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TOO BIG TO CARE?: FINANCIAL CONTRACTS AND THE PROBLEM OF TRANSACTIONAL ASYMMETRY

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I. INTRODUCTION

The primary focus of the policy debate on enhancing financial inclusion for small and medium enterprises (SMEs) has been on the issue of SMEs' *access* to finance and the steps that can be taken to improve it.[1] This preoccupation is also visible in the literature on SME finance where, again, the primary focus has been on policy measures and frameworks that increase the availability of external finance for SMEs.[2] At one level, this focus is both understandable and logical. It has been clear for at least three decades that SMEs are more dependent on banks for finance than are larger firms,[3] and that this reflects SME's greater need for that specific form of finance in comparison with larger firms. Broader forms of finance such as supplier finance or leasing are insufficient to fully meet the requirements of SMEs for finance.[4]

In its fullest sense, however, financial inclusion raises issues that go well beyond the bare issue of SMEs' access to finance. As the World Bank's definition of financial inclusion emphasises, financial inclusion as a concept and policy agenda brings together three distinct, and not necessarily correlated, issues: that of ensuring access to useful and affordable finance, that of ensuring that the financial products and technologies that are available meet the actual needs of financial users, and that of ensuring that the delivery of finance is both responsible and sustainable.[5] Whilst the focus of much of the existing work has understandably been on the first of these, the second and third also matter. There is, in particular, an obvious need to assess

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1 The primary focus of the World Bank's Financial Inclusion Global Initiative, for example, has been on its "Universal Financial Access 2020" goal even though, as discussed below, its own definition if inclusivity incorporates a much broader range of features (see *infra* note 5). WORLD BANK, FINANCIAL INCLUSION GLOBAL INITIATIVE (FIGI), https://www.worldbank.org/en/topic/financialinclusion/brief/figi (last accessed 30 September 2020).

2 See eg AN Berger & GF Udell, *A more complete conceptual framework for SME Finance*, 30 J BANK. & FIN. 2945 (2006).

3 M Pedersen & R Rajan, The benefits of lending relationships: Evidence from small business data, 49 J FINANCE 3 (1994)

4 T Beck et al, Financing patters around the world: are small firms different?, 25 J FIN. ECON. 467 (2008)

5 WORLD BANK, FINANCIAL INCLUSION OVERVIEW, https://www.worldbank.org/en/topic/financialinclusion/overview (last accessed 30 September 2020) ("Financial inclusion means that individuals and businesses have access to useful and affordable financial products and services that meet their needs – transactions, payments, savings, credit and insurance – delivered in a responsible and sustainable way").

what it means for SME finance to be 'responsible' and 'sustainable', whether current systems of SME finance meet that standard and, if not, then what might be preventing them from doing so, and what sort of policy measures or frameworks might be necessary to deal with the underlying issues.

This article seeks to contribute to that debate. Its principal argument is that the sustainability and resilience of SME finance depends to a far greater degree than is usually acknowledged on the actual terms of the financial contracts under which banks lend to SMEs, and that this impact is particularly strongly felt in times of financial crises. Prior research has shown that bank finance acts as a constraint on SMEs[6] in a way it does not for large firms,[7] that these constraints have a non-trivial impact on SME performance in a manner that is amplified during crises,[8] and that the nature and extent of this impact are strongly influenced by the actual lending behaviour and practices of banks.[9] Prior research has also shown that SMEs have a limited ability to influence the terms on which they access finance, particularly when they are dealing with rule-based, rather than more discretionary relationship-based, lending.[10] This article argues that these issues reflect a deeper underlying factor, namely, that SME lending is typically governed by terms which give banks the ability to, and a strong incentive to, engage in ways that constrain, disrupt, and potentially cause considerable financial distress to SMEs during economic downturns.

There is a strong parallel between the concerns of the present article and those of the literature on relationship lending. Since the 1990s, an important theme in the literature on SME finance has been the argument that the financial needs of SMEs and, thus, the broader goal of financial inclusion and sustainability for SMEs, are better served by 'relationship lending', where decisions on financing are based on 'soft' data and judgements formed through relationships and interaction rather than 'hierarchical' lending where decisions are made at arms' length and are primarily based on 'hard' quantitative data.[11] The arguments of this article are in sympathy with that literature, which it seeks to extend by analysing the impact of relationship-based lending not just on banks' decisions on whether or not to lend to a borrower, but also on their broader approach to managing the lender—borrower relationship. In doing so, this article does not seek to argue that the issues it discusses are more significant than the issue of access to finance. It seeks, rather, to argue that they are *also* problematic, and need to be addressed in any policy agenda directed towards financial inclusion. There have

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[6] T Beck et al, *The determinants of financing obstacles*, 25 J INTL. MONEY & FINANCE 932 (2006)

[7] T Beck et al, Financial and legal constraints to firm growth: does firm size matter?, 60 J FINANCE 137 (2005)

[8] M Campello et al, The real effects of financial constraints: evidence from a financial crisis 97 J FIN. ECON. 470 (2010)

[9] P Behr et al, Financial constraints of private firms and bank lending behavior, 37 J BANK. & FIN. 3472 (2013)

[10] J Grunert & L Norden, *Bargaining power and information in SME lending* 29 SMALL BUS. ECON. 401 (2012). On the distinction between rule-based and relationship-based lending, see G Cerqueiro et al, *Rules versus discretion in loan rate setting* 20 J FIN INTERMEDIATION 503 (2011)

[11] See esp. JM Liberty & A Mian, *Estimating the effect of hierarchies on information use* 10 REV. FIN. STUD. 4057 (2009)

been several measures taken in recent years to protect SMEs from lender overreach, such as the US Small Business Reorganization Act of 2019 (the "SBRA"),[12] and the idea of financial inclusion offers a promising basis on which to integrate them into a more complete policy agenda.

