture contract information. There is agreement that in the future, technology will be used more for analysis and to mine the data to optimise contract management and to manage contractual risk.

*“I am a big fan of technology but some of my colleagues are not. There is a bit of resistance and where I would look at things as potentially making our lives easier, other people would think that it’s not necessary and they would sort of critique without realising the creative benefit. At this stage we give them the option to work outside of the system”* (Respondent 3).

*“Currently a lot of stuff is sitting on spreadsheets. We are not doing it”* (Respondent 1).

### **5.8 Future Skills for Global Contracting**

Skills for a global world were viewed by the interviewees as being about capabilities of the incumbents and being lateral and strategic thinkers. The best skills set include legal and commercial acumen (this came up the most from four respondents) as well as the ability to find the sweet-spot in contracting through negotiations and contract management.

*“Contract managers have to be, “seasoned professionals; people who have very strong commercial acumen; people who understand strategy on one hand and commercial. All you are trying to do is extract value for the organisation. It cannot be junior people who can’t engage robustly to benefit the organisation”* (Respondent 9).

**Table 8 Future Skills for Global Contracting**

<b>Construct</b>	<b>Responses</b>
<p><u>Skills and skill types</u> for future contracting</p>	<p><i>“Chances are if you have paid your school fees for 20 years, chances are you have picked up such subtle skills and nuances that you won’t find in a textbook. Use that individual to start coaching others, guiding others”</i> (Respondent 9).</p> <ul style="list-style-type: none"> <li>○ Cost-containment.</li> <li>○ Strong EQ (emotional intelligence).</li> <li>○ Awareness of cultural differences.</li> <li>○ Awareness of different business practices and strategic insights and lateral thinking.</li> <li>○ Knowledge of the law and the legal environment you are negotiating in.</li> <li>○ Negotiation skills that enable negotiation to be an ongoing process and relevant for setting up value extraction.</li> <li>○ Innovation skills: <i>“Either you evolve or you die especially in technology”</i> (Respondent 7).</li> <li>○ People who can read and understand the contract document.</li> <li>○ Information technology skills as the world is moving in that direction.</li> <li>○ A person who can connect the dots.</li> </ul>
<p>Top <u>KPIs</u> that will determine your <u>teams’ success</u></p>	<ul style="list-style-type: none"> <li>○ Value-add and cost saving.</li> <li>○ Risk mitigation.</li> <li>○ Return on investment.</li> <li>○ The feedback that we receive from clients.</li> <li>○ Knowledge management.</li> <li>○ Contract administration.</li> <li>○ Turnaround times.</li> <li>○ Quality of service provided.</li> </ul>

	<ul style="list-style-type: none"> <li>○ Profitability.</li> <li>○ Training and development of people to be better contract professionals.</li> <li>○ Relationships with customers.</li> <li>○ Innovation in their particular roles.</li> <li>○ Integrity.</li> <li>○ Competence in your job.</li> <li>○ A person who is an initiator, can close deals and maintain relationships.</li> </ul>
<p><u>Outsourcing</u> contracting resources</p>	<p>Five respondents agreed that they would outsource.</p> <p>Respondent 4 pointed out that this will allow for accountability.</p> <p>One respondent pointed out that, <i>“Only in unfamiliar territories with no local contract administration presence”</i> (Respondent 3).</p> <p>Another respondent pointed out that, <i>“The more global we are, the more we need external contracting resources”</i> (Respondent 10).</p> <p>Six respondents averred that they use and aim to develop internal capabilities.</p> <p><i>“Outsourcing should be about capacity and not capability. So if we are bursting at the seams and we don’t want to expand our resources so we know we have a window to outsource for a defined period of time. But if I have the capacity and don’t have the capability I’d rather upskill my people”</i> (Respondent 9).</p>

Source: Researcher’s own interpretation of data

## 5.9 Quota Responses

### 5.9.1 Similarities in the quota responses

**Table 9 Three Main Similarities within the Quota Responses**

<b>Quota A</b> (Commercial Managers)	<b>Quota B</b> (Contract Managers)	<b>Quota C</b> (Negotiators)	<b>Quota D</b> (In-house legal counsel)	<b>Quota E</b> (Supply-chain managers)
<p><b>Choice of law:</b></p> <p>Local law was referred to by the commercial managers and a concerted effort was made to place local lawyers in regions they were not resident.</p>	<p><b>Simple language:</b></p> <p>Both contract managers has a legal background and readily admitted that legal language only helps the lawyers. They averred that it is easier to transact using simple language.</p>	<p><b>Soft skills:</b></p> <p>Trust, integrity, finding the sweet-spot and not taking advantage of the customers is necessary to contracting.</p>	<p><b>Self-preservation:</b></p> <p>The lawyers have to drive the contracting process for self-preservation.</p>	<p><b>International law:</b></p> <p>International standards should be considered within contracting otherwise Africa will be left behind.</p>
<p><b>International standards:</b></p> <p>Their organisations approximated to the highest international standards.</p>	<p><b>Relationship Management and Contract Management:</b></p> <p>Respondent 3 stated that there was a misunderstanding as to what contract management was.</p> <p>Respondent 4 supported this and added that the roles of contract management and relationship management have to be separated in order to avoid incidences of fraud.</p>	<p><b>Relationships</b></p> <p>The contract belongs in a drawer once it is signed and should only be taken out in cases of conflict and cases of conflict are occasioned by the breakdown in relationships.</p>	<p><b>Institutional voids:</b></p> <p>Countries in Africa deal with institutional voids and policy indecision this makes business partner selection difficult.</p>	<p><b>Attorneys:</b></p> <p>The supply chain managers rely heavily on the legal teams and their input. Legal teams therefore drive contracting.</p>

<b>Collaboration :</b> Collaboration is important and the importance of the contracting relationships is judged by frequency of transacting.	<b>Emerging markets and choice of law:</b> They both viewed Africa as the new powerhouse with a growing influence on contracting in a global world.	<b>Innovation:</b> The way that business is conducted works and should remain as is.	<b>Risk mitigation:</b> The more uncertain the market, the more risk is passed on to business partners in the country with institutional voids.	<b>KPIs:</b> The main barriers to contracting strategy are the different KPIs that are set and these work at cross-purposes with contracting excellence.
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Source: Researcher's own interpretation of data

### 5.9.2 Differences in the quota responses

**Table 10 Main Differences within the Quota Responses**

<b>Frequency Quota A</b> (Commercial Managers)	<b>Frequency Quota B</b> (Contract Managers)	<b>Frequency Quota C</b> (Negotiators)	<b>Frequency Quota D</b> (In-house legal counsel)	<b>Frequency Quota E</b> (Supply-chain managers)
No apparent differences presented themselves in the study.	<b>Incentives</b> Respondent 4 agrees with and uses a lot of incentives during negotiations and for maintaining the relationship and in order to get referrals.  Respondent 3 does not create or give incentives.	<b>Innovation</b> There is no need to innovate or experiment. All experimentation should occur outside of the contract in product and service delivery.	<b>Influence or emerging markets</b> Respondent 8 was of the view that only countries that are powerful exert influence.  Respondent 7 was of the view that emerging markets are coming into their own and are therefore influencing the markets.	<b>Innovation</b> Respondent 9 was of the view that innovation targets are necessary and you have to think outside of the box. Innovation is jointly shared with the suppliers.  Respondent 10 does not set innovation targets for team. They stick to company laid detailed procedures and extensive job descriptions.

		<p><b>Strategic planning:</b></p> <p>Respondent 5 is greatly involved in strategic planning whilst Respondent 6 was clear that there was no involvement in company's strategic planning and emphasised sticking to job description.</p>	<p><b>Relational versus transactional contracting</b></p> <p>While respondent 9 focused on relationships as the centre of contracts. Respondent 10 was clear that relationships are less important and as long as a contract exists, <i>rules are rules.</i></p>
			<p><b>Global partner selection</b></p> <p>Respondent 9 emphasised collaboration with strategic partners and leveraging these relationships for future growth.</p> <p>Respondent 10 emphasised transactional relationships in particular where geographical distance exists.</p>

Source: Researcher's own interpretation of data

### 5.9.3 Similarities in all Quotas

The different quotas presented similarities within certain questions and this are recorded below. The similarities are noted where 8 or more respondents were in agreement.

### **Affirmative Similarities ('Yes' answers):**

- The majority of the respondents agreed that relationships are the basis of contracting. Contract relationships are based on trust and the contract document should be relegated to the bottom of the drawer and only surface when there is a dispute the relationship cannot solve.
- The respondents relied on country specific laws and either had a branch office or retained local lawyers where they did not have the expertise. International law was used where it is not a deal breaker to diverge from local laws.
- Emerging markets, as they become more sophisticated and as markets become thicker, were seen as influencing international business and international business has to adapt to African nuances.
- The respondents were in agreement that there had to be alignment between the management of trading partner relationships and the strategic goals of the business. The two have to work hand in hand.
- Contracts were deemed as useful tools for governing contract relationships and it was anticipated that they would remain as useful tools for contracting in the future.
- Contracts will remain as legal tools and not commercial tools.

### **Negative Similarities ('No' answers):**

- The use of technology was either zero or is utilized for segmenting and stratifying business partners by financial spend.
- There is no focus on innovation and experimentation currently. Innovation is mainly targeted at products and not on contracting. The future will be more focused on innovation and experimenting in ways that will become best practice.
- Visual techniques are used in appendices in reference to products (such as machines manufactured) and are not the mainstay of the contracts and this will change in the future.

#### **5.9.4 Differences Presenting in all Quotas**

The differences mainly presented themselves where the respondents were asked to list, without a prescribed guideline, skills, KPIs, attributes.

- **Valued supplier and customer attributes:** there was no overlap in the attributes which ranged from solution focused partners to business partners who stick to contract rules.
- **KPIs that determine teams' success:** there was no overlap in the KPIs which ranged from value-add services, risk mitigation, integrity to profitability.
- **Skills and skill types for future contracting:** there was no overlap in the responses given which ranged from innovation skills, awareness of cultural differences to negotiating skills.

#### 5.10 Themes Arising but not Covered Directly by the Questions:

- **Value add:** Respondents 6 and 7 revealed that the value of contracts in emerging markets lies in how the big players can add value to up and coming firms and small businesses.

*"It goes down to the value chain and to their employees. We influence small businesses through our contracts and we help them grow. Apart from the corruption aspects and best practice teachings, we influence what happens down the value chain...to the point that we do not allow pregnant women to do heavy work in contracts"* (Respondent 7).

*"The more they trust you, the more you become an advisor and not just a supplier that is when you reach the stage where people can see from past experience that you have not exploited them or situations that you could have"* (Respondent 6).

- **Separation of powers:** Respondent 9 pointed out that the people who draft agreements and the people should not be contract managers as it does not allow for a fresh perspective.

*"It is too incestuous. There is a view that says that people who negotiate and put the agreement in place should not play referee and monitor, what if they have put in place a kak deal"* (Respondent 9).

Likewise Respondent 4 shared the same sentiment that contract management and relationship management should be separated to limit the cases of fraud and to ensure accountability. Respondent 3 pointed out that there was a lack of understanding in emerging markets on what contract management was.

## 5.11 Conclusion

The interconnectedness and interdependencies of cross-country businesses greatly influence current contracting and its future development. The results show that contracting in emerging markets is currently conservative and the outlook is equally conservative and will to a larger extent remain so. The respondents have to be flexible when they encounter institutional voids with contract risk mainly being passed on to the more powerful party. Strong relationships (*guanxi*) are the backbone of contracts. Respondent 7 opined that interconnectedness and interdependence is important. “*We have seen our suppliers grow with us. You don’t stand in isolation*” (Respondent 7).

