

**THE MODERNIZATION AND HARMONIZATION OF THE
COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: THE NEED
FOR A NEW RESEARCH AND DRAFTING METHODOLOGY***

Boris Kozolchyk **

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I. INTRODUCTION AND TERMINOLOGY

In my earlier article of this Symposium, I summarized the discussions and recommendations for the modernization and harmonization of commercial law in the Trans-Pacific region starting with five agreed upon topics: Simplified

Companies; Secured Transactions Law; Electronic Warehouse Receipts; Electronic Commerce; and Insolvency and Debtor Rehabilitation. This article discusses the methodology of the proposed modernization and harmonization based on the promise shown by this methodology in NatLaw's work, especially in the Americas. But first, we need to examine the problems posed by the continued reliance on isolated or wholesale amendments to existing civil and commercial codes as the prevailing method for modernization and harmonization in civil law developed and developing nations alike.

Rather than resulting in a harmonious integration of additions with pre-existing concepts, principles, and rules, the legislative method of isolated and wholesale amendments to commercial codes has resulted in codes that grow and shrink in a discordant accordion-like fashion. These are enactments whose provisions are often inconsistent not only with each other, but also with widely followed international standards and best practices. Two such attempts at modernization are found in France's and Mexico's commercial codes.¹ Chile and Peru had similar experiences with their initial attempts to introduce new secured transactions laws as part of their commercial and civil codes' provisions.²

In the following sections, I will show why codifying efforts designed to operate under 19th and 20th century codes are unsuited for a contemporary marketplace. I will also show why a more modest legislative component inspired by what an Official Comment of the U.C.C. referred to as "trade codes,"³ or

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** Boris Kozolchik, *Honoris Causa Professorship Acceptance Speech* (Shanghai University of International Business and Economics (SUIBE), January 8, 2015) (unpublished) (on file with author).

¹ For a discussion of amendments illustrating this concept, see CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] (Fr.). A similar approach is apparent in the additions to Mexico's Commercial Code of 1887. Código de Comercio [CCom], Diario de la Federación [DOF] (1887) (Mex.). Despite the wholesale addition of a law of negotiable instruments, which alone amounts to at least twice the size of the original provisions that remain in the code, Articles 311-320 of the Ley General de Títulos y Operaciones de Crédito (LGTOC) are hopelessly obsolete and have remained unobserved by banks and their customers for the last three generations. Código de Comercio [C. COM] [COMMERCIAL CODE], *as amended* 27-10-2009, Diario de la Federación [DOF] (27-10-2009) (Mex.); see Boris Kozolchik, 56 Calif. L. Rev. 538 (1968) (reviewing MATTHEW BENDER, *COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS* (1966)). De facto, these provisions have been replaced by the Uniform Customs and Practices for Documentary Credits issued by the International Chamber of Commerce (UCP). Conversely, Mexico's secured transactions law, which is mostly an up-to-date effective set of enactments, remains dispersed through presently the Ministry of the Economy has begun its unification. For a discussion of secured transactions, see BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT* 349-73, 356-60 (2014) [hereinafter *COMPARATIVE COMMERCIAL CONTRACTS*].

² See Boris Kozolchik, *Implementation of the OAS Model Law in Latin America, Current Status*, 28 ARIZ. J. INT'L & COMP. L. 19-22, 37-39 (2011).

³ See U.C.C. § 1-205(2) cmt. 5 (AM. LAW INST. & UNIF. LAW COMM'N 1972)

compilations of standard and best practices, could result in more effective and market-sensitive means for regional economic development.

By standard practices, I mean those observed by regular participants in the transactions of a given economic sector when acting reasonably, i.e., by treating other regular participants in the transaction in the manner employed by an archetypal, able, respected, and reasonable merchant.⁴ Standard practices are found in, among other compilations of practices, the International Chamber of Commerce's (ICC's) INCOTERMS for international documentary sales,⁵ the Uniform Customs and Practices for Documentary Credits (UCP),⁶ the Grain and Feed Trade Association's (GAFTA) Arbitration Rules,⁷ and the International Swaps and Derivatives Association (ISDA) Determination Committee Rules.⁸

Best practices, in turn, are concerned not only with the welfare of regular participants but also of third parties, such as bona fide purchasers/consumers and future investors and creditors and, accordingly, would also treat them reasonably. Further, when these third parties depend on or entrust their transactional decision-making to regular participants, the standard required from these participants is a fiduciary or "brotherly" one. This standard was best described by Justice Benjamin N. Cardozo, among the most lucid and market-sensitive of the United States' commercial law jurists:

("There is also room for proper recognition of usage of trade agreed upon by merchants in trade codes.").

⁴ See Boris Kozolchyk, *Fairness in Anglo and Latin American Commercial Adjudication*, 2 B.C. INT'L & COMP. L. REV. 219, 220 (1979) for the definitions of the "stranger," "market," and "brotherly standards." See also Boris Kozolchyk, *The Commercialization of Civil Law and the Civilization of Commercial Law*, 40 LA. L. REV. 3, 24-34 (1979). Since those studies, I have refined the market standard to mean, "[t]reat the other party to the transaction as a regular archetypal participant would reasonably expect to be treated when viewing his own advantage." See KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS*, *supra* note 1, at 5.

⁵ For the latest INCOTERMS (2015), see <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms> (last visited Nov. 13, 2015); see also ONE INTEGRATED LOGISTICS LTD., <http://www.one-ill.com/downloads/incoterms%202015.pdf> (last visited Nov. 13, 2015). See also *COMPARATIVE COMMERCIAL CONTRACTS*, *supra* note 1, at 967, 1033; see also generally Boris Kozolchyk, *Drafting Commercial Practices and the Growth of Commercial Contract Law*, 30 ARIZ. J. INT'L & COMP. L. 423, 423-605 (2014) [hereinafter *Standard Practices*].