Part II of this article outlines the basic factual underpinnings of the argument, namely, that banks' loan management practices have a negative effect on the overall resilience of SMEs in times of crises, and that these practices are enabled and facilitated by the terms and conditions of contracts. The focus of the Part is on two case studies, both exploring lender practices in relation to SMEs, and cumulatively demonstrating that these practices have a broader impact on financial inclusion which goes beyond the SMEs themselves. Part III argues that a proper understanding of the problem requires an engagement with contract theory and, in particular, relational contract theory. I identify two theoretical models of SME lending, one of which treats the contracts that underpin them as simple, discrete, and wholly unrelational contracts, while the other treats them as relational contracts whose effect is to create frameworks of private governance that supplant and supersede the priorities, interests, and outcomes embedded in public governance frameworks. I argue that the relational model is superior in its ability to explain the nature of financial contracts and provide a diagnosis of their impact. Part IV argues that addressing the resulting problems requires the law to take an active role in governing governance, by explicitly favouring and seeking to encourage relational lending. Drawing on the literature on corporate pluralism and negotiated economies, I outline a policy framework and agenda that can successfully address the issues this article identifies while also avoiding the dangers of overregulation. Part V summarises and concludes the discussion.

II. FINANCIAL CONTRACTS AND FINANCIAL INCLUSION: THE IMPACT OF BANK-SME ASYMMETRY

There is now a considerable body of work examining different models of lending to SMEs. Much of this literature has focused on two types of finance, or two 'lending technologies',[13] as they have come to be called: 'relationship' lending on the one hand, and 'hierarchical', 'transactional', or 'arms-length' lending on the other. Relationship lending is usually taken to be associated with smaller local or community banks, whose decision-making is informed by soft and less easily quantifiable information that has been gathered by individual loan officers[14] over the course of a sustained lending relationship with the borrower in question.[15] Hierarchical lending, in contrast, is usually associated with larger banks, or with foreign banks, who make lending

[12] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 11654, 133 Stat. 1079
[13] Berger & Udell, *supra* note 2, 2946
[14] H Uchida et al, *Loan officers and relationship lending to SMEs*, 21 J FIN. INTERMEDIATION 97 (2012)
[15] A Berger & GF Udell, *Universal banking and the future of small business lending*, *in* FINANCIAL SYSTEM DESIGN: THE CASE FOR UNIVERSAL BANKING (A Saunders & I Walter eds, 1996), 559—627

decisions based on models informed by hard quantified data, with loan officers having a lower degree of discretion and soft information playing a much more limited role.[16]

Relationship lending and hierarchical lending are better regarded as ideal types[17] rather than strictly empirical categories. More recent work has shown that banks can and do deploy them in complementary ways,[18] and that there is considerable diversity within each category.[19] Nevertheless, research also suggests that the categories do in fact encapsulate important differences in the way banks approach SME lending, even if the boundaries between them are somewhat less bright-line than they were initially thought to be. The origins of this body of work lie in a concern with understanding the implications of transaction costs and information asymmetries on financial markets and, specifically, the impact of the informational opacity[20] of SME finances to banks seeking to assess their creditworthiness.[21] A strong relationship between a borrower and a bank, and the concomitant ability to form judgements based on qualitative rather than quantitative information, was seen as an obvious and efficient way to overcome these information asymmetries[22] and avoid the credit rationing to which prevailing theory predicted imperfect information would otherwise give rise.[23] Early scholars in this tradition therefore focused on assessing whether community banks ought to play a central role in SME lending because of their superior ability to engage in relationship lending.[24] More recent work has focused on the question of whether newer advances in risk modelling have enabled hierarchical or transactional lending (and, thus, larger banks) to play a broader role in SME finance, notwithstanding the informational opacity of SMEs.[25]

Overwhelmingly, however, the focus of this literature has been on evaluating the two as *lending* technologies, approached from the perspective of their effectiveness at providing access to finance. Research carried out after the financial crisis has, in contrast, begun to show that relationship lending and hierarchical lending also produce different outcomes in relation to the *subsequent* course of the banker—borrower relationship. It has, for example, been shown that hierarchical lending is

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16 A Mian, Distance constraints: the limits of foreign lending in poor economies 61 J FIN. 1465 (2006)
17 The concept of an 'ideal type' was formulated by Max Weber, who posited them as idealised constructs that model certain aspects of social reality in a manner that enables us to draw broader inferences about the empirical phenomena to which they refer, even though in practice most objects treated as an instance of an ideal type will deviate from the ideal. M WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES (1969), 90—103
18 F Bartoli et al, SME financing and the choice of lending technology in Italy: Complementarity or substitutability?, 31 J. BANK. & FIN. 5476 (2013)
19 Berger & Udell, *supra* note 2, 2946
20 Petersen & Rajan, *supra* note 3.
21 GF Udell, What's in a relationship? The case of commercial lending 51 BUS. HORIZ. 93, 95 (2008)
22 J Stein, Information production and capital allocation: decentralized vs hierarchical firms 57 J FIN. 1891 (2002)
23 J Stiglitz & A Weiss, Credit rationing in markets with imperfect information 71 AM ECON REV 393 (1981)
24 JA Scott, Small business and the value of community financial institutions, 25 J FIN. SERV. RES. 207 (2004)
25 T Beck et al, *Bank Financing for SMEs: Evidence across countries and bank ownership types*, 39 J FIN. SERV. RES. 35 (2011); Berger & Udell, *supra* note 2, 2946—7.

likelier than relationship lending based on soft data to result in credit rationing to SMEs in times of crises.[26] Studies have also identified a strong 'flight home' effect across borders,[27] and even a 'flight to headquarters' effect within a single country,[28] in which lending patterns associated with hierarchical lending are more likely to result in banks cutting or eliminating facilities for SMEs during a crisis. Relationship lending, in contrast, appears to reduce SME credit rationing or, at least, to mitigate its effects.[29]

Crucially, and as discussed in more detail below, reports commissioned by lawmakers and legislators in the UK suggest that this difference also applies to other dimensions of the lender—borrower relationship, and in particular to the way in which banks engage with covenants in loan agreements with SMEs. Loan agreements incorporate a range of financial covenants which, typically, serve a dual purpose. Firstly, they enable the lender to monitor the performance of the borrower during the period of the borrowing.[30] Secondly, because the breach of a financial covenant constitutes a technical default giving the lender significant powers of control, financial covenants also enable lenders to limit credit loss either directly by assuming control, or through renegotiation by wielding the threat of assuming control as a bargaining tool.[31]