Respondents were in agreement that within emerging markets, country specific laws dominated and will continue to dominate. This is contrary to the anticipated convergence of global cultures and laws resulting in homogeneity as stated in literature. Best practice within contracting is seen as being set by international standards with some regional adaptation. What unfolded from the research was that contracts are legal documents made up of words and visuals are not the domain of contracts as they either do not appear or only appear in appendices to illustrate the products being transferred via the agreements. There is a general consensus that the future of contracting will remain in the hands of the lawyers. “*The language is depicted by legal purpose and legal purpose and legal language goes (sic) hand in hand*” (Respondent 6).

The results indicate that contracts are mainly driven by relationships and trust and the accumulation of emotional capital. There was very little discussion of the key contractual elements highlighting the lack of utility within contracts. Instead relational contracting was emphasised when negotiating agreements pre-contract signature and when re-negotiation post-contract signature. Trust is the basis though this is not readily given if there is distance between parties within different countries.

The results further show that firms in Sub-Saharan countries are gaining confidence within contracting the thicker and more sophisticated their industries become and as global players their contracting nuances are being accommodated, in particular, where they have indigenisation law. There is a rejection of and a selective adaptation of international standards with countries like Nigeria firming up their influence.

There is little consensus from the respondents on the highly valued supplier and customer attributes; skills and skill types for future contracting; and key performance

indicators for team success. The evidence suggested there is no unified theory of contracting.

The results also showed that incentivising and collaboration are approached with caution to avoid dishonest dealings or creating an impression of bribery. Similar caution was noted in that business strategy is the domain of company strategists and contracting teams do not set strategy but distil it from the main company strategy. Internally, different team incentives hamper efficient contract strategy and lead to loss in revenue.

Partner selection is critical in global business and the research highlights that collaboration, planning and negotiation is mainly possible with mature partners who have the wherewithal to realise that the different parties can help each other grow. Negotiators are expected to be competent and understand local laws and innovate from that basis. Lawyers are not viewed as great negotiators as they focus on contract terms versus commercial business sense. Correct partner selection in global businesses is critical and the partners have to share similar values.

The research is clear that contracts will continue to be useful tools that govern contractual relationships and there will be no significant shift in contract terms within emerging markets. Contracts will remain largely as legal instruments and will not morph into economic instruments. Contracts will remain conservative and contract professionals need to remain vigilant and alert to contract landscapes and the changes in the regulatory landscape.

The research indicates that contracting in emerging markets will remain conservative. The emerging markets economies are becoming more sophisticated but current contracting indicates that innovation techniques and technology use are not evident. There is some indication that in the future this will change. Within emerging markets, there is indication that there is a heavy reliance on trust and relationships. Innovation is targeted at the products and not KPIs or contract documents though the respondents indicated that this will shift in the future. Technology is not utilised to mine data but rather to segment clients and a greater use of technology to optimise contract management and risk management is envisaged leading to a move away from spreadsheets and handwritten minutes.

In conclusion, the results indicate that contracting in emerging markets is conservative with lawyers playing a dominant role. The evidence shows that there is a heavy reliance on legal opinion and lawyers guiding the contracting process. Contracting is

premised on trust and relationships, with the contract document taking secondary place with non-lawyers.

## **Chapter 6: Discussion of Results**

### **6.1 Introduction**

Chapter 5 presented the results from the qualitative research collated from the ten respondents. This chapter will discuss and interpret the findings of the five quotas namely - Commercial Managers, Contract Managers, Negotiators, In-house Attorneys and Supply Chain Managers. This discussion will take into account the links between the findings in chapter five, the literature review in chapter two, the questions posed in chapter three and the overall objectives of this study.

For ease of reference, the overall objective of this study was two-fold: to understand the role and purpose of contracting in emerging markets and, and in the main, to understand the future of contracting in emerging markets between firms in emerging markets.

The findings will be discussed synergistically by combining the responses of all the respondents and by discussing the responses research question by research question. The discussion will draw on the implications and recommendations of the data and will be set out as below:

1. General interpretation of results and implication for current and future contracting.
2. The importance of relationships as the main theme of contracting in emerging markets.
3. Discussion of the general questions.
4. Discussion of the five research questions.
5. The implications of the similarities in responses by the quotas.
6. The implications of the differences in responses by the by quotas.
7. Conclusion.
8. Proposed model with relationship management and good *guanxi* as a central tenet.

### **6.2 General Interpretation of Results and Implications**

The research reveals that the current state of contracting in emerging markets is conservative. There is alignment of trading partner management with the strategic goals and decision making of the business. The research shows that there is a strong

emphasis on the integration between contract management and relationship management. In a global world with interconnectedness and interdependencies (Barton & Anderson, 2012) it is important to improve partner selection through aligning goals. These three elements will carry on into the future state of contracting.

The research further revealed that there is a gap between the research and the literature especially in technology use in the transaction and portfolio analysis and the management of risk. When the literature research in chapter two was undertaken, it became abundantly clear that there is limited research on contracting in emerging markets. The literature on technology and innovation did not match the research findings. Contracting in emerging markets will in the future remain conservative as the context within which emerging markets firms operate in Sub-Saharan Africa is conservative and markets are immature warranting a conservative approach.

In the future, contracts will be based on relationships, tailored to local conditions. The relational framework will be the common denominator.

### **6.3 Relationships as the Central Tenet**

On deep analysis of the data relationships were deemed to be the most important element of contracting in emerging markets. Good relationships in many ways lead to growth of the business and these relationships filter down the value chain. Within the literature study in chapter two relational contracting was highlighted as being based on the lack of utility of contracts (Cummins, 2009; MacNeil, 1974). With Eastern literature, relationships are equally important (Shou, Guo, Zhang, & Su, 2011; Anedo, 2012). Relational contracting challenges contracting as an institution and challenges the proper nature of contract law and implies that contracting goes beyond the law per se (McLaughlin, McLaughlin, & MaElayadi, 2014). Relational contracting has been widely accepted with business scholars today reflecting a leaning towards relational contracting in the evolving business environment especially in emerging markets (Chen & Miller, 2011). Relational contracting in its formulation fosters trust.

The literature is aligned with this emergent study. This concept will be further gleaned into throughout the research as a central theme.

Key findings on relationships:

- *With our negotiation techniques we always try to put something on the table because we have higher power. We try to help smaller parties grow. What I have learnt in the past is you can't take all their profits otherwise you do not always get good quality (Respondent 7).*
- *But what I find is that those that have been stratified as strategic partners will fly you to China or America to see the next best thing that has hit this particular commodity at their own expense ... How do we work with you to make sure that you are the leader in your sector? Companies stick their necks out to that extent because they know the potential upside (Respondent 9).*
- *It goes down to the value chain and to their employees. We influence small businesses through our contracts and we help them grow. Apart from the corruption aspects and best practice teachings, we influence what happens down the value chain...to the point that we do not allow pregnant women to do heavy work in contracts (Respondent 7).*
- *The more they trust you, the more you become an advisor and not just a supplier that is when you reach the stage where people can see from past experience that you have not exploited them or situations that you could have (Respondent 6).*

The rest of chapter six themes pick up on the importance of relationships.

## **6.4 Discussion of General Questions**

### **6.4.1 The External Environment**

It emerged from the study that country specific laws dominate over international law. The firms contract using country specific laws and branch offices and local contracting teams are set up to facilitate contracting using local laws. Where international law is used, it is a pre-requisite that it is not a deal breaker and that neutral country is chosen for international contracting.

It further emerged from the study that though country specific local laws are applied, the firms aspired to international law as best practice. Best practice is customised for the region; international best practice has to be adapted to be context specific for that environment, especially in countries such as Nigeria, as noted by the respondents. Variation is created by the different enforcement mechanisms.

The theory by Siedel and Haapio (2010); Lysonski and Durvasula (2013) avers that globalisation has occasioned a convergence of cultures and laws. This has created

cultural interdependencies and interconnectedness (Barton & Anderson, 2012). Lysonski and Durvasula (2013) note that interdependencies and interconnectedness lead to an inevitable homogenisation of business cultures and common codes of practice. This explains the research result of the adaptation of international best practice as best practice in emerging markets.

On the other hand, Evans and Gabel (2014) acknowledge the phenomenon of globalisation but contrary to the view by Lysonski and Durvasula (2013) assert that the notion of homogeneity of cultures is erroneous. The different localities adapt the global standards to their localities and give meaning according to the different localities. The respondents noted that local law is preferred over international law highlighting that local customs are ever-present in a global world. The findings of the study and the literature findings are a match (Evans & Gabel, 2014).

International firms, therefore, need to immerse themselves in the context that they find themselves in (Webb, Tihanyi, Ireland, & Sirmon, 2009). Legal traditions are impacted by low and high rule institutions and local laws allow for the adoption of contracts into the existing country institutions. This leads to the integration of the business requirements, contracts and the market. It is at this point that North's formal and informal institutions meet (North, 1990; Webb, Tihanyi, Ireland, & Sirmon, 2009).

Nigeria was singled out as an interesting place to do business and adaptation to local nuances is as a result of institutional voids and opaque systems as highlighted by respondent 7. These environments call for creative compliance and Western ideals cannot be readily imposed (Nelson & Cabatingan, 2010; Evans & Gabe, 2014).

Globalisation has facilitated interactions across cultures and geographies but has not done away with regional and local law nuances.

#### **6.4.2 The Internal Environment**

The research revealed that contract documents are still being drafted in legal jargon and the desired state is a move towards simple language so that those who implement the agreements and customers can understand the contents of contracts. There is a call for user-friendly contracts. On the other hand, there was an equally strong indication that contracts are the domain of the legal fraternity and legal purpose needs legal language. Contracts need to be both user-friendly and need to offer sufficient legal protection.

The theory by Weber and Mayer (Weber & Mayer, 2011) proposes that contract design impacts the behaviour of the parties. It is not in the words of the agreement but in the format – promotion framed contracts with flexibility and creativity encourage the right contractual behaviour. The challenge with contracts is that they have to address written and unwritten parts, standard terms, flexible terms and relationships (Selviaridis & Spring, 2010). Current literature affirms that it is important to have best form of contract coupled with a tightly written contract. It must be drafted in a way that makes commercial sense and that can be interpreted by the courts (Geis, 2008).

The research and literature affirm that the desired state of contracting is towards a simpler form of contract that uses simple language in a contract that is tightly written and offers adequate legal protection. The role of the lawyers as drafters of agreements is important in this regard.

#### **6.4.3 Concluding Remarks on Discussion of General Questions**

The literature is aligned with the findings. Contracting strategy has to be aligned with global influences and adapted to local laws, cultures and nuances. This will persist into the future. The language of the law has to offer legal protection, has to be tightly written in a way that accommodates relationship factors, flexibility and the interpretative role of the judiciary.

#### **6.5 Research Question 1 - Is there integration between contract management and contract relationship management?**

The research showed that contract management is closely integrated with relationship management. The contract document was continuously defined as a document that belongs at the bottom of the drawer. Key words such as trust and emotional capital were discussed. In a few cases the respondents stated that trust was eroded by geographical distance.