⁶ See *COMPARATIVE COMMERCIAL CONTRACTS*, *supra* note 1, 1049-55. See generally, Boris Kozolchyk, *Towards New Customs and Practices for Documentary Credits: The Methodology of the Proposed Revision* in *Commercial Law Annual 1993*, 371, 377 (Louis F. Del Duca & Patrick Del Duca eds., 1992).

⁷ See Iryna Polovets, Matthew Smith & Bradley Terry, *GAFTA Arbitration as the Most Appropriate Forum for Disputes Resolution in the Grain Trade*, 30 ARIZ. J. INT'L & COMP. L. 559 (2013).

⁸ *DC Rules*, INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., <http://dc.isda.org/dc-rules/> (last visited Mar. 1, 2016).

Some relations in life impose a duty to act in accordance with the customary morality and nothing more. . . . Caveat emptor is a maxim that will often have to be followed when the morality it expresses is not that of sensitive souls. Other relations in life, e.g., those of the trustee beneficiary or principal and surety impose a duty to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honor might impose upon himself. In such cases, to enforce adherence to those standards becomes the duty of the judge.⁹

II. NINETEENTH AND TWENTIETH CENTURY COMMERCIAL CODES, CIVIL CODES, AND ECONOMIC DEVELOPMENT

Contemporary commercial standards and best practices belong to a very different marketplace than the one governed by the French Commercial Code (*Code de Commerce*) (C. Com) of 1807 and France's Civil Code of 1800 (*Code Civil*) (CC) and their numerous progeny in developing nations.¹⁰

A. The French Commercial Code and Civil Code

Napoleon's pejorative reference to England as "a nation of shopkeepers" and his praise for France's productive and tax-paying bourgeois land holders¹¹ went hand in hand with his policy to punish as severely as possible bankrupt merchants, most of whom he believed to be fraudsters.¹² This contemptuous view of merchants, often extended to bankers and money changers, was deeply rooted in European history and was influenced by the Canonic Law definition of usury, which as early as in the fourth century proscribed any charge of interest for the principal amount lent, no matter how insignificant.¹³

In fact, the strict prohibition of usury was one of the unexpressed reasons for France's enactment of two different codes to govern private parties' transactions. The CC governed the activities of upright not-for-profit or usury-motivated citizens. The C. Com was to govern for-profit transactions, many of

⁹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 109, 110 (1921).

¹⁰ See *COMPARATIVE COMMERCIAL CONTRACTS*, *supra* note 1, at 268–80.

¹¹ See *generally, id.* at 268–80, 332, 752.

¹² *Id.* at 327–29.

¹³ See Joe Carter, *Did the Catholic Church Change Its Doctrine on Usury?*, ACTION INST. POWER BLOG (Dec. 8, 2014), <http://blog.acton.org/archives/74469-catholic-church-change-doctrine-usury.html> (last visited Mar. 1, 2016) ("For much of church history, any interest was considered immoral. The 12th canon of the First Council of Carthage (345) and the 36th canon of the Council of Aix (789) declared it to be reprehensible even for anyone to make money by lending at interest.").

which could easily turn out to be usurious. Not surprisingly then, France's C. Com was not particularly friendly to the customs and usages of French merchants, especially retail merchants, moneychangers, and bankers.¹⁴

The C. Com governed what for many of its interpreters was an exhaustive list of for-profit transactions or acts of commerce (*actes de commerce*) engaged in by professional merchants. Many of the acts in this list could easily raise the suspicion of usury such as the sale of goods in installments whose price was usually higher than a "cash on the barrelhead" price, thereby hiding a charge of interest.

In contrast, the CC was drafted for civil, i.e., non-profit transactions. Civil transactions that were supposed to be engaged in by those members of society who behaved in accordance with Cato the Censor's version of Roman dignity and probity.¹⁵ Accordingly, CC lenders of money or of things, as well as CC agents acting on behalf of principals, to this day are supposed to do so at no charge. In contrast, professionals such as lawyers, physicians, and engineers, whether singly or as members of civil partnerships or other associations, charge only "honoraria" for their services, a term that purports to be free of lowly profit motivations, reality notwithstanding.¹⁶

In contrast with his participation in the drafting of the CC, which Napoleon considered one of his signal accomplishments, he paid little attention to the drafting of the C. Com. Not surprisingly then, the CC acts as the most important supplementary source of the C. Com or as the "constitution" of France's private law, or the law of the "mine and thine."¹⁷

¹⁴ See, e.g., Loi 1866-06-13 du 13 juin de concernant les usages commerciaux [Law 1866-06-13 of June 13, 1866 on Relating to Commercial Usage] DALLOZ, *LÉGISLATION* [D.L.], pp. 1664-65 (almost six decades after the enactment of the C. Com) (listing, in seemingly exhaustive fashion, the detailed usages that retail merchants must follow when selling general or special merchandise. Despite the statement that these usages will apply in the absence of a contrary agreement, the nature of this enumeration is administrative and "tariff" like in nature; it does not refer to a pre-existent commercial compilation of usages or to a "trade code.").

¹⁵ See COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 112-13, 1039-40, for Cato the Censor's praise of the small Roman farmer-soldier as a model "*Virum Bonum*" (honest and decent man of affairs "who unlike merchants 'do[es] not think evil thoughts'" and who equated moneylending to "murder," although apparently he made his fortune by investing in maritime ventures and lending to maritime traders).