There are sound reasons for loan agreements to have such provisions. Financial contracts are typically incomplete contracts in that they can neither foresee nor provide for even a reasonable proportion of the eventualities that might arise during the contract's term. The use of flexible terms, including unilateral powers, is an established way of dealing with this issue.[32] In the context of financial lending, covenants providing for a combination of monitoring and control are a particularly efficient way of dealing not just with incompleteness[33] but also with the broader issue of uncertainty.[34] Nevertheless, the nature and extent of the control given to lenders by these provisions also creates serious risks for SMEs. Given the limited negotiating power of SMEs in hierarchical lending, and the significantly higher degree of switching costs they face due to their informational opacity[35] and the sunk costs of information

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26 Bartoli et al, *supra* note 18

27 M Giannetti & L Laven, The flight home effect: Evidence from the syndicated loan market during financial crises, 104 J FIN. ECON. 23 (2012)

28 H Degryse et al, SMEs and access to bank credit: Evidence on the regional proposition of the financial crisis in the UK, 38 J FIN. STAB. 53 (2018)

29 M Cotugno et al, Relationship lending, hierarchical distance and credit tightening: Evidence from the financial crisis, 37 J BANK. & FIN. 1372 (2013)

30 M Berlin & J Loeys, *Bond Covenants and delegated monitoring*, 43 J FIN. 397 (1992)

31 CW Smith & JB Warner, On financial contracting: An analysis of bond covenants, 7 J FIN. ECON. 117 (1979)

32 AW Katz, Contractual Incompleteness: A Transactional Perspective, 56 CASE WEST RES LR 169 (2005)

33 P Aghion & P Bolton, An incomplete contracts approach to financial contracting, 59 REV. ECON. STUD. 473 (1992)

34 PR Demerjian, *Uncertainty and debt covenants*, 22 REV. ACCOUNT. STUD. 1156 (2017)

35 C Howorth et al, *An examination of the factors associated with bank switching in the UK Small Firm Sector*, 20 SMALL. BUS. ECON. 305 (2003). Subsequent developments are likely to have increased switching costs, in that hierarchical lending to SMEs now typically involves a suite of loan and non-loan products, thus

provision,[36] there is a significant risk that lenders may opportunistically use the powers they acquire under financial contracts to extract a financial windfall in situations where the risk that the SME will fail or be unable to meet its debts is not high. The powers conferred on lenders by financial covenants in effect act as a 'hostage', in the sense identified by Williamson in his classic article,[37] but with the risk of opportunistic behaviour by the hostage-taker (the bank) remaining wholly unmitigated.

Two sets of cases from the UK involving lender behaviour vis-à-vis SMEs demonstrate that this risk is real, and that it can have significant adverse consequences not only for borrowers but also for a broader community of stakeholders. The first of these cases arose following the post-2007 financial crisis out of the actions of the Royal Bank of Scotland (RBS) in connections to loans it had made SMEs.[38] Prior to the crisis, RBS had made itself the largest lender to SMEs in the UK.[39] Part of its approach to SME lending involved referring SMEs to one of its internal turnaround units if they exhibited signs of financial difficulty. The task of these units was to assess whether the business was viable and, if it was, to restore it to financial health drawing on expertise within the turnaround unit.[40] If, however, the borrower's business was judged not to be viable, RBS would move to taking recovery action against the borrower, a process that usually led to the business being liquidated.[41]

The process of turnaround was not, however, necessarily run in the borrower's interest. RBS's internal documentation emphasised the need to treat customers 'fairly and sensitively',[42] but the primary purpose of turnaround was to assist RBS in securing its own financial position. Turnaround was a largely unregulated activity, and there were in consequence few external constraints on how RBS treated borrowers.[43] Whilst there was a potential congruence of interests between RBS and its borrowers in situations where RBS's own interests were best served by assisting the borrower to return to a sustainable financial position[44] (internally called 'return to satisfactory' or 'RTS'), it could not be assumed that RBS would invariably perceive its interests as

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increasing the cost of switching. A de la Torre et al, *Bank involvement with SMEs: Beyond relationship lending*, 34 BANK. & FIN. 2280 (2010)

36 Cotugno et al, *supra* note 29, 1376—77.

37 O Williamson, Credible Commitments: Using Hostages to Support Exchange, 73 AM. ECON. REV. 519 (1983)

38 Three reports were commissioned into this crisis: LAWRENCE TOMLINSON, BANKS' LENDING PRACTICES: TREATMENT OF BUSINESS IN DISTRESS (2013) (hereinafter, 'Tomlinson Report'); ANDREW LARGE, RBS INDEPENDENT LENDING REVIEW (2013) (hereinafter 'Large Review'), and PROMONTORY FINANCIAL GROUP, RBS GROUP'S TREATMENT OF SME CUSTOMERS REFERRED TO THE GLOBAL RESTRUCTURING GROUP: A REPORT UNDER SECTION 166 OF THE FINANCIAL SERVICES AND MARKETS ACT 2000 (2016) (hereinafter, "Promontory Report"). The account in this article draws on the material set out in these reports.

39 LARGE REVIEW, *supra* note 38, 24—5

40 PROMONTORY REPORT, *supra* note 38, para 4.2.2

41 LARGE REVIEW, *supra* note 38, 47.

42 GRG PROCEDURES AND GUIDANCE MANUAL (2010), quoted in PROMONTORY REPORT, *supra* note 38, para 1.38

43 PROMONTORY REPORT, *supra* note 38, para 2.1.56

44 LARGE REVIEW, *supra* note 38, 47

lying in RTS even in situations where RTS was factually possible.[45] As a result, SMEs sent into the turnaround process always faced the risk that RBS's turnaround units would prioritise other commercial considerations over returning the borrower to health and would, in consequence, act in a way that exacerbated the SME's financial distress sending a potentially viable business into insolvency. It was precisely this risk that eventuated in the aftermath of the crisis.