Trading activities are mainly regulated by relationships versus being purely transactional. Contracts are supplemented with meetings to cement relationships. Contract relationships are segmented and maximum value is extracted from inter-firm relationships. Emerging markets are exerting their influence on global markets as they become more sophisticated and as the emerging market trading patterns become

thicker. Relationships are easy to form with mature firms and these mature firms are impacting on immature firms by influencing their whole value chain. Contracting strategy is indirectly adding to the value chain of both mature and immature firms.

It has emerged from the study that contract relationships are based on a match between closely linked supplier and customer attributes. The study showed that there is no unified theory on highly valued supplier and customer attributes as different aspects on valued customer and supplier attributes were listed by the respondents. The valued supplier and customer attributes below point to central themes of collaboration and relational contracting.

**Table 11 Highly Valued Supplier and Customer Attributes** (Reproduced from Chapter 5)

<b>Valued supplier and customer attributes</b>	<b>Literature construct</b>
Solution focused	In emerging markets, the market is thin and there is high uncertainty in the business environment, business partners have to collaborate to create mutual solutions and share mutual vulnerability (Geis, 2009; Gilson, Sable, & Scott, 2013).
A partner who will walk the strategic route and is willing to invest for future reward	Societal values and co-contribution is necessary for the formation of relationships. This has roots in sociology (Anedo, 2012; McLaughlin, McLaughlin, & MaElayadi, 2014).
Reputable and reliable customers	Relies on the Confucian concept of <i>guanxi</i> where there are intricate relational networks and a reciprocal sharing of mutual responsibility over a long period of time (Anedo, 2012; Shou, Guo, Zhang, & Su, 2011).
Firms with processes in place to ensure smooth relationships	Miller (2010) notes that sophisticated contracting is possible with sophisticated parties. This allows the parties to effect efficient contract designs that exclude the courts' erroneous interpretation post ante, should the parties litigate.  On the other hand, unsophisticated parties are at the mercy of the courts to investigate beyond the four walls of the contract to prevent exploitation. This further

	complicates contracting especially where there is an adoption of a hodgepodge of formal explicit terms and underlying practice. (Miller G. P., 2010).
Honest in business dealings and can commit to an agreement and keep their side of the bargain especially in long term relationships	<p>Anedo (2012) avers that relationships should be formed in ways that do not make people lose face.</p> <p>Smyth and Pyke (2008) honour soft skills and cooperation within contract formation and execution.</p>
Advisory skills	<p>The global legal advisor has to be an entrepreneurial lawyer who empowers the firm and offers advice that is empowering to the firm and helps clients learn their legal ABCs (Haapio, 2010).</p> <p>However, Miller (2010) avers that sophisticated parties are easier to contract with. Improved partner selection means aligning requisite goals of the business (Barton &amp; Anderson, 2012).</p>
Flexibility	MacNeil (1974) and Mouzas and Bois (2013) aver that contracts lack utility and are not a list of fixed rights and obligations but present a starting point for negotiation and re-negotiation.
Humility	Not directly covered by contracting literature but driven by <i>guanxi</i> (Anedo, 2012; Shou, Guo, Zhang, & Su, 2011).
Integrity	<p>Also driven by <i>guanxi</i> (Anedo, 2012; Shou, Guo, Zhang, &amp; Su, 2011).</p> <p>Relational contracting in its formulation fosters trust and minimises opportunistic behaviour (Mouzas &amp; Bois, 2013).</p>
Business partners who stick to the contract rules without being cumbersome.	This implies flexibility as above and relates to literature by MacNeil (1974) and Mouzas and Bois (2013).

Source: Researcher's own interpretation of data

The above relates to literature on relational contracting (MacNeil, 1974; Smyth & Pryke, 2008; Abraham, Gibson, Novicevic, & Robinson, 2009; Geis, 2009; Cummins, 2009; Chen & Miller, 2011; Shou, Guo, Zhang, & Su, 2011; Anedo, 2012; Mouzas & Bois, 2013). The above distilled literature on relational contract shows that:

Within emerging markets, the recurring contracting theme was relationships and collaboration. Relationships are the foundation of contracting. The literature shows that doing business in Africa under the Hofstede dimensions (Hofstede, 1981) means there is a sense of collectivism that underpins contracting. This calls for intricate relational networks where firms underpin contracts with trust, relationships and reciprocity; contracting in emerging markets dictates that you form *guanxi* (Anedo, 2012). The sociological roots of relational contracting dictate collaboration through exchange as people cannot contract outside of societal behaviour and exchange. McLaughlin et al (McLaughlin, McLaughlin, & MaElayadi, 2014) impose external measures to contracting such as codes of conduct. This is in line with the research findings that firms should be reliable, act with integrity and have processes in place to ensure smooth relationships.

Where the research averred that contracting should be transactional, this is supported by the literature. Mouzas and Blois (2013) advocate for framework agreements where the relationship is transactional. These cover the requisite 17 boilerplate clauses in order to reduce opportunistic behaviour.

### **6.5.1 Conclusion to Research Question 1**

The basis of contracting in emerging markets is relational contracting and good *guanxi*. Where the relationship is transactional firms use framework agreements will avoid opportunism. The research relates to the literature collaborative relationships lead to better contract results. The pre-eminent IACCM research shows that contracts and contract management lags behind business models. The research on contracting in emerging markets goes against the IACCM (Western based) research. Valued customer and supplier attributes have a central theme of collaboration and relationships. The African contracting landscape is collective and contract management and relationship management is the cornerstone of all contracting.

## **6.6 Research Question 2 - Is there alignment between trading partner management and the strategic goals and business making decisions of the business?**

It emerged from the study that there is alignment in emerging market firms' alignment between trading partner management and the strategic making decisions of the business. The strategic goals of the business need to support partner value creation. To this end the contracting parties create incentives for collaboration to achieve mutual synergies. Two respondents noted that due to the low rule of law incentives are not always beneficial and have to be given discerningly as this may amount to either bribery or discounts may lead to lower quality products.

It arose from the study that contracting teams do not generally direct company strategies, however, company strategy filters down to contracting teams. The biggest barrier to meeting the strategic goals of the business is the misalignment of KPIs of the internal departments such as sales, contracting, procurement and legal groups. Individualised scorecards and too many rules lead to lack of accountability by individuals within the teams.

The literature avers that the biggest challenge facing CEOs is the volatility of the environment within which they operate. This rapid change in the environment has resulted in firms not being competent to deal with this complexity (Barton & Anderson, 2012; Wang, 2013). The literature research and market volatility address the external environment. The research shows that for contracts to work there needs to be a consideration for aligning the internal and external environment. Contracting in the future should be linked to external right partner selection and aligned to internal contracting through concerted efforts of proactive lawyers and business managers (Haapio, 2010). Internal clarity leads to better understanding, better results and ease of doing business. The internal environment should be geared towards addressing external uncertainty.

The literature shows that contracting in emerging markets is particularly difficult due to the instability and the unpredictability of the environment. The thickness of the market is determined by the number of people in a similar industry engaging in similar strategies. It is important that there alignment between trading partner management and the strategic goals and business making decision especially where markets are thin (Gilson, Sable, & Scott, 2013). The right partnerships within contracting help businesses grow in a volatile market.

Contracts and relational factors should act in tandem in order to develop inter-organisational relationships (Hofenk, Schipper, Semeijin, & Gelderman, 2011). The literature shows that, contrary to the research results, that contract professionals should set strategy and enable the business to deal with the external volatility. This includes:

- Setting, managing, changing policies, practices and procedures that determine contract terms.
- Undertake competitive and market research on commercial terms, policies and practices; audit contract structures and terms to provide competitive advantage.
- Identify and implement technology systems and tools to improve efficiency and effectiveness of the contracting process.
- Market entry or management, new business development, and channel strategy (Cummins, Kawamoto, & Mallory, 2011).

A gap in the results of the research seems to be the lack of involvement by contract professionals (in particular the contract and commercial managers) in strategic planning. This may be due to the immaturity of the contracting industry in emerging markets.

### **6.6.1 Conclusion to Research Question 2**

Contracting for the future should concern itself with right external partner selection in order to develop strong inter-organisational relationships. The internal contract mechanisms should be supportive of firm contracting strategies in order to give the organisation competitive advantage by creating a buffer against the volatility of the external environment. Contract professionals need to be more involved and assertive in setting company strategy.

### **6.7 Research Question 3 – Are negotiation techniques been transformational and have they enabled the improvement of partner selection?**

It emerged from the study that negotiation techniques are central to negotiating and selecting trading partners and managing the relationships after relationship formation. Parties with higher power have to offer incentives to firms with lower power and the relationships should not be exploitative. It also emerged from the study that negotiating,

planning and collaboration are possible with mature business partners. Different firms are at different stages of collaboration. It further emerged that there is a greater willingness to collaborate, negotiate and plan by smaller firms as this enables them to grow. The future of contracting will be more collaborative.

The literature shows that the volatility of the markets is forcing firms to negotiate tactically and these negotiation strategies are revelatory of the priorities of the negotiating firms (IACCM, 2012). The willingness to negotiate shows that there is a shift in trading patterns in emerging markets and standard templates are being challenged by strategic collaborative partnerships. This will remain as the future of contracting as this is premised on relationships, which relationships, as a central theme, have revealed themselves to be of utmost importance throughout the research.

The research revealed that the contract document was ironically proffered as the barrier to contracting as the parties after presenting the contract document in a global business were wary of negotiating and making changes to the document in case they made mistakes.

The literature shows that there is no single and complete legal descriptive or normative legal theory. The contract terms should not undermine business purpose and any contract terms must be focused on business processes (Barton & Anderson, 2012). The fear of negotiating across borders is giving precedence to contract terms and a lesser value to business purpose. This is aligned with the conservative nature of contracting in emerging markets.

The study showed that global business partner selection is critical as it crucial to find global partners that share similar values and referrals are important. A preference for mature business partners was shared by the respondents as mature firms enable easier collaboration.

The literature research shows that there are stark differences between negotiating across borders versus negotiating within domestic markets. The differences are presented through language barriers, cultural barriers, legal barriers, and business practices (Hum, 2007). Gilson, Sable and Scott (2013) point out that the emerging market has unpredictable and unstable contracting environments. The thin markets and contracting barriers as described above show the preference for contracting with mature firms. This will be the case in the foreseeable contracting future as long as the markets remain unpredictable.

The research showed that the collaboration and mature business partner selection required special negotiation skills. Both negotiators pointed out that their go-to strategy is finding a sweet-spot with the other side, creating a good relationship then developing the relationship from there. Negotiators must be competent and must be able to communicate the value they bring to the table. Commercial acumen is key, legal knowledge and patience and perseverance.

**Table 12 Negotiation Skills and Literature Constructs**

<b>Negotiation skills</b>	<b>Literature constructs (Cohen, 1999; Hum, 2007)</b>
Finding the sweet-spot	Great listening skills and sensitivity.
Good <i>guanxi</i> / relationships	Orientation towards people
Commercial competence	Economic, market and political intelligence
Communicate value	Not directly covered by contracting theory.
Patience and perseverance	Not directly covered by contracting theory but relate to Cohen's (1999) theory on soft skills required in cross-cultural negotiations.
	<b>Literature constructs not mentioned by the respondents (Martin &amp; Herbig, 1997; Cohen, 1999)</b>
	Willingness to use team assistance. High self-esteem. High aspirations. Attractive personality. Cultural sensitivity such as a determination of monochromic or polychromic attitudes. The importance of saving face.