¹⁶ See, e.g., CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1986 (Fr.) ("Unless otherwise agreed, the contract of agency is gratuitous"); see also CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1876 (Fr.) (with respect to the loan of a thing for use, which is also "essentially gratuitous.").

¹⁷ The most famous use of this dichotomy was by the German philosopher Immanuel Kant. IMMANUEL KANT, *THE SCIENCE OF RIGHT* § 5: Definition of the Conception of the External Mine and Thine (W. Hastie trans., 2003) <https://www.marxists.org/reference/subject/ethics/kant/morals/ch04.htm>. My use of this dichotomy is less profound. Relying on the instinctive qualities of what is "mine and thine," I hope to call the common law reader's attention to the civil law dichotomy of private and public law; or between the law that governs disputes between private parties as contrasted with disputes between these

The omnipresent possibility of usury in many commercial transactions led the “French” (among other European merchants), to use bills of exchange as subterfuges or simulations of other lawful transactions.¹⁸ Loans of money that charged interest were documented as sales of foreign exchange supposedly earning not interest, but a “commission.” Thus, the actual borrower pretended to be the purchaser of foreign exchange to be delivered by a correspondent of the issuer of the bill of exchange at a foreign and sufficiently distant location (*Distantia loci*).

This subterfuge earned the bill of exchange a bad reputation with the codifiers of the French C. Com, and especially with Napoleon, who feared the loss of bourgeois fortunes at the hands of usurious moneylenders and even devious courtesans whose services were paid with bills of exchange.¹⁹ Hence, the codifiers of the C. Com stated that transactions with bills of exchange that involved non-merchants could not result in their imprisonment as defaulting debtors, as would have been the case had they been merchants.²⁰ At the same time, French commercial lay judges (generally merchants) tried to provide every appearance of religious virtue in their businesses by allegedly charging the lowest possible prices and donating much of their profits to the church.²¹

One of the costliest consequences of this attitude toward commerce and profit-making in France and Spain was the absence, during most of the nineteenth and early twentieth centuries, of secondary markets for the sale of accepted bills of exchange.²² As an instrument purporting to be a contract of exchange suspected of bearing an illegal (usurious) cause, few bona fide purchasers would be interested in buying or discounting it. In contrast, England, the Netherlands, and eventually Germany relied on sales of bills of exchange, promissory notes, or bonds in secondary markets to finance activities as economically significant as the building of low-income housing in Germany.²³

parties and their governments or between governments or agencies.

¹⁸ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 328–29.

¹⁹ *Id.* at 312–29 (discussing the Red Ink case).

²⁰ CODE DE COMMERCE DE 1807 [C. COM.] [COMMERCIAL CODE OF 1807] art. 637 (Fr.) (“Where bills of exchange and promissory notes bear at the same time the signatures of merchants and non-merchants, the commercial court will hear the case but it will not decree the debtors’ imprisonment against non merchants, unless they engaged in commercial transactions of trade, purchase and sale of foreign exchange, banking or in the earnings of commissions.”) (translation by author) (“*Lorsque ces lettres de change et ces billets à ordre porteront en même temps des signatures d’individus négocians et d’individus non négocians, le tribunal de commerce en connaîtra; mais il ne pourra prononcer la contrainte par corps contre les individus non négocians, à moins qu’ils ne se soient engagés à l’occasion d’opérations de commerce, trafic, change, banque ou courtage.*”).

²¹ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 310–15.

²² *Id.* at 385–93.

²³ *Id.*

B. An Illustration of a Contemporary Codal Failure: Ineffective Promises to Sell or Buy in the French Civil Code and its Progeny

Aside from economic development financing, everyday commercial contracting also suffered from France's CC's contract provisions and their vast progeny. Consider for example the ineffectiveness of promises or options to buy or sell. Article 1589 of the CC states in relevant part, "the promise of a sale is the equivalent of a sale when there is reciprocal consent on both parties as to the thing and its price. . . ." Does this mean that "firm" promises are unenforceable and that, say, a seller-promisor can revoke with impunity his promise to sell at any time prior to the moment of "reciprocal consent?"

Assume, for example, the following everyday transaction in Mexico, one of the many countries whose civil law was influenced by France's CC. S, a seller of land, promises B, an interested buyer, that he will sell the land for price X and will refrain from selling to another buyer during 90 days following the receipt of his promise. S's only condition is that B deposit a check for one-third of the asking price with him, which if the buyer does decide to buy, will be part of the purchase price, and if not, will be returned. B deposits the check but 30 days later S receives a higher offer from C and decides to sell him the land. In response to B's breach of promise claim, S answers that his was not a contractual obligation, but a revocable promise. And since it was a promise "to do" something, i.e., to execute a public deed of sale to B, instead of "to give" the land to B, this obligation is unenforceable except through an action for specific performance of the execution of the deed, which is a lengthy and costly procedure with an uncertain outcome. Is S right? Apparently so, not only under the French CC Article 1589 but also under the Mexican State of Jalisco's CC Articles 2163 to 2167 as well as that of and many other CCs.²⁴

1. The Problems with French Civil Codes' Article 1589's Method of Reasoning and Drafting

Article 1589 of the French CC resulted from Hugo Grotius's version of contract as the product of the "will" of both or more contracting parties. His

²⁴ See COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 285, 938 (quoting from Maria Trinidad Gómez Jiménez, 125 SJF5a 355 (1955), in Woodfin L. Butte, Selected Mexican Cases 305-08 (1967) (any changes made are to aid in clear understanding) ("Articles 2163 to 2167 of the Civil Code [of the State of Jalisco] clearly state that a promise to sell must include the elements particular to a sale agreement, i.e., its determination [of the thing] and its price . . . [it] does not transfer ownership of the offered good; it only creates an obligation to do—that of granting the final contract by the obligated party provided that the other party requests it within the term stipulated in the promise. In this case, the parties consent that their agreement is not regarding an actual transaction but rather a future contract; thus the buyer's payment on consignment does not grant him the right to receive the contractual good.").