One of RBS's units was the Global Restructuring Group (GRG). This was originally a small, specialised unit[46] but, after the post-2007 financial crisis it came to play a central part in the process by which RBS managed its debt. The number of SMEs referred to the GRG (or its local UK-based unit, the BRG) rose from 738 in 2008 to 1497 in 2009, and a total of 5,900 SME cases were referred to it between 2008 and 2013.[47] There were two reasons for the increase. The crisis had led to many SME customers breaching financial covenants,[48] but it also led to a change in RBS's appetite for risk. After the crisis, RBS sought to reduce its exposure to certain sectors and certain types of customers, including SMEs.[49] The GRG became one of the instruments deployed to achieve this end, with referrals to it being used to address poor lending or pricing decisions.[50] As a result, the process of turnaround came to be used not just to rehabilitate and restore to financial health customers in financial distress, but also to be a source of revenue which contributed to RBS's revenue through its margin fees and other revenue-generating mechanisms, as well as to protecting RBS's capital, reducing its exposure, and helping it meet relevant metrics.[51] The GRG's performance was, accordingly, measured not in terms of SMEs saved, but in terms of its performance in helping RBS achieve its goal of reducing facility levels, and its contribution to RBS's overall income.[52]

The result was that SMEs were repeatedly and frequently treated in ways that exacerbated their financial difficulties. In practice, GRG placed little emphasis on turnaround, or on returning customers to financial health and mainstream banking through genuine business restructuring.[53] Relationship managers within GRG were often not provided with the tools that would be necessary to support an analysis of turnaround options.[54] Instead, GRG strove to reduce facility levels without regard to the impact on borrowers, and to increase profits by increasing prices and exploiting leverage opportunities in non-transparent ways.[55] SMEs referred to GRG were hit with management fees, arrangement fees, exit fees, risk fees, and waiver fees, amongst

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[45] *Id.*, 52.
[46] PROMONTORY REPORT, *supra* note 38, para 2.1.46
[47] *Id.*, para 2.1.47
[48] *Id.*, para 2.1.40
[49] LARGE REVIEW, *supra* note 38, 29.
[50] PROMONTORY REPORT, *supra* note 38, para 2.1.42
[51] PROMONTORY REPORT, *supra* note 38, para 3.1.3
[52] *Id.*, para 3.1.29—3.1.40.
[53] *Id.*, para 4.2.63—4.2.65
[54] *Id.*, para 4.2.46
[55] *Id.*, para 4.2.61

others, [56] and the GRG invented new instruments which adversely affected the position of the shareholders of SMEs. One example was the 'upside instrument'. In form, this instrument was designed to obtain an appropriate return for the increased risk RBS incurred in continuing to support businesses which were showing signs of financial distress or fell outside current lending criteria,[57] and it was in theory linked to the growth in the value of the borrower's shares.[58] In practice, however, it was treated as simply another stream of income[59] delinked from the borrower's actual needs, and was often used opportunistically to create a windfall profit rather than on any analysis of what was an appropriate price or an appropriate return for the actual risk RBS had incurred.[60]

This conduct would have been less problematic had it related primarily to distressed businesses that were likely to have to close. However, subsequent reviews showed that approximately 66% of the SMEs referred to the GRG were viable and could have been turned around.[61] Despite this, 92% of these viable SMEs were treated inappropriately,[62] and in 16% of cases the result was to cause material financial distress to the SME borrower.[63] Viable SMEs were pushed on a journey towards administration, receivership and liquidation. Adverse outcomes were particularly likely in trading-based businesses, with 22% of viable trading-based businesses sent into turnaround experiencing material financial distress as a result of RBS's actions.[64]

From the perspective of financial inclusion, this trend is a cause for concern. Although the issues raised by RBS's practices do not touch on the issue of access to finance, it is hard to see how the practices in question could be said to be either responsible or sustainable. In addition, other cases from the UK demonstrate that the impact of these practices reached beyond the borrower itself, to also encompass a broader category of stakeholders. The failure of Farepak serves as a good illustration.[65] Farepak was a Christmas savings company. Christmas savings companies in the UK appeal primarily to poorer and unbanked families, and operate by convincing these families to make periodic payments into the savings scheme over the course of a year, which is put towards the cost of a Christmas hamper and Christmas shopping vouchers provided by the company. Farepak had a long history as a Christmas saving scheme, but it ran into financial trouble in 2006. Its directors made what a court would later describe as 'genuine strenuous efforts' to save the group and, in particular,

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[56] *Id.*, para 4.2.78
[57] *Id.*, para 5.2.7
[58] *Id.*, para 5.2.24
[59] *Id.*, para 5.2.30
[60] *Id.*, para 5.2.47
[61] *Id.*, para 6.2.53
[62] *Id.*, para 6.2.85
[63] *Id.*, para 6.2.53
[64] *Id.*, para 6.2.57
[65] The account presented here is taken from a Judge's Statement made by Justice Peter Smith in the case of Secretary of State v. Fowler on 21 June 2012. *See* Courts and Tribunals Judiciary, *Secretary of State v Fowler and others: Day 15 – Judge's Statement*, https://www.judiciary.uk/judgments/farepak-judges-statement/ (last accessed 30 September 2020) (hereinafter, "Farepak Judge's Statement").

protect the interests of its depositors.[66] A number of proposals were put forward which offered a material prospect of preserving the business, some of which involved significant sacrifices by shareholders.[67] However, the company's bankers, HBOS, refused to permit any of these to be put into effect (as they were entitled to do under the loan agreement). The view HBOS took was that insolvency was not only inevitable, but it was (from HBOS's perspective) the preferred outcome, as their charge over Farepak's assets would enable them to "maximise their return as quickly as possible" in an insolvency.[68] As a result, and following what the judge described as "a policy of playing hardball, of which it appeared to be proud, and conceding nothing",[69] HBOS used its contractual powers to compel Farepak to continue to collect deposits from savers until such time as there was enough money in Farepak's bank account to fully satisfy its debt to HBOS, at which time HBOS took Farepak into insolvency.[70] Whilst HBOS fully recovered its money, Farepak's depositors recovered next to nothing.

III. CONTRACTUAL POWER AND TRANSACTIONAL ASYMMETRY: TOWARDS A DIAGNOSIS

Three broad themes emerge from the literature and cases material discussed in Part II of this article. The first is that hierarchical lending, a category into which both the RBS loans to SMEs and HBOS's loan to Farepak fall, has effects on financial inclusion that stretch well beyond the narrow issue of access to finance, which has been the main focus of the literature. The manner in which banks approach hierarchical lending has non-trivial effects not just on access to finance, but also the sustainability and resilience of the borrower and other stakeholders. The second is that ordinary approaches to financial regulation are not in and of themselves well-equipped to deal with the challenges that hierarchical lending creates for SMEs over the lifetime of the loan. In both the UK cases discussed above, the regulator had a somewhat limited power to take action against the bank, because the case related to commercial lending,[71] but they also appeared reluctant to use the powers they did have.[72] In the