Source: Researcher's own interpretation of data

There was no guideline given to the respondents for the above criteria. Once more, relationship building was at the centre of the discourse together with commercial competence. This is in line with the collective assignment of relationships in an African setting. However, the literature showed that there was a gap in the answers proffered in the study. There was no mention of personality attractiveness, cultural sensitivity and personal characteristics such as high aspirations and ambition, self-esteem and ensuring that the other side does not lose face. This implies pragmatism is valued in emerging market negotiators where the market is less sophisticated.

### **6.7.1 Conclusion to Research Question 3**

Negotiation techniques and skills required in emerging markets are, and will remain, pragmatic. The market is volatile and collaboration, planning and incentives are aligned with the collectivist nature of emerging markets. As markets become more sophisticated, negotiators will move from a practical competence and pragmatism base to a competence and personality based coupled with cultural awareness.

### **6.8 Research Question 4 - Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?**

It emerged from the research that relationships are the most important aspect of contracting in emerging markets. The negotiators, who are the first port of call in the contract formation emphasised finding the 'sweet-spot' outside of the contract then negotiating the contract thereafter. The ten respondents emphasised relationships as being primary and the contract as being secondary. Long-term relationships are viewed by the respondents as a marriage with ups and downs. As the relationship element arose in most of the responses even those indirectly related to relationships, this called for a further delving into the relationship aspect. Relationships sustain contractual relationships and they also involve not making the other party lose face. Relationships have to be formed before contract signature and throughout the contracting relationship.

The literature shows that framework agreements can be adopted for transactional contracts where a contract does not need to be formed. The one respondent, a supply-chain manager, with three years' experience in an immature firm preferred not to have a relational framework as trust had been broken in the past. The theme of trust recurred both as a positive and as a negative. This lack of trust shows the variation as expounded by Cummins, Kawamoto and Mallory (2011) in reference to the maturity of the practitioner, maturity of the firms, industry and reporting lines (Cummins, Kawamoto, & Mallory, 2011).

The research findings are in line with the literature. The literature states that relational contracting implies that cultural factors have to be taken into account as culture affects the way business is conducted (Anedo, 2012). The importance of relationships in an African context shows correlations with the Chinese culture and the concepts of

collectivism and *guanxi*. Relational contracting has roots in sociology and people cannot contract outside of society's norms. Collectivism and the relationship framework in Africa is supported by the literature as Miller (2011) states that there is a leaning towards relational contracting which fosters a trust versus an exhibition of when to litigate. This is related to the research finding that contracts are still relevant tools but only in cases of breach and litigation.

Despite the relationship framework being important, it emerged from the study that contracts will continue to govern relationships in particular in cases of breach. When the relationship goes sour, the contract document becomes important. Without contracts, the parties were in agreement that there would be no yardstick for compliance and optimising the agreement.

The study further showed that there would be no change to the general terms and conditions. The preservation of static general terms and conditions is to keep a lifeline in case the relationship goes wrong and there was an admission that the law (as encapsulated in contract terms) does not change rapidly. Three of the respondents opined that the contract had to become more vibrant. The vibrancy of the agreement was linked to contextual dynamic adaptation to suit the market especially if firms are operating in different jurisdictions where certain clauses have no value.

The research also showed that contracts are and will remain as legal instruments and the preserve of lawyers. Only two respondents stated they were dual purpose and one stated that they were economic instruments as litigation only happens when there are disputes.

The top ten negotiated terms of 2011/2012, the latest available, show that top negotiated terms are mainly linked to potentially litigious clauses not relational or performance clauses. This is mainly shown in the top three clauses: limitation of liability; indemnification; and price, charge and price changes (IACCM, 2012). The IACCM (2012) avers that these top terms show there is a need for intelligent contracting. The primacy of the contract must be accompanied with vigilance towards the changing global landscape. This current study is in line with the current literature as the minority of the respondents agree that contracts have to be adapted to the emerging market especially when operating in unfamiliar jurisdictions. The majority of the respondents, however, stated that the contract conditions will remain stable because contracts are the preserve of lawyers who protect the sanctity of the law and contracts. This may show that contracts are skewed towards serving the law and not the commercial business.

The literature is in direct opposition to the research findings. Cummins (2009) and the IACCM (Barton & Anderson, 2012) in their study found that contracts are becoming more about business outcomes and less about contract scope and transition. The world of business is rapidly changing and the contracts have not kept up with the pace of change. Literatures research and findings show that hard-coded standard terms and conditions create stumbling blocks in building relationships. The view point that contracts are of paramount importance is indicative of old practices (Cummins, 2009).

The disjuncture in the current research and the literature shows that the current and future state of contracting in emerging markets is premised on contracts being the mainstay of business dealings with minor adjustments to contract terms and conditions to fit into the context of cross-jurisdictional contracting. The general contracting theme has been conservatism in the contracting process in emerging markets. Hard-coding of standard terms and conditions does not create a stumbling block. Relationships or good *guanxi* are built first and the contract document is secondary to the relationships. Contracts are indeed important but do not supersede collectivism and relationships in realising business outcomes.

It emerged from the study that the value proposition of the different functions will change should there be revenue generation opportunities. These changes will, however, happen in the framework of what the company allows. Internal company dynamics presented the biggest hurdle in altering and re-evaluating value propositions to meet revenue generating opportunities. An emerging theme that was unsolicited was changing of value proposition was seen by some firms as threats and this led to self-monitoring in not changing value propositions and an adherence to job descriptions.

The literature on contracting mainly relates to external relational contracting. The research shows internal dynamics are equally important in influencing contracting in emerging markets. A working contracting model is premised on business units working well together and contracts being used for better business solutions. Contracts must support the shifting needs and goals of a business and contracting processes must offer both flexibility and stability, as encapsulated in the role of the entrepreneurial lawyer (Haapio, 2010). The contracting departments need to be living instruments that allow for malleable reaction to new business scenarios (Barton & Anderson, 2012).

### **6.8.1 Conclusion to Research Question 4**

Relationships are the foundation of the law and this is borne out of the fact that contracts are drafted within a social context. The lawyers, to a great extent, control the contracting process, which creates conservatism in contracting. Relationship frameworks allow contract professionals to weather external volatility. Internal contracting frameworks have to be equally robust to counteract the external capricious global environment.

### **6.9 Research Question 5 - Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?**

The research shows that that use of technology and innovation is low. Technology is used to segment strategic partners and to determine contract values and not for transaction or portfolio analysis. The research further shows that innovation is used for product development. Only two respondents have innovation targets for their teams and jointly innovate with their service providers. There is indication that in the future technology will be considered for portfolio analysis or management of risk.

It emerged from 80% of the respondents that there is no inclination or future consideration from the respondents for implementing innovation targets, focusing on innovation or experimental practice. However, the study shows that the respondents foresee technology being used extensively for optimising contract management, portfolio analysis and for risk management. There is an intention to move away from spreadsheets and ubiquitous note taking to a technology based contract and risk management approach. But as the literature research states technology has created new sets of problems and legal puzzles (Moringello & Reynolds, 2013). The emerging markets may not be mature enough to tackle technological contractual innovations.

In the research by the IACCM creativity was pointed out as the most important leadership competency to overcome contract complexity (Barton & Anderson, 2012). This literature finding is the direct opposite of the research findings on research in emerging markets. Emerging markets are driven by pragmatism and product innovation supersedes leadership and contractual creativity.

The above shows that contracting within emerging markets is and will remain conservative. Of the four elements explored – (i) innovation targets for team; (ii) shift on focus on innovation; (iii) experimental practice becoming best practice; and (iv) the use

of technology to optimise contract management and risk management, the last element is where there is an anticipated shift in contracting. This is indicative of a conservative contracting process within emerging markets. There is resistance to innovating and adopting technology.

The literature shows that modern contracts are developing alongside a market economy that is becoming more sophisticated and dealings range across geographies with strangers. Innovation and technology must take place within this context (Barton & Anderson, 2012; Kim, 2013). The challenge is presented in literature is to make the law more fully integrated with business life (Susskind, 1998; Susskind, 2000).

The study further revealed that lawyers control contracting in emerging markets. The call for proactive law and proactive lawyers has been led by the pre-eminent scholar Helena Haapio (2009; 2010) who portrays a global lawyer as a legal designer as depicted in figure 2. The role of lawyers should be that of a designer who combines being a fighter with being a problem solver. This means they help managers run their business, put systems in place and stimulate and support clients' legal self-care. Kim (2013) opines that contracts are only useful if they are responsive to market place realities. Kim (2013) further argues that there needs to be an adaptation by the courts of the changing contract dynamics. On the other hand, researchers maintain that the law needs to remain stable in order to be followed.

Merging the research results and the literature, the implication is that contracting in emerging markets is, as Kim (2013) notes, only useful if they are responsive to market place realities. The reality of contracting in emerging markets is that the law and contracting is at a point of stability or conservatism that is befitting the market place realities. Innovations and innovative KPIs and technology use for risk and portfolio analysis are not a current reality nor are they foreseen as a reality in the five years that the respondents were asked to glean into. Contract visuals are based on studies of cognitive capacity, strategic reading, affordance and schemata (Miller, 1956; Gibson, 1977; Paris, Wasik, & Turner, 1991; McVee, Dunsmore, & Gavelek, 2005) together with proactive lawyering (Haapio, 2009; Haapio, 2010) are not current or foreseeable realities.

The research further goes against current literature that states that organisations have to have distinctive technological competences for competitive advantage in order to create new opportunities (McLaughlin, McLaughlin, & MaElayadi, 2014). This is not representative of the reality in emerging markets. The firm strategies and context do not support this. Relationships are the anchor.

The IACCM (2012) research findings state that the future of contracting will move towards contract automation to free and assist contract managers with routine contracts a point made by one of the respondents, a contract manager. The benefits of technology need to match the emerging market specific context. However, the problem that may present itself is that technology may be mismatched if firms in emerging markets do not share complimentary technologies. Emerging markets do not share same technology and innovation for contract enablement (Fourne, Jansen, & Mom, 2014). This disjuncture is what creates the mismatch between the literature and this current study.

The differences that are noted from the research of a handful of innovators and technology use can be explained by the work done by Cummins, Kawamoto and Mallory (2011). This is dependent on the maturity of the practitioner, reporting lines, geography, culture, industry and complexity. Within this current study there were two professionals (Respondents 3 and 9) who are innovating and are not averse to using technology work in mature industries that are driven by innovation and technology. Their responses are relates to maturity of practitioner, industry and complexity.

### **6.9.1 Conclusion to Research Question 5**

The emerging market context has to be taken into account and innovation and technology use cannot be used for innovation's sake. Innovation within contracting is currently not wide spread and any reference to innovation is product related. The markets are not ready for innovation and extensive technology use especially where there is a mismatch of technological capabilities between firms. Lawyers as the drivers of contracting should be designers who help managers run their business, put systems in place and stimulate and support clients' legal self-care. This will be only useful if they are responsive to market place realities. The law in emerging markets needs to remain stable in order to be followed. Current and future contracting is only useful if they are responsive to market place realities. And this conservatism that is befitting the market place realities of emerging markets.

## 6.10 Future Skills for Global Contracting

The research showed that the skills that were highly valued were practical skills. The research showed the requisite skills are strong commercial acumen, an understanding of strategy peppered with commercial sense.