major premise was that “as in the case of . . . contracts and treaties, which depend upon (the will of) two or more, all these acts are liable to changes, with a subsequent change of will in the parties concerned.”²⁵ Thus, as long as the promisor’s promise remained unaccepted by the promisee, the promisor was free to revoke his promise. Robert Pothier, whose 18th-century treatise on obligations was the source of many of the provisions on the law of obligations of the French CC, first defined a contract and then distinguished it from a *Pollicitation*:²⁶

A contract is a kind of an agreement. . . . An agreement or a pact is the assent of two or more persons to form an engagement between them or to dissolve or modify one already formed.

A contract includes a concurrence of the will of two persons, at least, one of whom makes and the other accepts the promise. A *pollicitation* is a promise which is not yet accepted by him to whom it is made. The *pollicitation* according to the principles of mere natural law produces no obligation properly speaking. He who makes this promise may revoke it as long as it is unaccepted by him to whom it is made. . . .²⁷

Grotius and Pothier relied on an Aristotelian theory of knowledge,²⁸ which posited that all things have distinctive features that are permanent and universal; as long as such a thing exists, it will be recognizable by those features.²⁹ And as Aristotle looked for peculiar features of species within a family and genus of, say animals, so did Grotius and Pothier within the legal genus of obligations. The essential features of contracts were that they were voluntary and thus distinguishable from involuntary obligations such as the tort of negligence or a governmentally imposed obligation. Yet, the empirical knowledge that supported the finding of the essence of a contract (and of a *pollicitation*) was the result of Grotius and Pothier’s observations of a transactional universe circumscribed, mostly, by what took place in the Roman marketplace as reflected in Justinian’s sixth century AD. Thus, Pothier offers the following quote in support of the unenforceability of the *Pollicitation*: “*Pollicitatio est solus offerentis promissium* (A *pollicitation* is solely the offeror’s promise).”³⁰

²⁵ HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 142 (A.C. Campbell trans., abridged trans. ed., Batoche Books 2001) (1625).

²⁶ ROBERT POTHIER, I A TREATISE ON OBLIGATIONS 4, 5 (Francois-Xavier Martin trans., Martin & Ogden 1802).

²⁷ *Id.* at 5 (emphasis added).

²⁸ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 48–50, 256 (citing WILHEM WINDELBAND, HISTORY OF ANCIENT PHILOSOPHY 255 (Herbert Ernest Cushman trans., C. Scribner’s Sons 2d ed. 1910) (1901)).

²⁹ *Id.* at 48–50, 256.

³⁰ *Id.* at 256–57.

Note the repeated use of the active verbs “is” (*est*) or “are” (*sont*) in, among numerous other provisions, French CC Articles 1101 and 1108 respectively. The Contract is an agreement (*le contrat est une convention*), and “four conditions are essential for the validity of an agreement” (*quatre conditions sont essentielles pour la validité de une convention*). These verbs signal a permanent and universal, or an Aristotelian essential feature, without which a contract is simply not a contract and contractual-type obligations are unenforceable.

Note also that even if the shortcomings of Grotius’ and Pothier’s definitions resulted from the transactions they observed in their respective marketplaces (although promises binding on the acceptors of bills of exchange from the moment they were issued were growing in use in Europe since the 13th century),³¹ can the same be said about our contemporary financial marketplace? Hardly. For this is a marketplace replete with binding, unilateral promises expressed not only in negotiable instruments, such as promissory notes, bills of exchange, bankers’ acceptances and certified or cashier’s checks, or in published or broadcasted offers to the public by sellers of a limitless variety of wares at a stated price and valid during a specified time. It is also a transactional universe of countless terse, computerized messages containing orders by buyers or sellers of securities to their brokers to “buy or sell X amount of stock A at price B, during date(s) C,” orders that implicitly promise or authorize payment, reimbursement, or the delivery of the securities. Could these orders and promises be deemed revocable until their brokers, and subsequently the floor traders, expressly accepted them? Not unless one would be willing to cripple the liquidity of the contemporary financial marketplace.

Why do legislators and courts in countries like Mexico and Colombia, among many others, continue to disregard the anachronistic nature of *pollicitations*? In May 2010, I participated in a workshop of commercial law reform that involved distinguished Mexican judges and legal practitioners as well as merchants and brokers.³² One of the Court decisions discussed was the above-quoted *Maria Trinidad Gomez Amparo*, by Mexico’s Supreme Court.³³ During this discussion it became clear that, in part because of the deficiencies in the applicable codified law and in part because of the propensity of courts to engage

³¹ See *Bill of Exchange*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/bill-of-exchange> (last visited Nov. 13, 2015).

³² See Boris Kozolchyk, *Enhancement of Mexican Commercial Adjudication by Improved Transactional Fact Finding, Application of Equitable Principle, and Drafting of Standard Contracts and Best Contractual Practices: The Individual Norm in Mexican Commercial Adjudication*, 27 ARIZ. J. INT’L & COMP. L. 339, 345-46 (2010) (this workshop was held May 5-7, 2010) [hereinafter *Mexican Workshop*].