[66] *Id.*, para 20
[67] *Id.*, para 119
[68] *Id.*, para 112
[69] *Id.*, para 20
[70] *Id*, para 118
[71] In evidence to the Treasury Committee of the House of Commons, Andrew Bailey—then the Chief Executive of the Financial Conduct Authority (the UK's main financial regulatory)—repeatedly argued that RBS's conduct lay outwith the perimeter of its regulatory powers at the time. Although he also accepted that the powers had since been amended to bring commercial lending within the scope of the FCA's authority, he took the view that it would be improper to apply that expanded power retrospectively. *See* TREASURY COMMITTEE, ORAL EVIDENCE: THE WORK OF THE FINANCIAL CONDUCT AUTHORITY, HC 475, Q11 (31 October 2017), data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Treasury/The work of the Financial Conduct Authority/Oral/72428.html (last accessed 6 October 2020)
[72] A report by the Treasury Committee in 2019 pointed out that the FCA did in fact have the power to take action even beyond the perimeter of regulation, albeit in a more limited way; and these limitations led it to prioritise its resources to focus on activities in the perimeter. *See* TREASURY

RBS cases, for example, the regulator initially refused to publish a report it had commissioned into RBS's practices, and the report did not ultimately become public until it was obtained by a Parliamentary committee which proceeded to publish it.[73] In relation to Farepak, the response of regulators was not to proceed against the bank, but instead to prosecute and seek to disqualify the directors of Farepak. The full nature of the bank's conduct only became public when judge presiding over the trial took the unusual decision while acquitting the directors to make a judicial statement setting out how it was in fact the bank's conduct that had brought about the company's collapse and the loss by the depositors of their money.[74]

The third, and arguably most significant, theme that emerges from the discussion in this Part relates to the role of contracts and contract law. The lender's ability to exercise a high degree of control over the borrower had an entirely contractual basis, as did the lender's freedom to use that control in a way that were both opportunistic and to the detriment of the borrower. This was emphasised by the judge hearing the Farepak action,[75] as well as by the reviews commissioned by the UK government and the Financial Conduct Authority (the main financial regulator in the UK) into RBS's lending practices. A key finding of these reviews was that the RBS's right to exercise a high degree of control over companies was wholly contractual. The lending contracts between RBS and SMEs gave it a wide discretion which let it use a technical breach as leverage over SMEs.[76] The reviews also found that a major factor underlying this was that the nature of the interaction between SMEs and banks meant that the balance of power had tipped too far in favour of banks. There was no longer a "level playing field" for banking agreements, and the market did not let borrowers make informed decisions on risk and reward.[77] Contracts were imbalanced, and whilst there was a broad expectation that banks would exercise their contractual powers in good faith and in a fair, transparent, and reasonable manner,[78] this expectation had no basis in law and in practice things were often otherwise.[79] For example, there was evidence the RBS had used its contractual discretion to send businesses which were not in financial difficulties but were simply in legal disputes with it into turnaround.[80] There was accordingly a need to give SMEs legal protection against "heavy handed, profiteering, and abhorrent behaviour"[81] by banks, and to "rebalance the relationship

COMMITTEE, THE WORK OF THE FINANCIAL CONDUCT AUTHORITY: THE PERIMETER OF REGULATION, (Thirty-fifth report, Commons session 2017-19), paras 19-22 (24 July 2019), https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2594/2594.pdf (last accessed 6 October 2020)

73 HOUSE OF COMMONS LIBRARY, DEBATE PACK NUMBER CDP-2018-093: DEBATE ON REDRESS FOR VICTIMS OF BANKING MISCONDUCT AND THE FCA (2018), https://commonslibrary.parliament.uk/research-briefings/cdp-2018-0093/ (last accessed 30 September 2020), 9.

74 *Farepak Judge's Statement*, *supra* note 65, para 77

75 *Id.*, para 120

76 PROMONTORY REPORT, *supra* note 38, para 2.2.6, 4.4.73

77 TOMLINSON REPORT, *supra* note 38, 19

78 PROMONTORY REPORT, *supra* note 38, para 2.2.7

79 *Id.*, para 1.4—1.5.

80 *Id.*, para 4.1.15.

81 TOMLINSON REPORT, *supra* note 38, 19

between business and bank."[82] The reports also stressed the need to protect SMEs against unfair contract terms,[83] and to develop an industry code on how banks can best support customers in need of business support, especially in relation to protecting SMEs referred to turnaround divisions.[84]

The findings of the reviews points to a deeper issue with the role of contracts in SME lending, addressing which requires reconceptualising the role and function of financial contracts in asymmetric lending transactions. Relationship and hierarchical lending represent not just different models of *lending*, but also different models of *contracting*. As proponents of relational contract theory have pointed out, legal understandings of contract can be classified as falling within one of two archetypes: the discrete contract and the relational contract. These map closely onto the ideal types of hierarchical and relationship lending, respectively, in that hierarchical lending treats the loan relationship as a discrete contract, whereas relationship lending treats it as a relational contract. In discrete models of contract, the terms of the transaction set out in the parties' formal agreement exhaustively describe the parties' relationship. A financial transaction in this view is simply an instance of market exchange, indistinguishable from a classic instance of market exchange such as a transaction for the sale of a natural commodity.[85] A borrower seeks purchasing power, and acquires it from a willing lender in exchange for the payment of a price (in the form of interest) for the acquired purchasing power and the provision of security to the seller in the event that the price is not paid on time.[86] Because the relationship is simply one of exchange, everything that one needs to know about the relationship can be discovered in the terms of the contract.[87] Relational models of contracting, in contrast, treat the formal contract as being simply one manifestation of a broader relationship, which is fundamentally and inextricably bound up with broader social expectations and understandings.[88] Much like formal processes in relationship lending, formal terms in a financial transaction are treated as merely one dimension of a broader relationship, which are embedded in wider social expectations in relation to how the powers and claim-rights conferred by the contract on the borrower and lender will be exercised.