**Table 13 Future Skills for Global Contracting**

<b>Future skills</b>	<b>Literature construct</b>
Emotional intelligence	This is not covered in the literature for requisite skills in contracting.
Awareness of cultural differences	Contract practitioners need cultural awareness and great competences and process management (Barton & Anderson, 2012).  Global counsel must have fluency in cross-cultural law. Global literacy dictates that the organisation be mobilised to contract in culturally mindful ways (Mann & Gotz, 2006).
Awareness of different business practices	The literature shows that highly valued skills include an value creation through an understanding of the organisation, management system and business processes. There has to be a commitment to understanding the business of the clients and industry and market norms. Legal awareness and proactive lawyering are critical skills within contracting (Haapio, 2010).
Strategic insight and lateral thinking	Contracting is complex and requires dedicated practitioners and places the practitioners in position where they must balance competing interests and tensions in the business otherwise there is value seepage (Cummins, Kawamoto, & Mallory, 2011).
Legal knowledge and a deep understanding of legal documents	Most contract managers are legal experts and legal astuteness is a valuable managerial capability. The issue is that legal minds are trained to fervently avoid risks. There is a great call for entrepreneurial lawyers as a new breed of attorney, conventional

	lawyers are not strategic thinkers. In low rule of law markets often the risk moves from the market place to the legal realm (Evans & Gabe, 2014).
Negotiation skills	The practitioner on a personal level has to be committed to change and personal development, <u>negotiation skills</u> , team work and problem solving skills (Haapio, 2010).
Innovation	<p>Lawyers are central to contracting. The literature speaks about a new breed of an entrepreneurial lawyer (Masson &amp; Shariff, 2010).</p> <p>Most contract managers are legal experts and legal astuteness is a valuable managerial capability. The issue is that legal minds are trained to fervently avoid risks. There is a great call for entrepreneurial lawyers as a new breed of attorney, conventional lawyers are not strategic thinkers. In low rule of law markets often the risk moves from the market place to the legal realm (Evans &amp; Gabe, 2014).</p> <p>The role of lawyers should be as designers that introduce solutions, put systems in place and maximise opportunities while minimising risks (Haapio, 2010).</p>

Source: Researcher's own interpretation of data

The skills required for contracting is not a heavily researched area in academia. Contracts are at the core of business and the essence of the firm is the nexus of contracts. Contract practitioners who can extract maximum value from their contracts will get better returns (Bird, 2010). The literature review is aligned with the research outcomes of this study. Lawyers are mainly the contract practitioners and the research shows that the supply chain managers and negotiators and commercial managers rely heavily on their legal teams. Respondent 8 admitted that there is a tendency for lawyers to overcomplicate legal documents for self-preservation: *“As lawyers for self-preservation reasons, if we simplify it any person on the street can decipher it easily”*.

Respondent 9 presented a solution against over-reliance on the lawyers. Respondent 9 pointed out that the people who draft agreements should not be contract managers as it does not allow for a fresh perspective. *“It is too incestuous. There is a view that says that people who negotiate and put the agreement in place should not play referee and monitor, what if they have put in place a kak deal”* (Respondent 9). Likewise Respondent 4 shared the same view that contract management and relationship management should be separated to limit cases of fraud and to ensure accountability. Respondent 3 pointed out that there was a lack of understanding in emerging markets on what contract management was. The findings of the study show that the skills of conventional lawyers do not serve the business; they have to be strategic thinkers especially in low rule of law markets where business risk is heavily placed in the legal realm.

The research shows that when all the elements are combined, it is a call for highly skilled individuals who in a global environment are able to deal with complexity and simplify or eliminate it for the business. Contracting skills are the backbone of business and they should support the business in its ability to drive change, adapt and, indeed, create value (IACCM, 2012).

A gap that presented itself within the research is that sometimes that skill simply is capacity. Warren (2014) explored that even with highly skilled individuals, as the workload increases, so does the occurrence of incomplete contracts. Workloads impact highly skilled people.

Another gap in the research is there is a great focus on emotional intelligence, innovation and strategic skills but an in-depth understanding of the specific roles is lacking. For instance, the IACCM (Cummins, Kawamoto, & Mallory, 2011) have given an in-depth definition of the role of a contract manager but as the research reveals there is a lack of understanding of what contract administration and contract management entails (Respondent 3). Even where roles have been well defined, there is variability that is occasioned by the maturity of the practitioner, reporting lines, geography, culture and industry complexity (Cummins, Kawamoto, & Mallory, 2011).

The research on team KPIs to determine future contracting success shows a similar pattern no synthesised theory and are reliant on, as per above, the maturity of the practitioner, reporting lines, geography, culture and industry complexity (Cummins, Kawamoto, & Mallory, 2011).

### 6.10.1 Conclusion to Future Skills for Global Contracting

The practical skills of a legal practitioner are invaluable in a complex global world. Contracting skills should drive change, adapt and create value. This is in line with the research. In low rule markets, such as most emerging markets, there is a heavy reliance on the legal realm and lawyers have to be entrepreneurial designers with a global leaning. They cannot scream, “No, limitation of liability! No! No!” you get stuck on limitation of liability when commercially it is such a great deal. Why not negotiate on penalties, cap the liability (Respondent 9). Their role is to reduce complexity and their skills need to drive competitive advantage.

### 6.11 Similarities and Differences in All Quotas

#### 6.11.1 The Implications of the Similarities in All Quotas.

**Table 14 Similarities Presenting in the Majority of all Quotas and Literature Constructs**

Affirmative similarities (‘Yes’ answers):	Literature constructs	Implications
The majority of the respondents agreed that relationships are the basis of contracting. Contract relationships are based on trust and the contract document should be relegated to the bottom of the drawer and only surface when there is a dispute the relationship cannot solve.	Relational contracting highlights that contracts in themselves lack utility and have to be based within a social context (MacNeil, 1974; Mouzas & Bois, 2013).  <i>Guanxi</i> relays the same concept as above translating into “intricate relational networks that connect mutual responsibilities, trusts, and understanding with relevant people within social settings (Anedo, 2012, p. 94).”	The respondents acknowledge that contracts are important but in a collectivist society as presented by emerging markets - the contract documents are utilitarian and meant for when things go wrong. Relationships are the glue to contract performance. Relationships have to be based on trust and as implied by respondent 10’s (supply chain manager) response, the

		<p>respondent is an anomaly and does not value relationships because on a personal level there has been a breakdown of trust in the respondent's business dealings. Trust has to be upheld for the relational and trust basis to hold.</p>
<p>The respondents rely on country specific laws and either have a branch office or retain local lawyers where they do not have the expertise. International law is used where it is not a deal breaker to diverge from local laws.</p>	<p>The literature shows that in the emerging market it is dangerous to rely on Western or Eastern models. Contracting has to be context specific especially where there are institutional voids (North, 1990) and low rule of law (Khanna &amp; Palepu, 2011).</p>	<p>Local laws take precedence over international law. Countries in emerging markets have Western legal systems that they have adopted to suit their own contexts.</p> <p>Contract professionals require flexibility when contracting in foreign jurisdictions. Local knowledge is important and no one country can claim to have superior operating practices. It is trite that companies in foreign jurisdictions are not viewed as being non-local as this creates liability of foreignness.</p>
<p>Emerging markets, as they become more sophisticated</p>	<p>One of the main reasons for undertaking this</p>	<p>Global influences do not necessarily create</p>

<p>and as markets become thicker, are influencing international business and international business has to adapt to African nuances.</p>	<p>research was to challenge the current literature “<i>assumes a high rule of law backdrop</i> [emphasis not mine], and in particular takes for granted the presence and correctness of Western institutions” (Evans &amp; Gabel, 2014, p. 2).</p> <p>The presumption of homogeneity due to globalisation is misguided and patterns in different localities acquire different meanings within local socio-economic conditions (Kjeldgaard &amp; Askegaard, 2006). Cultural differences will remain influential in business as the laws of nations are far from converging (Hofstede, 1981; Evans &amp; Gabe, 2014).</p> <p>Sophisticated contracting embeds as much or as little contexts as necessary to avoid courts erroneously interpretation of agreements (Miller, 2010).</p>	<p>homogeneity. Firms doing business in emerging markets have to be contextualised within the markets they are operating in.</p> <p>Contracts have to be aligned to the environment that businesses operating in. Contracting parties must be cognisant of the sophistication or lack of sophistication of the contracting parties.</p>
<p>The respondents are in agreement that there has to</p>	<p>Contracting in the future should be linked to external</p>	<p>Internal clarity leads to better understanding,</p>

<p>be alignment between the management of trading partner relationships and the strategic goals of the business. The two have to work hand in hand.</p>	<p>right partner selection and aligned internal contracting through concerted efforts of proactive lawyers and business managers (Haapio, 2010).</p>	<p>better results and ease of doing business. The internal environment should be geared towards addressing external uncertainty. This is in line with the literature.</p>
<p>Contracts are useful tools for governing contract relationships and will remain useful tools for contracting in the future.</p>	<p>Contracts are central to commercial operations and are inseparable from all economic activities. Business transactions, rights, responsibilities and remedies revolve around underlying contracts. When these contracts fail, business performance inevitably suffers (Haapio H. , 2010)</p>	<p>The research indicates that contracting in emerging markets is and will remain conservative.</p>
<p>Contracts will remain as legal tools and not commercial tools.</p>	<p>Contrary to the above view, it is held that the world of business has changed and contracts have not kept in pace with this as litigation is mainly about scope and transition (Cummins, 2009; IACCM, 2012). Continuing research shows that it is not commercially viable to hard-code standard terms and conditions into policies as this creates delays and stumbling blocks in negotiating and building</p>	<p>In emerging markets, conservative lawyers mainly drive contracting and preserve the usefulness of contracts. As lawyers become more entrepreneurial, this will change. Cummins (2009) avers that contracts should be for business and commercial purposes primarily and that contracts have not kept abreast of business</p>

	relationships.	developments. The research in emerging market research is in oppositions to Cummins' assertions as the market is conservative. The results, therefore, do not support this assertion currently and the future of contracting.
<b>Negative similarities ('No' answers)</b>		
The use of technology is either zero or is utilized for segmenting and stratifying business partners by financial spend.	Technology allows the delivery of data into usable metrics and allows for transparency between data and contract performance. The effects of technology vary by markets (Arrighetti & Reinhard, 2007). Firms in emerging markets use of technology and innovation are dependent on culture, practitioner, industry and complexity (Cummins, Kawamoto, & Mallory, 2011).	Technology use is limited to stratifying business partners by value as this is the usability that is required and allowed by the market.  The respondents foresee in the near future greater use of technology to deliver value.  The literature and research anomaly is due to most technology research being related to emerging markets.
There is no focus on innovation and experimentation currently. Innovation is mainly targeted	Where there are dysfunctional institutions innovation can be problematic and can cause	Emerging market firms remain largely unsophisticated and pragmatic. Innovation

<p>at products and not on contracting. The future will be more focused on innovation and experimenting in ways that will become best practice.</p>	<p>further confusion. The law requires stability in order to be followed (Kim, 2013).  Contracts are only useful in they respond to market place realities. Contracts can become a source of competitive advantage and contracts have to be integrated with business life (Barton &amp; Anderson, 2012).</p>	<p>will be a consideration in the future but currently, practicality trumps experimental contracting.</p>
<p>Visual techniques are used in appendices in reference to products (such as machines manufactured) and are not the mainstay of the contracts and this will change in the future.</p>	<p>As above, contracts are only useful in they respond to market place realities. Contracts are interfaces for collaboration and communication and pictures avoid ambiguity of interpretation (Passera &amp; Haapio, 2011).</p>	<p>The consensus is that emerging market place realities deal with complexities and global interdependencies and interconnectedness by pushing risk to the legal realm and relationship formation and not through visual techniques. Visual techniques at this point might add complexity. The future as it stands is contract pragmatism. Pragmatic contracts, simply drafted are a source of competitive advantage.</p>

Source: Researcher's own interpretation of data

### 6.11.2 The Implications of the Differences in all Quotas.

**Table 15 Differences Presenting in the Majority of all Quotas Literature Constructs**

<b>Differences</b>	<b>Literature constructs</b>	<b>Implications</b>
<b>Valued supplier and customer attributes:</b> there was no overlap in the attributes which ranged from solution focused partners to business partners who stick to contract rules.	No synthesized theory. Refer to Table 13.	There is no concise contracting theory of contracting in emerging markets as this belongs in the realm of humanities.
<b>KPIs that determine teams' success:</b> there was no overlap in the KPIs which ranged from value-add services, risk mitigation, integrity to profitability.	No synthesized theory.	There is no concise contracting theory and the researcher did not give any guidelines.  The suggested KPIs indicate conservative and practical setting of KPIs with few innovation and experimental KPIs being suggested.
<b>Skills and skill types for future contracting:</b> there was no overlap in the responses given which ranged from innovation skills, awareness of cultural differences to negotiating skills.	No synthesized theory.	There is no concise contracting theory and the researcher did not give any guidelines. The suggestions by the respondents were mainly competence based highlighting conservatism in contracting within emerging markets and a call for innovation by one respondent.