³³ See Boris Kozolchyk, *Enhancement of Mexican Commercial Adjudication by Improved Transactional Fact Finding, Application of Equitable Principle, and Drafting of Standard Contracts and Best Contractual Practices: Preparatory Reading Materials*, 27 ARIZ. J. INT’L & COMP. L. 349, 357-63 (2010); see also Maria Trinidad Gómez Jiménez, *supra* note 24.

in a strictly literal interpretation of code provisions, widespread uncertainty prevailed with the use of agreements or options to purchase and sell real estate as well as other valuable things.³⁴

Consequently, merchants and brokers were quite eager to adopt practices that avoided those uncertainties, such as one proposed by NatLaw in which banks would act as escrow agents and depositaries of the buyer's earnest money and of the seller's deed of sale.³⁵ If the stipulated terms and conditions were satisfied, the bank would pay the seller the agreed-upon purchase price and would convey the title of the land to the seller. The proposed practice had an auspicious start. Some of the real estate brokers present during the workshop subsequently told me that they, and an increasing number of their clients, had repeatedly used fiduciary escrows instead of the Mexican CC promises to buy or sell.

So far, this does not seem to be the case in Colombia. In February 2011, I participated in a meeting celebrating the 40th anniversary of the enactment of Colombia's C. Com.³⁶ One of my suggestions of modernization and harmonization was the adoption of provisions on firm promises thereby abrogating *pollicitations*. In response to my suggestion, a good-humored panel member and distinguished commercial litigator asked me, "Do you have any idea how many children of Colombia's ablest commercial litigators could not have attended our expensive private schools had *pollicitations* not been alive in Colombian law?"

2. Summary and Conclusions

The permanent and universal essences of the French and Latin American codifiers are as good as the empirical, transactional data on which they are based. Yet, once verbs such as "is" or "are" become part of definitions, these definitions become impervious to market-required modernization. The same is true, incidentally, with the definitions in the law of secured transactions and the concept of pledges as it applies to commercial assets. During a 2012 visit to Chile, a Chilean professor of civil law reminded me that accounts receivable could not be pledged because, according to Chile's Commercial Code, only movable, corporeal, or tangible things could be pledged. Yet, unknown to this professor, a day earlier the president of the Chilean factoring association had announced

³⁴ Boris Kozolchyk, *Enhancement of Mexican Commercial Adjudication by Improved Transactional Fact Finding, Application of Equitable Principle, and Drafting of Standard Contracts and Best Contractual Practices: Report on June 30-July 1, 2009 Workshop at Instituto de Estudios Judiciales Del Tribunal Superior de Justicia del Distrito Federal—Mexico City, Mexico*, 27 ARIZ. J. INT'L & COMP. L. 416, 435 (2010).

³⁵ *Id.* at 418–20, 443–52.

³⁶ Fortieth Anniversary of the Enactment of the Colombian Commercial Code (*Cuadragésimo Aniversario de la Expedición del Código de Comercio de Colombia*), <https://www.facebook.com/events/863866860319327> (panel of distinguished jurists) (last visited Nov. 12, 2015).

during a meeting on a future secured transactions law for Chile that in 2011 commercial factoring agreements secured by accounts receivable amounted to 13% of Chile's GDP.³⁷ On the other hand, a legal counsel for the same factoring association conceded that factoring security interests does not protect the rights of lenders as well as pledges would or the preferential possessory rights of the Organization of American States (OAS) Model Law of Secured Transactions.³⁸

In sum, by ignoring the needs of the contemporary marketplace and freezing into permanence and universality anachronistic legal institutions, economic development has been stymied in many developing nations. What is encouraging is that, as shown by the Mexican merchants and brokers' use of fiduciary escrows and the Chilean merchants' participation in factoring transactions, merchants, brokers, and bankers are quite willing to adopt new commercial practices that can help them balance their assumptions of risk against the profitability of the new practices.

III. OTHER INFLUENTIAL CIVIL AND COMMON LAW COMMERCIAL CODES

A. The German Civil Code (*Bürgerlichen Gesetzbuches* of 1900) and the Commercial Code (*Handelsgesetzbuch* of 1897)

The German *Bürgerlichen Gesetzbuches* (BGB) listed a number of promises enforceable against their promisor without a previous acceptance by the promisee.³⁹ In addition, Section 346 of the German *Handelsgesetzbuch* (HGB) relied on custom and usage of trade as primary sources for the determination of the parties' contractual intent; "to establish between traders the extent and importance of doing and omitting to do certain things, account must be taken of [the] customs and usage in force in business relations."⁴⁰

³⁷ Boris Kozolchik & Cristina Castaneda, *Invigorating Micro and Small Businesses Through Secured Commercial Credit in Latin America: The Need for Legal and Institutional Reform*, 28 ARIZ. J. INT'L & COMP. L. 43, 63 (2011). See CÓDIGO CIVIL [Cód. Civ.] (Civil Code), art. 2384 (Chile), ("By means of a pledge, a movable thing [is delivered] to a creditor to secure his loan. . . ." ("Por el contrato de empeño o prenda se entrega una cosa mueble a un acreedor para la seguridad de su crédito..") (author's translation)).

³⁸ MODEL INTER-AMERICAN LAW ON SECURED TRANSACTIONS art. 28 (ORGANIZATION OF AMERICAN STATES 2009), http://www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf.

³⁹ See BGB, *infra* note 87, at §§ 780 (executory and independent or abstract promises), 781 (acknowledgment of a debt), 793-94 (negotiable and bearer instruments), and 657 (public offer of a reward). See also COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 419-20, 435.