Crucially, relational contract theory can and does draw a distinction between the *exchange* element of a contract and the *relation* element of the transaction, and recognises that they can have very different characteristics.[89] This has particular relevance to financial lending. There is a real sense in which a loan *is* about exchange and, to that extent the discrete model of the transaction is not incorrect as much as it

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[82] *Id.*, 20
[83] PROMONTORY REPORT, *supra* note 38, para 7.23
[84] *Id.*, para 7.19.
[85] TT Arvind, *Law, creditors and crises: the untold story of debt*, *in* LAW AND FINANCE AFTER THE FINANCIAL CRISIS: THE UNTOLD STORIES OF THE UK FINANCIAL MARKET (K Aldohni ed, 2017) 20
[86] *Id.*, 24—25
[87] For a recent restatement of this position, see J Morgan, Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law (2013)
[88] IR Macneil, *The Many Futures of Contract*, 47 SO. CAL. LR 691 (1974)
[89] I.R. Macneil, The New Social Contract 130 fn 18 (1980).

is incomplete. As relational contract theory points out, however, in addition to the exchange element, the transaction also has a relation element whose character, in this case, is better described as creating a framework of private governance. In its broadest sense, governance can be understood as "the setting of rules, the application of rules, and the enforcement of rules."[90] It encompasses not just the rules of the game, but also the ability to steer the rules of the game.[91] It is precisely this effect that the control provisions of loan agreements have, and it is precisely the manner in which these powers were used that have been at issue in the cases discussed in this Part. In doing so, they not only supplement but also seek to supplant and displace public frameworks of governance, such as those contained in bankruptcy law, including in relation to the specific interests they prioritise and the level of protection they grant the borrower.[92]

The distinction relational models of transactions draw between the exchange- and governance-oriented dimensions of transactions therefore helps provide a deeper diagnosis of the impact of lender control on financial inclusivity in SME lending. The role played by contracts in facilitating sourcing lending through market exchange may be desirable, but that does not mean their role in facilitating the creation of private governance systems is desirable. Relational models of contracting are often described as if their goals were primarily normative, and as if they did no more than argue for courts to take a very different approach in dealing with cases that come before them. This court- and litigation-focused approach to discussing and evaluating competing models of contract reflects a broader trend in the way in which academic legal scholars approach contract law,[93] but it also places somewhat less emphasis on the way in which contracts are actually used in practice[94] and, in consequence, on the regulatory and policy issues that arise out of such use.[95] Yet relational contract theory is also, and has always been intended to be, an analytical approach to studying the practices of contracting. The theory of relationality, when reduced to its most essential elements, does no more than assert that the study of legal and economic relations must be informed by the study of social relations and the expectations arising out of them.[96] It does not suggest that parties, when left to govern their own contractual relations, will necessarily behave in relationship-enhancing or relationship-preserving ways. As Macneil pointed out, contractual powers and terms have the potential to cause what he terms 'disproportionate harm'; and the solidarity belief that is foundational to the sustainability of private ordering supported by contract cannot survive if there is a widespread belief among one set of participants that other participants in that system

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[90] AM Kjær, Governance 10 (2004)
[91] *Id.*, 7
[92] See further Part IV, *infra.*
[93] A Katz, *Taking Private Ordering Seriously*, 144 U. PA. LR 1745 (1996)
[94] S Macaulay, Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine, 80 TUL. LR 1161 (2005)
[95] Macaulay describes this as being one of the key issues separating 'old' and 'new' legal realism. S Macaulay, *The New versus the Old Legal Realism: "Things Ain't What They Used To Be"*, 2005 WIS. LR 365 (2005)
[96] IR Macneil, *Reflections on Relational Contract Theory after a Neo-classical Seminar*, in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS (D Campbell, H Collins & J Wightman (eds), 2003)

of private ordering are willing to cause disproportionate harm to achieve gains for themselves.[97]

The RBS and Farepak cases discussed above, and the strong public reaction to them, represent precisely such a situation, where the use by banks of their powers under financial contracts to achieve gains for themselves were perceived as causing disproportionate harm to SME borrowers and the broader public. The rise of hierarchical lending as a source of SME finance[98] is likely to have exacerbated this trend, in as much as hierarchical lenders are likelier to take a derelationalised approach to SME borrowers,[99] whereas relationship lenders are likelier to take a relationship-preserving approach.[100] Whilst discrete models of financial contract can avoid grappling with the implications of this disjunction by taking a commodified and exclusively exchange-based view of lending, relational models in contrast draw attention to it, and to its potential impact on financial inclusion vis-à-vis SMEs and on the integrity of financial lending more broadly.

This makes relational models of contracting superior to discrete models of contracting when it comes to understanding the challenges posed to financial inclusion by the transactional asymmetry between banks and SME borrowers, and the manner in which that asymmetry is reflected in the governance of the relationship. In particular, if we move away from a court-centric approach to a more transactional approach, a focus on the relational dimensions of financial contracts gives us an analytical tool for studying the "relational sanctions and private government" that underpin lender behaviour vis-à-vis SME borrowers,[101] and the systemic issues which the patterns of social relations that underpin contractual relations raise for the sustainability and integrity of the systems of private ordering that these contracts support.[102] Loan transactions between banks and SMEs not only embed an exchange in the form of the actual loan, but also a complex framework of governance that gives the lender considerable regulatory power over the SME. Where the lender behaves in a derelationalised way, the implications of its conduct not only affect individual borrowers, but also have the potential to cause disproportionate harm and, through doing so, undermine the basis of the system of private ordering on which the debt system depends. That, ultimately, is the challenge with which the law must grapple if it is to support financial inclusion for SMEs.

IV. GOVERNING GOVERNANCE: TOWARDS A NEW FRAMEWORK FOR FINANCIALLY INCLUSIVE SME LENDING

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97 Macneil, supra note 89, 102—104

98 *See* Berger & Udell, *supra* note 2; Beck et al, *supra* note 25.