Source: Researcher's own interpretation of data

### **6.11.3 Conclusions to Similarities and Differences in All Quotas.**

Similarities: contracting and the future of contracting in emerging markets will to a greater extent remain conservative. This is mainly driven by the market realities. The respondents gave similar responses that negated the influences of innovation and technology and highlighted relationships and trust as key contracting tenets. The usefulness of innovations such as visual techniques is hinted to be useful in the future but in a market given to pragmatism, this seems a long way off. The use of local laws and the growing influence of emerging markets highlights the importance of contextual considerations.

The differences that presented owed to a lack of unified theory and the lack of overlap in skill sets supports the assertion that contracting theory is still developing and over time, changes may present themselves. In future research there may not be an overlap but there might be a leaning towards innovative skills and KPIs and more personal and ambitious skill sets for contract professionals.

### **6.12 Concluding Remarks**

Contracting strategy has to be aligned with global influences and adapted to local laws, cultures and nuances. The language of the law has to offer legal protection in a manner that accommodates relationship factors, flexibility and the interpretative role of the judiciary. The desired state of contracting is towards a simpler form of contract that uses simple language in a contract that is tightly written and offers adequate legal protection. Within the emerging markets contracting landscape, the literature and the research show that the emerging contracting model is premised on collectivism and contract management and relationship management are the cornerstone of all contracting. The contracting model presented below has its core as relationships or good *guanxi*.

Even though there is no synthesised theory on future skills for contracting, it is clear that emotional intelligence, cultural intelligence, business processes and practices, negotiation skills, and knowledge of the law are key drivers. The results within the quotas show that the legal practitioners are mandated to drive the contracting process

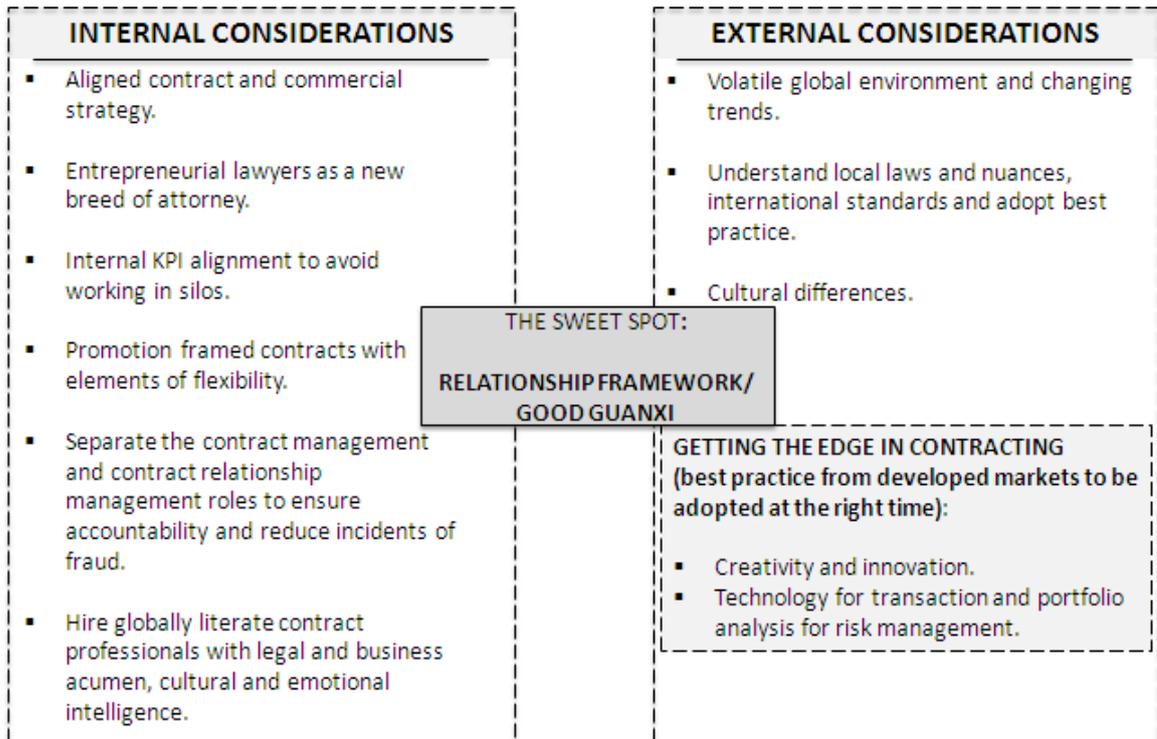
and they are required to support the business in its ability to drive change, adapt and, indeed, create value while reducing complexity for the business.

In emerging markets, in particular where the markets are thin. Partner selection is important and it is critical to balance internal competences with external partner selection in order to overcome the volatility that the market presents and will aid CEOs to overcome contracting complexity. Relationship frameworks allow contract professionals to weather external volatility. Internal contracting frameworks have to be equally robust to counteract the external capricious global environment. A strong arising but unsolicited theme was that contract management and relationship management should be separated to limit the cases of fraud and to ensure accountability.

As markets become more sophisticated, negotiators will move from a practical competence and pragmatism base to a competence and personality based coupled with cultural awareness. Innovation and technology use presents a mismatch between the research and literature findings. Literature states that these two elements give distinct competitive advantage. Current and future contracting is only useful if they are responsive to market place realities, the emerging market reality is conservative.

This study undertook to understand the role of contracting to ultimately get to the answer of what is the future of contracting in emerging markets?

**Figure 7 Proposed Model for the Future of Contracting in Emerging Markets with Relational Contracting/ Good *Guanxi* as the Key Contracting Tenets**



Source: Researcher's own interpretation of data

## **Chapter 7: Conclusion**

### **7.1 Introduction**

This chapter will examine whether the objectives as stated in chapter one were realised. The findings will be summarised including the shortcomings of the research. The groundwork for future research will also be discussed in order to lay a foundation for continued research.

The essence of a firm is the nexus of contracts (Bird, 2010). The aim of the research was to gain insight into the role and purpose of contracts in emerging markets and to understand the future of contracting in emerging markets. The study was based on literature around contracting and active research in emerging markets. The final outcome was to come up with a model that can be used by CEOs in emerging markets and contracting professionals, especially lawyers to deal with the volatility and interconnectedness and interdependencies of contracting in a global world (Barton & Anderson, 2012).

Overall, it emerged that contracts are legally enforceable promises that allow for commerce to take place. Contracts are only useful if they respond to market place needs and realities (Gilson, Sable, & Scott, 2013). The tension throughout the research was the lack of research in emerging markets on the marriage between contracts and international business and this gave rise to a call to understand contracting dynamics in emerging markets (Barton & Anderson, 2012; Chironga, Leke, Lund, & van Warmelen, 2011). The Western contracting models that are readily accepted are based on Western ideals, are dangerous if applied in emerging markets (Khanna & Palepu, 2011). Emerging markets generally present a low rule of law and legal principles do not always readily apply. (Evans & Gabe, 2014). Owing to the limited research in emerging markets, Africa in particular, it was important to undertake this research as it was established there was no deep exploration of contracting in emerging markets from a global business perspective. Given this peculiarity, it was worthwhile research in order to understand the future of contracting in emerging markets.

### **7.2 Research Relevance Revisited**

The aim of this study was to gain insight into the purpose of contracts in emerging markets and to understand the future of contracting in emerging markets. In conducting

this study the law and the shifting nature of international trade patterns in emerging markets were explored together with the role and purpose of lawyers and contract professionals in the contracting process. The researcher's focus was on emerging markets in Sub-Saharan Africa. Was this achieved? The greatest achievement of this research was that it exposed the future direction of contracting and allows for forward thinking leaders to use these tools to prepare for the future.

The outcomes contained in chapter 6 address the outcomes and implications of the research, which took place with people who are exposed to contracts continuously as part of their work.

### **7.3 Findings Summary and Conclusion**

The objectives of the study were met and all the research questions set out were answered. The research revealed that contracting in emerging markets is different from contracting in Western markets as these markets are more mature and sophisticated as the markets are thicker. Furthermore, it was discovered that there are integral elements within contracting in emerging markets that support a more conservative and pragmatic approach. The complexity of dealing across borders can be overcome by a strong contracting strategy based on the formation of strong long-term relationships or good *guanxi* grounded on trust and emotional capital.

In contracting in emerging markets collaboration and value-add to suppliers and customers were regarded as critical. Contracting and its future in emerging markets rely on the interplay between contracts and relationships, with an indication that the actual contract document is only required when there are cases of breach. An interesting finding was the revered role that lawyers play, which led to the conclusion that contracts are mainly driven by lawyers. This was supported by the finding that contracts will always be useful tools within business transactions. The role of the contract document was also viewed as being more legally based than commercially based. On a deeper analysis the rigid role of the lawyer and the malleable relationship base may seem contradictory. The insight gleaned from this study is that contracting in emerging markets is conservative and the role of the lawyer and the law is rigid as this allows for stability of the law, which is necessary for the law to be followed. Furthermore the contract management and relationship management should be separated to limit incidences of fraud and to ensure accountability. The study

established that the role of relationships is due to the collective nature of the African society and this drives business outcomes and affects contracting.

In juxtaposing the literature and the research findings, a deeper delve indicated that technology and innovation are detailed in the literature as giving distinct competitive advantage. The mastering of technology use especially for transaction and portfolio analysis is critical. The findings of the study established that there is limited or no use of technology for risk management and transaction and portfolio analysis and this is in direct opposition to the literature. The focus in emerging markets is on segmenting clients by monetary value in order to build value-add strategic relationships. The study established that innovation will be a consideration in the future. Technological considerations for the future will be reliant on the match of contractual technological capacity between firms in emerging markets. Relationships will be an integral part of the future of contracting as it emerged from the study that there is integration between contract management and contract relationship management. There was clarity of alignment between trading partner management and the strategic goals and business making decisions of the business. Negotiation techniques have become transformational and enabled an improvement in partner selection especially across unfamiliar territory. The relationship framework was the most important element as it was a recurring theme.