⁴⁰ See HANDELSGESETZBUCH FÜR DAS DEUTSCHE REICH [HGB] [THE COMMERCIAL CODE FOR THE GERMAN EMPIRE], art. 346, *translation at* THE COMMERCIAL CODE FOR THE GERMAN EMPIRE 146 (Bernard A. Platt, trans., London, 1900) [hereinafter HGB]. It is

In addition, the HGB set forth standards of commercial honesty and diligence for various contractual relationships, such as between the agent and his principal. After listing various expected duties of the agent, Section 86 pointed to the behavior of an archetypal decent and proper merchant (*Ordentlichen Kaufmann*) and imposed symmetrical duties on the principal.⁴¹ Also, Section 347 of the HGB acknowledged the contracting parties' duties to third parties and required they "use care in the interest of a third party, [and be] responsible to such a third party for the use of the ordinary care of a prudent trader."⁴²

B. The Uniform Commercial Code of the United States (1952)

From the perspective of civil law methods of codification, the Uniform Commercial Code (U.C.C.) is not a systematic code. By systematic, I mean a code organized around concepts, definitions, classifications, policies, principles, and rules aimed at an exhaustive regulation of an entire field or branch of law. U.C.C. § 1-202 lists some "underlying purposes and policies" such as the "liberal" construction of those purposes and policies, and overall goals such as (1) [t]o simplify, clarify, and modernize the law of commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.⁴³ Of these goals, (2) is central to the main thesis of this article and I will return to it shortly. Before I do, however, I will highlight some of the elements that a systematic civil law codifier would find missing in the U.C.C.

Far from basing its definitions on Aristotelian essences, many of the U.C.C.'s definitions are unabashedly tautological as in, "goods means all things including specially manufactured goods."⁴⁴ Other terms, which to a civilian codifier would be crucial for the determination of the scope of their commercial codes, such as "commercial transactions" are loosely defined. It could mean all transactions undertaken by "someone who regularly 'deals in goods of the kind or otherwise by his occupation holds himself out as having the skills peculiar to the practices or skills involved in the transaction?'"⁴⁵ Yet what about those

noteworthy that a French-influenced commercial code such as Mexico's *Código de Comercio* of 1887 does not even mention use of trade or custom as a source of commercial law. On the contrary, Article 2 of the Mexican Commercial Code states that: "In the absence of provisions in this code and other mercantile statutes on acts of commerce, the provisions of the civil code applicable to federal matters." (Parenthesis added) *Código de Comercio de 1887 [CCom]* (Commercial Code of 1887), art. 2, *Diario Oficial de la Federación [DOF]* 7-10-1889, últimas reformas *DOF* 17-04-2012 (Mex.), <http://www.metro.df.gob.mx/transparencia/imagenes/fr1/normaplicable/2013/cc14012013.pdf>.

⁴¹ See *COMPARATIVE COMMERCIAL CONTRACTS*, *supra* note 1, at 431.

⁴² See HGB, *supra* note 40, at § 347 (parenthesis added).

⁴³ U.C.C. § 1-102(a)-(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 1952).

⁴⁴ See U.C.C. § 2-105 (AM. LAW INST. & UNIF. LAW COMM'N 1952).

⁴⁵ See U.C.C. § 2-104 (AM. LAW INST. & UNIF. LAW COMM'N 2002) (Parenthesis

transactions whose practices and skills are generally regarded as commercial, but are not governed by the U.C.C., such as unsecured loans, brokerage (including commission agency) carriage, and insurance, among others? And if the above definition of a merchant applies throughout the U.C.C., why promulgate different definitions of good faith in Articles 1 and 5, but not in Article 9?⁴⁶ In an attempt to draw attention to the fundamental differences between the method of drafting the U.C.C. and the French CC, I analogized their respective approach to codification to the manner in which Greeks and Babylonians approached mathematics and physics.

As assessed by the late Nobel Prize winning theoretical physicist, Richard Feynman:

[The] Babylonians cared only whether or not a method of calculation worked—that is it adequately described a real physical situation—and not whether it was exact, or fit into a greater logical system. . . [The Greeks]. . . on the other hand, invented the idea of theorem and proof—and required that for a statement to be considered true, it had to be an exact logical consequence of a system of explicitly stated axioms or assumptions. To put it simply, the Babylonians focused on the phenomena, the Greeks on the underlying order.⁴⁶

As with the Babylonians, the U.C.C. drafters did not provide a precise definition of a commercial transaction, or of other terms or concepts they constantly use such as reasonableness or fair dealing. And because of the flexibility of its above mentioned goal “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties” the U.C.C. drafters did not require that contracts for the sale of valuable, real, or personal property be cast in “tablets of stone.” In doing so, the U.C.C. rejected the ceremonial approach to valuable contracts that required their execution of public deeds (*Actes Authentiques*)⁴⁷ characteristic of the French CC and its progeny.

In contrast, U.C.C. § 2-204 provides that “a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”⁴⁸ Even though U.C.C. § 2-201 requires a writing for sales of goods that exceed the amount of \$500 USD, the purpose of this requirement is remedial, i.e., the availability of an action or defense to allege such a defect, it is not constitutive, i.e., it does not state

and emphasis added).

⁴⁶ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 245–46 (quoting an interview of Richard Feynman). See LEONARD MLODINOW, FEYNMAN’S RAINBOW: A SEARCH FOR BEAUTY IN PHYSICS AND LIFE 24, 15 (2003).

⁴⁷ See CODE CIVIL [C. CIV.] (CIVIL CODE) art. 1341 (Fr.) (requiring a notarial or public deed for transactions whose value exceeds a certain amount).