99 Bartoli et al, *supra* note 18

100 Cotugno et al, *supra* note 29

101 S Macaulay, Relational Contracts Floating on a sea of custom? Thoughts about the ideas of Ian Macneil and Lisa Bernstein, 94 NORTHWESTERN UNI. LR 775, 804 (2000)

102 Macneil, *supra* note 89, 64—70 (1980).

How, then, can the challenges identified in Parts II and III be addressed? One option is to focus on the regulatory potential of private law in general.[103] Yet, whilst such an approach can play some part in the overall legal approach to SME lending, it is unlikely to be sufficient in and of itself, as the example of the law of lender liability illustrates. The laws of a number of states in the US grant a remedy against lenders to borrowers who have been harmed by opportunistic lender conduct by drawing on a number of different theories of liability, including breach of contract,[104] course of conduct,[105] implied duties of good faith,[106] fraud,[107] negligence,[108] and fiduciary duty.[109] In practice, however, lender liability has been limited in a number of ways. A number of leading cases have involved lenders with heavy involvement in the day to day running of the business,[110] playing an active part in boardroom battles,[111] or in a relationship of trust and confidence with the borrower.[112] The most expansive readings based on broad theories of unreasonable conduct, such as *KMC v. Irving Trust Co*,[113] have come in for considerable criticism and in general have not been followed or read very narrowly in other states.[114] Courts have also been reluctant to hold liable a lender whose actions have stayed within the scope of actions authorised by the provisions of the loan agreement.[115]

The somewhat limited impact of lender liability reflects the distinction Macneil drew between the exchange element of a contract and the relation element of the transaction. Macneil pointed out that the two were conceptually distinct, and that participants could benefit from the exchange even if the actual working of the relation was unjust. Ignoring this, he argued, could lead to bad results in which victims of unjust relations could end up losing whatever benefits they may have gained from the

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[103] On the argument that private law does have regulatory potential, see TT Arvind and J Gray, *The limits of technocracy: Private law's future in the regulatory state*, *in* PRIVATE LAW IN THE 21ST CENTURY (K Barker, K Fairweather, & R Grantham (eds.), 2017)
[104] See e.g. Bank One, Texas, NA v. Taylor, 970 F.2d 16 (5th Cir 1992); Alaska State Bank v. Fairco, 674 P.2d 288 (Alaska 1983)
[105] Pipken v. Thomas & Hill, 258 S.E.2d 778 (NC 1979)
[106] e.g. Wells Fargo Realty Advisors Funding, Inc v. Uioli, Inc, 872 P.2d 1359 (Colo App 1994); KMC v. Irving Trust Co, 757 F.2d 752 (6th Cir 1985)
[107] Crystal Springs Trout Co v. First State Bank, 732 P 2d 819 (Mont 1987)
[108] MSA Tubular Products, Inc v. First Bank & Trust Co, 869 F 2d 1422 (10th Cir 1989)
[109] Cowan Brothers, LCC v. American State Bank, 743 NW 2d 411 (SD 2007).
[110] A. Gay Jenson Farms Co. v. Cargill, Inc, 309 N.W.2d 285, 290-91 (Minn. 1981) (lender had a right of first refusal to purchase the borrower's grain); Connor v. Great Western Savings & Loan Association, 447 P.2d 609, 617 (Cal. 1968) (lender played an active role in home construction and had the right of first refusal to make loans to purchasers of homes)
[111] State National Bank of El Paso v. Farah Manufacturing Co., 678 S.W.2d 661 (Tex. Ct. App. 1984) (lender sought to prevent the election of directors, select the chief executive, and pack the board with their own nominees)
[112] Barnett Bank v. Hooper, 498 So. 2d 923 (Fla. 1986) (relationship of trust and confidence created a duty to disclose material facts)
[113] 757 F.2d 752 (6th Cir 1985)
[114] See e.g. Shawmut Bank, N.A. v. Miller, 614 N.E.2d 668 (Mass. 1993); Check Reporting Servs., Inc. v. Mich. Nat'l Bank, 478 N.W.2d 893, 899 (Mich. Ct. App. 1991); Pavco Indus. v. First Nat'l Bank, 534 So. 2d 572, 577 (Ala. 1988).
[115] Continental Bank, N.A. v. Everett, 964 F.2d 701 (7th Cir.) (lender not liable where all actions were authorised by the loan agreement).

exchange.[116] Many of the problems with what has come to be called the 'regulatory trilemma',[117] and with attempts to regulate transactions through contract law doctrines,[118] arise out of the precise danger against which Macneil warned, where the law in attempting to deal with an unjust relationship fails to distinguish adequately between the exchange and relation elements of transactions.

This point is of particular importance to financial inclusion when it comes to SME financing, where the exchange element of lending does in fact play a productive role in SME finances. As Polanyi pointed out, exchange is not just a feature of individual transactions, but also a key mode and process through which individual transactions are integrated into a broader economic system.[119] Although other modes of integrating transactions into economic systems do exist,[120] as far as SMEs are concerned exchange is likely to remain the key integrative mechanism for the foreseeable future. The challenge, therefore, is to separate the exchange element of lending from the governance element, and regulate the latter without adversely affecting the former, and do so in a manner that is sensitive to their broader systemic dimensions.[121]

Jenny Steel and I have recently suggested a framework for considering regulatory goals and techniques in governing systems of private ordering underpinned by contract. We argue that there are four broad families of approaches to these sectors, based on four views, or categorical types, of markets, which we term market-individualism, relationalism, market-managerialism, and welfarist interventionism. In market-individualism, the market plays a necessary and benign role of setting prices and matching participants who are, for the most part, capable of self-protection. Contracts here have a propensity to be balanced, and law's primary role is to provide adaptive support for the market. In relationalism, the market plays an initial role, but is not of continuing importance, because participants are co-operative despite being motivated by self-interest. Contracts, again, tend to be balanced, and law's role is once again supportive, but with a focus on relations that endure in the medium- and long-term. Market managerialism presents a very different picture, in which markets play

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116 *Id*, 130 fn 18

117 The regulatory trilemma suggests that regulatory law tends to fall into one of three traps: of irrelevance (in which it is ignored by the regulated community); of producing 'disintegrating effects on the social area of life' (by damaging the regulated community); or of producing 'disintegrating effects on regulatory law itself' (by damaging the integrity of the legal system). See G Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS OF THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (G Teubner (ed), 1987) 3–48

118 For an argument in favour of a far-reaching acceptance of contract law as a regulatory system, *see* H COLLINS, REGULATING CONTRACTS (2002). For a counter-argument on the limits to contract law's regulatory capacity, see Morgan, *supra* note 87, Chapters 7, 8.

119 K Polanyi, *The Economy as an Instituted Process*, *in* TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY (C Arensberg, K Polanyi & HW Pearson (eds), 1957).