The other findings of this study revealed the growing influence of emerging markets on the global interconnectedness. Local laws are preferred in contracting and international law is only applied if it is not a deal breaker. Local nuances always have to be accounted for so that global firms do not have the burden of being viewed as foreign entities. Even in cases where international best practice is adopted, it is always adopted to the regional nuances. The literature states that amalgamation of culture through globalisation is a myth. There will always be local distinctions and the future of contracting has to take this into account.

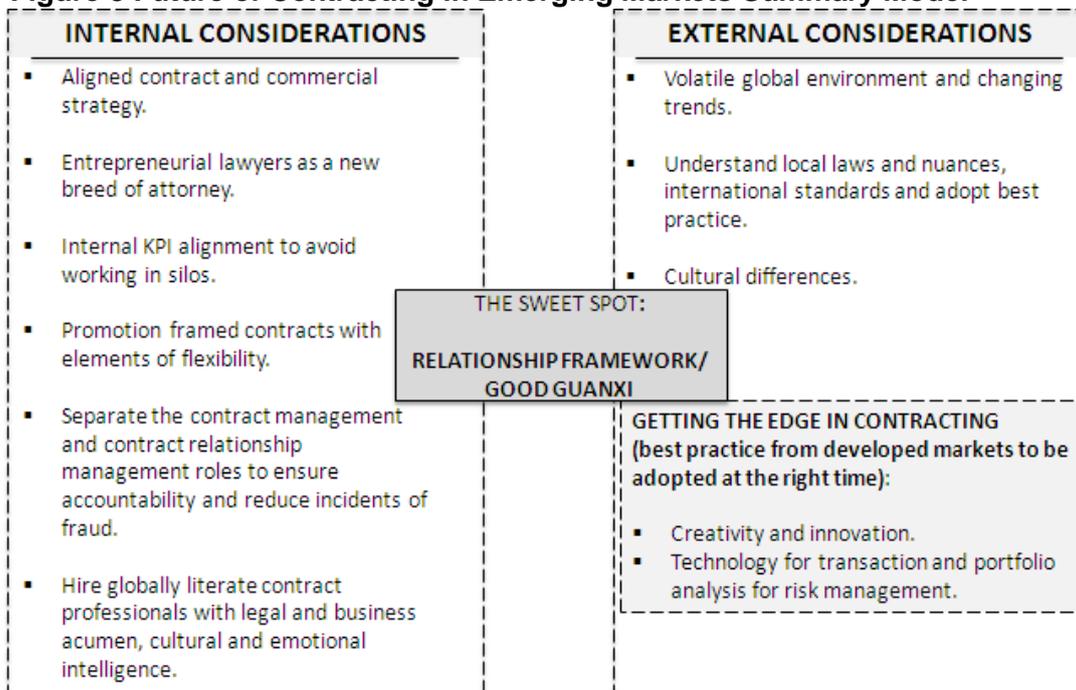
The future of contracting can, therefore, be stated to rely around these factors:

- A relationship framework of contracting or good *guanxi* will be the axis. This implies deeper integration between contract management and relationship management; alignment of trading partner management with the strategic goals of the business; and transformative negotiations.

- A consideration of external volatility which can be combatted by understanding and adopting local laws and regional nuances and aligning international best practice to regional peculiarities.
- A consideration of internal firm influences through an aligned contract and commercial strategy; contracts that use simple language but with enough legal robustness to offer adequate protection.
- The adoption by global lawyers of entrepreneurial law and the role of a legal designer and a move away from a purely risk management role.
- And the separation of contract management and contract relationship management roles to ensure accountability and reduce incidents of fraud.

The other findings of this study which revealed a down-side to contracting in emerging markets was that contracting lags behind business practice and other markets (East and West). Technology is not used to mine data in order to support the proactive management of risk and portfolio analysis. The presence of institutional voids in emerging markets prescribe an apportionment of risk and a flexibility that is case-by-case dependent. Contrary to the research results, technology, innovations and the use of visuals within contracts should be viewed as contracting enablers and adopted to suit the regional idiosyncrasies. Technology would greatly aid with predictive modelling and will lead to a refinement of data and contract information.

**Figure 8 Future of Contracting in Emerging Markets Summary Model**



Source: Researcher's own interpretation of data

## **7.4 Recommendations**

### **7.4.1 Recommendations to CEOs in Multinationals**

Chapter one indicated that the study would allow for a greater understanding of contracting in emerging markets. It was further indicated in chapter one that CEOs and business leaders doing business in a global world are confounded by issues of interdependencies and interconnectedness and contracts and contracting strategies can be a way of detangling and simplifying this complexity. The findings of this study will help business leaders and CEOs to navigate this complexity.

The findings bring to the fore a great need to understand the context within which firms operate in. Countries that operate in countries with opaque systems have to have a sophisticated understanding of global risks in running businesses and international trade. Contracts and contracting strategy can be used by a business for contracting strategy as the turbulent international environment has had an impact on global business. Contracts can create strategic advantage through creating flexibility by applying legal rules in the hands of an entrepreneurial lawyer to overcome institutional voids.

CEOs should focus on using their contracting strategy to give their firms an edge and competitive advantage and results from the study show this will be possible through more strategic contribution by contracting professionals. Most importantly, it is a great idea to hire entrepreneurial and globally literate contract practitioners.

The research revealed that contracting needs to combat external volatility but a recurring and disturbing finding was that there is internal volatility and inconsistency that is created by differing KPIs, over-emphasised job descriptions and procedures, which creates silo activities and a lack of accountability. KPIs between the contracting professionals, legal teams and sales teams have to be aligned and CEOs have to ensure this.

### **7.4.2 Lawyers who are Contract Practitioners**

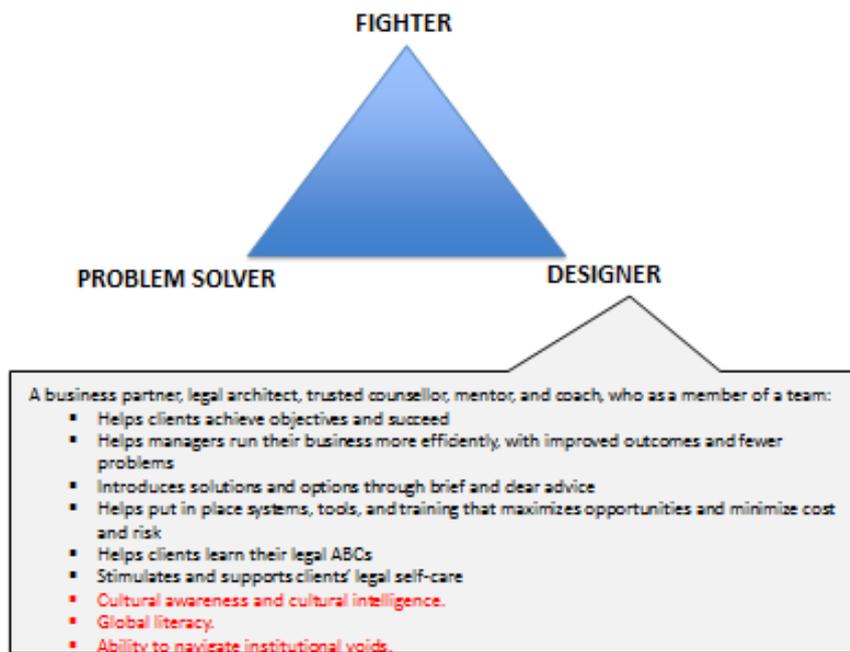
Research shows that for any laws to be effective there must be stability in the law. Research further shows that there is a tension that needs to be balanced between lawyers using precedent; sticking to the law; and being robust and relevant to the context and business challenges within which firms operate in. Lawyers must draft contracts in a way that uses simple language and using techniques that allow those

who have to implement contracts to be able to turn the contract into a working and user-friendly document.

Legal documents cannot cover all legal contingencies, lawyers have to become more entrepreneurial and respond to the changing needs of businesses and the external volatile environment.

**Figure 9 Restated Role of Lawyers and the Call for the Entrepreneurial Lawyer**

**The Role of the Entrepreneurial Lawyer in Emerging Markets**



Source: (Haapio, 2010, p. 30) The Role of Lawyers

The red represents the skills that have been added to the model originated by Haapio (2010) above using the common findings from the current study.

**7.4.3 Contract Practitioners**

The first recommendation to contract practitioners is to acknowledge that time should be spent on value-adding activities such as building relationships and creating sustainable commercial relationships to support the contract document and exchange

value. The focus should not be on the contract but on a relational form of contracting. Contract management and relational management should be inextricably linked.

The second recommendation is that in any contract formation, the contract practitioners should find a sweet-spot with which to create relationships. Relationships are formed on a personal level first then on a company level. The personal relationship formation should be based on finding a 'sweet-spot' of commonality.

The third and final recommendation is that there has to be a greater consideration on how the contracting process impacts the overall business. The contracting professionals should be tasked with connecting to and engaging the whole business and not operating in professional silos. This move requires that contract professionals equip themselves with business acumen, strategic orientation and cultural awareness. Contract professionals need to support the strategic needs of the business.

#### **7.4.4 Consultants**

The gap between the literature and practice creates a gap for consultants to enter into the contracting arena and create context relevant innovations, and technology innovations for data analysis, predictive modelling and portfolio analysis. Consultants can help simplify contract design and allow for a greater use of visual aids, which include graphs and flow charts. The study revealed that the use of technology is possible in the future, though the majority of the respondents do not foresee it in the next five years. Technology can be used to build relationships by building in analytics that contribute to business success. Technology can also create a great repository of business and contracting relationships, discussions and the openness will create greater trust.

#### **7.5 Shortcomings of the Research**

All research is prone to errors and in qualitative research this is confounding on the researcher and there were possible errors in the ability to identify information that could be relied to come up with the research conclusions from the interviews. Despite the limitations, the researcher made all efforts to stay honest and to extract as much relevant data as possible from the interviews. Throughout the research process, some

bias was discovered through intellectual self-awareness and self-examination by the researcher (Pierce, 2008).

There were several shortcomings of this research:

Lack of focused emerging market literature: Within emerging markets journals there was no literature found on commercial contracting within a business environment and the interaction of contracts with global influences. Most of the literature relied on Western concepts and an assumption that emerging markets have a low rule of law. What was clear in the literature was that is dangerous to transpose Western concepts onto emerging markets but the literature and studies averring the same was literature borrowed from developed markets. There is a general assumption within this research that in emerging markets there are institutional voids in that there is an absence of specialised regulatory systems and contract enforcing mechanisms. This cannot be generalised across all jurisdictions within Africa as this may apply differently across different geographies.

Respondent distribution: The study accommodated contract professionals as defined by the IACMM and the quota samples were drawn from member group categories. The use of quotas and the accommodation of all contract professionals may have impacted on the findings. Since the exploration was around contracting, the enquiry could have been focused around people with a legal qualification. The role of contracting and the future of contracting may manifest itself differently across the different sectors. The respondents are qualified by being IACCM members and are not at the same level within their respective companies. This could have impacted the results. Lower level employees are not able to influence the contracting strategy or decision making process in the company. The sampling technique used may have impacted on balanced insights. On the other hand, the spread of respondents contributed to a wider range of views.

Qualitative study: The participants were asked, through their experiences, to glean into the future of contracting. An empirical and more focused way may be required to determine this. Criticisms have been levelled against qualitative research in that it lacks the rigour of quantitative research and relies on issues and concepts are influenced by prior learning. The scope for misinterpretation is large.