⁴⁸ See U.C.C. § 2-204 (AM. LAW INST. & UNIF. LAW COMM’N 2002).

that the absence of a public deed means the non-existence or nullity of the agreement. Simply put, if the parties behaved as if they had agreed to certain terms and conditions, and acted accordingly they would not be heard to claim its non-existence or nullity because of the lack of a writing as is the case in many civil law countries.⁴⁹ *Mutatis mutandi*, and lest there be a doubt that a contractual obligation is only born from the assent or conduct of both parties, § 2-205 bowed to transactional reality and stated:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable for lack of consideration, during the time stated or if not time is stated, for a reasonable time. . .⁵⁰

Hence, the U.C.C.'s approach to contract formation is informal and fluid. If it were to have an essence, it would be its Heraclitus like fluidity,⁵¹ or a commercial conduct sensitive to transactional and market needs. This approach is reflected in the U.C.C.'s sources of interpretation of contractual intent: the parties expressed intent must be informed by their course of contractual performance, course of dealing and usage of trade.⁵² The net result of this approach to contract interpretation is a commercial code much closer to commercial practice than any other. At the same time, the drafters of the U.C.C., and especially Karl Llewellyn,⁵³ intuited that concepts such as reasonableness and fair dealing, regardless of their seeming conceptual fuzziness, were pre-requisites of viable commercial practices.

I would argue that this fuzziness disappears once the interpreter realizes that, as was counselled by the Roman jurist Ulpian, honesty, reasonableness, and fairness are the ones practiced by respected members of commercial communities. These are the archetypal merchants he identified as respected, prudent men of affairs (*boni viri*).⁵⁴ In a similar vein, Karl Llewellyn described his favorite commercial archetype as the "decent dealer" and alluded to him in Official Comment 5 to § 1-205. This archetype strongly resembled the HGB's "decent and proper merchant" (*Ordentlichen Kaufmann*). In Llewellyn's words:

Full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.⁵⁵

⁴⁹ See generally, COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1.

⁵⁰ See U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

⁵¹ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 868, 943.

⁵² See U.C.C. § 1-303 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

⁵³ See COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 852–53, 943.

⁵⁴ See *id.* at 97, 131, 207.

⁵⁵ See U.C.C. § 1-205 (2), cmt.5 (AM. LAW INST. & UNIF. LAW COMM'N 1972).

Inspired by this archetypal behavior, the U.C.C. relies on the concepts of bad faith and of unconscionable behavior, among others, to combat the practices of Llewellyn's "sharpies" or corner-cutting "dissidents." As stated in the Official Comment to § 2-302 with respect to unconscionable behavior:

The basic test is whether in the light of the general commercial background and the commercial needs of a particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.⁵⁶

In sum, the U.C.C. assumes that for its provisions to be able to fulfill the reasonable expectations of market participants and of society at large, commercial practices must be cooperative and thus inconsistent with zero sum game commerce or one in which one party's gain is necessarily at the expense of the other's loss.

IV. STANDARD AND BEST PRACTICES AS A TOOL FOR ECONOMIC DEVELOPMENT

The U.C.C.'s success in providing the requisite certainty and flexibility for the commercial transactions of the world's largest and most vital marketplace paradoxically foreshadowed the decline of commercial codification as a preferred tool for the modernization and harmonization of commercial law. As I stated in my Keynote speech at the Shanghai University of International Business and Economics *Honoris Causa* award:

Commercial codification is no longer the preferred tool to modernize and harmonize commercial law. This is not because commerce is so diversified that very few drafters (or even teams of drafters) can credibly claim expertise in the ever growing number of transactions now practiced by professional and non-professional merchants. Neither is it because the speedy transformation of the existing methods of doing business is such that often rules are obsolete before their proverbial ink is dry. Codes are no longer preferred tools of modernization because the actual standard and best practices, instead of their reformulation or restatement by scholars and judges, are much closer to both, marketplace behavior and market needs.⁵⁷

⁵⁶ See U.C.C. § 2-302, cmt.1 (AM. LAW INST. & UNIF. LAW COMM'N 2008).

⁵⁷ *Second Pacific Rim Colloquium on Economic Development and the Harmonization of Commercial Law*, NAT'L LAW CTR. FOR INTER-AM. FREE TRADE (Jan. 8-10, 2015), <http://www.natlaw.com/sites/default/files/Pac-Rim%20Colloquium%20>

Thus, increasingly, U.S. merchants, bankers, carriers, brokers, insurers, providers of professional services, and their lawyers seek their daily guidance on how to perform their international and local contracts or fulfill their firm promises in sources such as: the ICC's INCOTERMS; the UCP; the International Standard Banking Practice for the Examination of Documents under Letters of Credit (ISBP); GAFTA's Arbitration rules; the standard contracts of the American Society of Civil Engineers; or by the American Institute of Architects.⁵⁸

The same is true in Germany and other European countries with the so-called "General Conditions of Trade."⁵⁹ Hence, it is to the credit of a few commercial codes such as the U.C.C. and the Commercial Code of Colombia that they encouraged reliance on standard and best practices as primary sources of commercial contract law even though reliance on the commercial codes themselves was diminished.⁶⁰ It is also to the U.C.C.'s credit that it relies on the archetypal behavior of "decent" merchants, which is not only a more cooperative, but also more realistic version of the behavior of regular free market participants than Napoleon's "tricky" or Karl Marx's "exploitive" merchants.⁶¹

Materials%202015.pdf (Text on file with the author).

⁵⁸ See THE AM. SOC'Y OF CIVIL ENGINEERS, www.asce.org/contractdocuments/ (last visited Nov. 11, 2015); see also the standard forms for the American Institute of Architects, AMERICAN INSTITUTE OF ARCHITECTS, <http://www.aia.org/groups/aia/documents/pdf/aias076840.pdf> (last visited Nov. 11, 2015).

⁵⁹ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 455–61.