120 Polanyi (*id.*) names two: reciprocity and redistribution.

121 *Cf.* SL Schwarcz, *Beyond Bankruptcy: Resolution as a Macroprudential Regulatory Tool*, 94 NOTRE DAME LR 709 (2018) (discussing the balance in bankruptcy between dealing with resolving the problems of individual firms and those of the system as a whole).

an essential role, but are nevertheless prone to disintegration without external support because participants have a propensity to adopt flawed courses of action which serve immediate interests but, in the long run, have a propensity to destabilise the market by adversely affecting participant trust in its mechanisms. Law, here, has to play a more active role in stabilising, restructuring, and managing the market, and diverting it away from its internally destructive tendencies. Finally, welfarist intervention sees markets as necessary, but having a tendency to be oppressive, due to its participants' tendency to create one-sided, onerous transactions. Here, law plays an active role in enforcing public policy against a potentially fickle and unreliable body of market participants.[122]

The task for the law in relation to SME lending is primarily one of market managerialism. Whilst the market mechanism is adequate for the element of exchange in lending transactions, it is neither obvious nor necessarily effective as a way of designing governance systems. Whilst official neutrality between relationship lending and hierarchical lending is therefore defensible in relation to the actual allocation of finance, it is neither defensible nor sustainable in relation to the actual governance framework for the subsequent lender-borrower relationship. As the discussion in Parts II and III has shown, a relational framework is superior when it comes to matters of governance.

What sort of mechanisms, then, might the law adopt to stabilise and restructure the market in the direction of a more relationally informed framework, which diverts it away from its tendency to cause disproportionate harm to SMEs in times of crisis? A system that is potentially of particular utility in relation to situations such as those presented by SME lending, where the goal is to support the continuance of the basic exchange function but restrict broader governance functions, is the system referred to as "the negotiated economy" in the literature. The negotiated economy, also sometimes called the 'negotiation-based economy' or 'economy via persuasion'[123] was devised, along with the closely related idea of 'corporate pluralism',[124] to analyse and explain features of governance in Scandinavia. In contrast to the 'supermarket' model of governance which emphasises economic rationality and consumer choice,[125] the negotiated economy emphasises economic co-operation, through the use of systems of corporate pluralism that enable all key interest groups to be represented in governance processes,[126] the classic example being Scandinavian labour arrangements

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[122] TT Arvind and J Steele, *Remapping Contract Law: Four Perceptions of Markets* in CONTRACT LAW AND THE LEGISLATURE: AUTONOMY, EXPECTATIONS, AND THE MAKING OF LEGAL DOCTRINE 439—445 (TT Arvind and J Steele eds, 2020).

[123] K Nielsen & OK Pedersen, *The Negotiated Economy: Ideal and History* 11 SCANDINAVIAN POL. STUD. 79, 81 (1988)

[124] *See esp.* S Rokkan, *Norway: Numerical Democracy and Corporate Pluralism*, *in* POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES (RA Dahl ed., 1996). For a review of the subsequent literature, see MO Heisler, *Corporate Pluralism Revisited: Where is the Theory?*, 2 SCANDINAVIAN POL. STUD. NS 277 (1979)

[125] T Christensen, Narratives of Norwegian Governance: Elaborating the Strong State Tradition, 81 PUB. ADMN. 163, 180-4 (2003)

[126] K Nielsen, The Mixed Economy, the Neoliberal Challenge, and the Negotiated Economy, 21 J SOCO-ECON 325 (1992)

where labour market policy has historically largely been made through collaborative governance arrangements between labour and employer interest groups.[127] It is easy to see how such a system could be translated to the world of SME lending, with model contracts, protocols, and procedures emerging through similar processes between interest groups representing SMEs and lenders. Such a system will necessarily require a legal scaffold and backstop, in at least three forms: firstly, in the form of rules facilitating and incentivising the production of new forms of contracting;[128] secondly, in the form of a more responsive, flexible, and relational approach to defining the scope of the regulator's powers;[129] and thirdly, in the form of SME-friendly bankruptcy laws along the lines of the reforms recently introduced in the US through SBRA.[130] Such a system will, however, be superior both to the current state of deregulated private governance as well as to more intrusive and coercive forms of regulation, in supporting broader dimensions of SME financial inclusion.

V. CONCLUSIONS

Although financial inclusion as a policy objective has multiple dimensions, the focus of the debate on financial inclusion for SMEs has largely been on the issue of enhancing SME access to finance. This article has shown that more attention needs to be paid to the issue of reshaping lender practices to make the delivery of finance to SMEs more responsible and sustainable. The terms of SME financing agreements offer considerable scope for lenders to engage in opportunistic or predatory behaviour and, as this article has shown, there is evidence to suggest both that this is a problem, and that it causes material financial distress to SMEs and beyond. Against that background, this article has argued that the law needs to take a less neutral approach that is more favourable to relational lending practices. It has also suggested a range

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127 *See* K Nielsen & OK Pedersen (eds), Forhandlingsøkonomi i Norden (1989)

128 An example of a very similar framework in a commercial, common law context is provided by the UK's Housing Grants, Construction and Regeneration Act 1996, which was motivated by common practices in the construction industry which, cumulatively, were seriously destabilising the finances of SME contractors and which expressly sought to incentivise the construction industry to create new contract forms which would reform these practices. For an overview and analysis, see C Ellis, *Regulating Commercial Contracts: What can we Learn from Part II of the Housing Grants, Construction and Regeneration Act 1996?*, in CONTRACT LAW AND THE LEGISLATURE: AUTONOMY, EXPECTATIONS, AND THE MAKING OF LEGAL DOCTRINE 329-361 (TT Arvind and J Steele eds, 2020)

129 The 2019 report of the Treasury Committee of the UK House of Commons on the perimeter of regulation forms a useful starting point for charting the shape of these reforms. The Committee recommended that more clarity be provided to customers of banks when the banks were engaged in unregulated activities (*see* Treasury Committee, *supra* note 72, para 13-18) and that the FCA be given a formal statutory power to review and formally recommend changes to its perimeter of regulation (*see* Treasury Committee, *supra* note 72, para 23-31). These changes, if embedded in a broader turn to a negotiated economy, would have helped redress many of the problems that SMEs encountered in their dealings with the GRG.

130 Despite the SME-friendly intentions of SBRA, a literature has already begun to emerge examining how lenders can circumvent its provisions and maintain their superior position over small business borrowers under the new regulatory regime created by the Act. *See e.g.* CG Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. LR 251 (2020).

of techniques, grounded in the established models of negotiated economies and corporate pluralism, which can help achieve this end. Although the challenge of fostering responsible and sustainable lending practices is not a simple one, it is one that can be met with the right combination of approaches.