Personal bias: The researcher is a member of the IACCM and had working knowledge of the contracting process in emerging markets. This may have influenced the

information received from the participants as the researcher may have unintentionally qualified certain concepts to the interviewees in an attempt to remove interviewee bias and may have resulted in biased findings.

Assumptions made: the researcher made assumptions that contracting strategies that are appropriate in the developed world are inapplicable and treacherous in emerging markets due to the presence of institutional voids, low rule of law and the differences in how contracts are honoured. This may have impacted on the findings. These assumptions were made without investigating legislative changes within the context of the research.

## **7.6 Directions for Future Research**

This research unearthed the interaction of the law and contracting in emerging markets and the research revealed a number of areas for further research. The suggested avenues for future research are as follows:

- This research had shortcomings due to it being qualitative research. Quantitative research can be undertaken to gain a wider understanding on the future of contracting in emerging markets. A greater quota spread and larger numbers of participants may lead to more reliable findings.
- The study revealed that it is critical to consider the unfolding development of the future of contracting from a position of relationships – how do relationships or the concept of *guanxi* manifest itself in contracting in Sub-Saharan Africa?
- The impact of the low rule of law and institutional voids came up as a key feature of emerging markets. Further exploration could be on the impact of the low rule of law and institutional voids in creating flexibility and adaptability in contracting within emerging markets. This can include a longitudinal study of legislative changes within the context of the research.
- Global influences are bringing about a requirement for a new skills set by contracting professionals. Future research can be undertaken to explore the role and impact of focused training by organizations such as the IACCM in developing the skills and competences of practitioners in emerging markets to become more globally literate.
- It emerged that the country specific institutions shape commercial contract law. An area for future research is how the wisdom of the courts as institutions in

emerging markets shape contracting through the quality of their commercial judgments.

- A study using secondary data can be undertaken to glean into the development of contract law over a ten year period to highlight the indicators of contracting success and/or contracting failures in emerging markets.

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## Appendices

### Appendix A: Letter of Consent

#### Informed Consent Letter

Dear Sir / Madam

Beyond contract interpretation and enforcement: The future of contracting in emerging markets.

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This letter serves to obtain the consent or disapproval of a third party to participate in an interview used in research conducted in the process of fulfilling the requirements for a Master's degree at the University of Pretoria's Gordon Institute of Business Science.

I am conducting research on the future of contracting in emerging markets and am attempting to gain insight into the changing role and purpose of contracts in emerging markets and to understand the future of contracting in emerging markets.

Our interview is expected to last approximately one hour, and will help us understand how contracting is evolving in emerging markets. This will assist businesses that are operating globally to contract intelligently. This will further assist firms to get maximum value out of their contracts.

**Please note:** Your participation is voluntary and you can withdraw at any time without penalty. Please note all data will be kept confidential.

If you have any concerns, please contact me or my supervisor. Our details are provided below.

**Researcher name**

Tafadzwa Sithole

**Email** [tazsithole@gmail.com](mailto:tazsithole@gmail.com)

Phone 079 502 7472

**Research Supervisor Name**

Andre Vermaak

**Email** [andrepv@mweb.co.za](mailto:andrepv@mweb.co.za)

Phone 083 308 0235

Signature of participant: \_\_\_\_\_ Date: \_\_\_\_\_

Signature of researcher: \_\_\_\_\_ Date: \_\_\_\_\_

## **Appendix B**

### **Detailed Description of the Pilot Interviews Conducted**

The initial intention was to rely on the 5 questions as outlined in Chapter 3 as the researcher assumed that the questions would generate enough interest from the participants. However, as the researcher carried the pilot study it became clear that the questions were too few and that there was no guidance given as to how the questions should be answered and this led to varied answers and different interpretations to the questions. As more questions were added and tested, the interviews were more directed and the sub-questions served to clarify the main five questions.

The researcher was aware that due to the use of quota samples, the questions asked within each quota had to be adjusted slightly to accommodate for the nuances of their particular jobs. The pilot questionnaire was conducted with four contract professionals, one who was a member of the IACCM and three who were non-members to test the specificity of the questions and to ensure that the terminology used was not localised to the IACCM but was applied generally within commercial contracting. It was found that the questions, concepts and phrases were not specialised or localised to the IACCM but were of general use within contracting. A few questions were also rephrased to elucidate the meaning and to avoid interviewee bias so that the interviewees did not try to impose their own meaning into the research questions.

The last section on skills (highlighted in red on the questionnaire) was added as a result of the pilot survey as the issue of skills was highlighted to be a key influence in how the individual and/or contracting teams influence contracting. This was in line with the research call for the globally literate practitioner. The pilot study highlighted that question 5 was confounding and an explanation had to be given to set the context to ensure that the meaning was clear and that practitioners answered along the same lines. The explanation given is also highlighted in red in the questionnaire below.

Once the revisions were made, the questionnaire was once again pilot tested with two contract professionals, one belonging to the IACCM and the other a non-IACCM member. The questions in the final questionnaire were pitched at a level where everyone in the quota sample, who had relevant exposure to contracts, could answer the questions. The main aim of the pilot study was to eliminate the need for different questionnaires, which would make it difficult to compare the findings across the different quotas. The pilot study was a time consuming exercise but worth the time spent as it clarified and refined the questions asked to the relevant interviewees.

## **Appendix C:**

### **Interview Questions**

This research which is being circulated to a number of interviewees– asks participants to provide a variety of information regarding the future of contracting in emerging markets including the challenges and opportunities in contracting. The researcher will anonymise all responses, with the goal of generating useful, real-world insights about the future of contracting.

The participants are asked to consider **what the future of contracting will be over the next five years as they respond to the questions.**

### **Industry:**

.....

**Role:** In my role I am involved on the:

- Sell side
- Buy side
- Both Sell Side and Buy Side

### **Job Title:**

- Legal
- Commercial manager
- Contract manager
- Negotiator
- Business manager

### **Job Level:**

- Administrator
- Functional Manager
- Executive Level
- Director Level

**Primary geography within which your company operates and specify country in**

**Sub-Saharan Africa:**

- Africa
- Asia/Pacific
- Europe
- North America
- South America
- All

**Years of contract exposure:**

- .....

**Average size of contracts:**

- ZAR0 - 50 000
- ZAR50 000 – 100 000
- ZAR100 001 – 500 000
- ZAR500 001 - 1 000 000
- ZAR1 000 000+

**General Questions**

**What aspects of contracting will change over the next few years?**

- Will common law maintain dominance over international contracting?
- Will there be more international standards applied to contracting?
- Will there be a great focus on simple language versus legal jargon?
- Will there be greater use of visual techniques (pictures, graphs, flow charts etc)?

**Question 1**

1. Is there integration between contract management and contract relationship management?

- 1.1 Do you foresee that trading activity will become more transactional or relationship based?
- 1.2 As emerging markets grow and given their different ways of handling trading relationships. As their influence grows what influence will this have on contracting practices?
- 1.3 How do you see contract management and relationship management changing in the future?
- 1.4 What supplier or customer attributes will be highly valued in five years' time?

## **Question 2**

2. Is there alignment between trading partner management and the strategic goals and business making decisions of the business?
  - 2.1 How will you create commercial incentives for suppliers or customers to collaborate with your organization to achieve mutual profitability, performance and other synergies?
  - 2.2 Will your team be more involved in your company's strategic planning, if so, in what way?
  - 2.3 What changes would you wish to see in the relationships between sales, contracting, procurement and legal groups?

## **Question 3**

3. Are negotiation techniques becoming transformational and are they enabling the improvement of partner selection?
  - 3.1 How do you think the approach to contracting will change with regards to collaborating, planning and negotiation with partners.
  - 3.2 What issues do you foresee tackling in a global business with regards to partner selection?
  - 3.3 What skills will negotiators need in a global business?

## **Question 4**

4. Is there a shift from focusing on contracting terms and conditions to a relationship framework to reduce low value reviews and negotiations?
  - 4.1 Will contracts still be useful tools in the near future?
  - 4.2 Do you expect any significant changes to general terms and conditions?
  - 4.3 Will there be a shift in emphasis between contracts as a legal instrument versus contracts as economic instruments?

4.4 Assuming you need to identify new revenue generating opportunities in five years how will your functions' value proposition change?

### **Question 5**

*(In the past decade contracts have been focused on things like capturing, structuring and implementation standards).*

5. Does the use of technology in transaction and portfolio analysis proactively assist in the management of risk?

5.1 What sort of innovation targets will your team have?

5.2 How do you see the focus of innovation shifting in the next five years?

5.3 Is there anything experimental that might in five years be accepted as best practice?

5.4 How will technology be used to optimize contract management and risk management?

### **6. Skills**

*Taking into account all the answers above:*

- What skills and skill types will be most in demand in five years' time?
- What top three KPIs will determine your teams' success?
- Do you expect to be using contracting resources from outside your enterprise?

## Appendix D

### Contracting in Nigeria

#### Extra questions asked to the Nigerian interviewee in response to unfolding interview responses

1. **How do external global firms react to the nuanced contract requirements in Nigeria?**

Response:

*There are two sides. With local suppliers we use local law. If contracting with people outside Nigeria we look at international contracting law and choose a neutral venue such as English law. If it will be a dealer breaker then we use their venue of choice. For us we find relationships avoid litigation, except when you terminate. The contracts are always straightforward. We terminate for breach, force majeure, termination for convenience, liquidation so those are the grounds that we terminate or sometimes when you want something different.*

2. **How do you find the influence as a high growth economy permeating the way that external firms contract with Nigerian firms?**

Response:

*Yes we influence contracting. With contract management chances of people having a bad experience is reduced and reduces litigation. Our region affects the way we do business. There are great challenges such as infrastructure challenges, power challenges, access to roads, transactional problems, the high rates that the banks are giving, and bureaucracy in governmental parastatals. This affects how we contract. For instance, a contract with a supplier is difficult. Payment terms are difficult and they transfer that risk to you.*

3. **How does your business respond to dealing with small entrepreneurs, low volumes and numerous contracts?**

Response:

*We do not always deal with high volume suppliers. With our negotiation techniques we always try to put something on the table because we have higher power. We try to help the smaller parties grow. What I have learnt in the past is that you can't take all their*

*profits otherwise you do not always get good quality. Once you pay peanuts you get monkeys. We have standards (industry standards) and we compare prices. We are fair.*

*We are surrounded by many small entrepreneurs. The bigger ones are more interesting and we have affiliations with them and they are owned by big international companies. For the smaller ones its smaller transactions. The little ones collaborate a lot as they are growing.*

**4. How do people respond to the request to pay ahead on contracts some up to 5 years?**

Response:

*A law prohibiting people taking more than a year's rental has been promulgated. There is two sides: one, if you pay for five years it is capped and fixed and there will be problems if there is a need for escalation. Secondly, the practice has been that they are used to pre-paying. For instance, it is different when I lived in London I had to pay weekly. However, if there is early termination whatever you is not used is paid back to you.*

## **Appendix E**

### **The Importance of Relationships** (extra questions asked to a global executive coach)

#### **What is the importance of relationships in contracting?**

*Building relationships before contract formations is important. When you get to the contract it is easier to get things done and with good guanxi you are less strict. Spend time together at company level then at personal level, you can do things like going to dinner together. Local subsidiaries should play that role. You should bring gifts that are a cultural representation.*

*As you contract it is important that the other party does not lose face, you need to give respect. Shameful feelings are not good and they do not want to be embarrassed in front of their juniors.*