⁶⁰ U.C.C. § 1-205(2), cmt.5 (AM. LAW INST. & UNIF. LAW COMM'N 1972). In the words of Professor James J. White, the Reporter for the drafting of Article 5 of the U.C.C. (on letters of credit), the Uniform Customs and Practices for Documentary Credits (UCP 500):

had an enormous influence on the revision of Article 5. Nothing else, not American common law, local practice, the law of another country, or even the UNCITRAL draft, had anything like the influence the UCP had. In fact, the UCP may have had a greater influence on the redraft of Article 5 than existing Article 5 of the U.C.C.

James J. White, *The Influence of International Practice in the Revision of Article 5 of the U.C.C.*, 16 NW. J. INT'L L. & BUS. 189, 190 (1995). Article 3 of the Colombian Code of Commerce (Codigo de Comercio, Decreto número 410 de 27 de Marzo de 1971), in turn, is one of the most receptive code provisions to commercial custom. It states: "Commercial custom shall have the same authority as commercial statutes, as long as it does not contradict the latter manifestly or tacitly and that the transactional facts of that custom are public, uniform, and reiterated where they have to be observed. . . ." CÓDIGO DE COMERCIO (C. COM.) (Commercial Code) Decreto N° 410 de 1971, 27 de Marzo (Colom.), http://www.wipo.int/wipolex/en/text.jsp?file_id=229595 (last visited March 1, 2016).

⁶¹ See Boris Kozolchyk, Evo DeConcini Professor of Law and Director of National Law Center, SUIBE Acceptance Speech at the Second Pacific Rim Colloquium on Economic Development and the Harmonization of Commercial Law (Jan. 8-10, 2015) (manuscript on file with author).

A. The Drafting of Standard and Best Practices: The Role of the Roadmap

During the first five years or so following its founding, NatLaw's main mission was to make the trade among the NAFTA countries (Canada, Mexico, and the United States) as legally seamless as possible.⁶² NatLaw's success in harmonizing important areas of the NAFTA trade law and practice largely attributable to the data provided by transactional roadmaps. One of these roadmaps was used to harmonize the existing procedures for the collection of checks thereby expediting their collection and clearance; another was to assure that the practices for the examination of letters of credit documents did not delay their expeditious payment in Mexico and the United States. A third roadmap helped to harmonize the use of truck bills of lading to expedite deliveries and payments thereof, especially in "cash on delivery" (COD) transactions.

As will be apparent in the following sections, the NatLaw Roadmap is a combination of a cultural/anthropological observation of commercial and financial practices including the identification of archetypal or representative commercial behavior and a legal and economic analysis in support drafts of standard and best practices. As just noted, this last phase of the roadmap requires identifying those practitioners who in the eyes of their colleagues practice their trade or profession in an honest, profitable, and fair manner.

1. The Roadmap of the Collections and Clearings of NAFTA Checks

The NatLaw Roadmap of check collection practices in the NAFTA region started in Hermosillo, Sonora, Mexico, located approximately 200 miles south of the United States border. P, a Mexican supplier of Sonoran products to a Dallas, Texas importer deposited the latter's U.S. Dollar check drawn against a Dallas, Texas bank (USDB). This check was deposited in the Mexican bank of first deposit (MBFD) in Hermosillo. In Mexican deposit and collection practice, the endorser to the MBFD could be either P or his endorsee. Following this deposit, MBFD could forward the check for payment directly to USDB or send it to its correspondent in Nogales, Sonora (the northernmost border city of Sonora and thus the location of the Mexican Point of Exit Bank (MPEB). Upon receipt of P's check as well as of the checks forwarded by other Mexican banks, MPEB would deliver the check to a U.S. bank in the nearest point of entry to the U.S. and thereafter, the U.S. Point of Entry Bank (USPEB) in Nogales, Arizona acted as a "funnel" bank for all the Sonoran banks.

Gene Saunders, one of Arizona's most-respected international bankers at the time, provided a firsthand account of the funnel system to NatLaw's

⁶² See Boris Kozolchik, *NAFTA's Continuous Commercial Legal Highway*, in NAT'L L. CTR. FOR INTER-AM. FREE TRADE, *TOWARD SEAMLESS BORDERS: MAKING FREE TRADE WORK IN THE AMERICAS* 5-33 (Boris Kozolchik ed., 1993).

researchers. His bank was Valley National Bank, which was subsequently purchased by a succession of U.S. banks, the latest of which is JPMorgan Chase.

Coming from Mexico to the US, a branch of the Mexican bank in Nogales Sonora (MPEB) gathers items from. . . Northwestern Mexico. [The gathered checks are] drawn on US or Canadian banks. [It] puts them in a bag and manually walks them over to Nogales, Arizona and hands them over to someone at our branch. . . . Then our branch sends them into the item processing area and sends them out. We have a correspondent relationship account with (MPEB) so that the Mexican bank's account at Valley National Bank is credited. Returns come back the same way. They go to Valley National Bank in Nogales when the Mexican courier comes to deliver the US items, he will take back all the return items. He then takes them across the border where they are handled on the Mexican side.⁶³

Thus, Gene Saunders's Valley National Bank acted as the earliest USPEB and also as the funnel bank that distributed and forwarded checks received from Mexican banks to U.S. and Canadian banks and vice-versa. NatLaw researchers inquired into the problems that the NAFTA bankers encountered with the practices described in the roadmap. There were some purely mechanical problems such the absence of micro-encoding in many of the gathered checks. Micro-encoding could have expedited significantly the check's journey to the Canadian or U.S. drawee-payor banks by enabling Valley National Bank's "reader/sorter" machines to select the most expeditious routing.

Among the non-mechanical banking practice caused problems listed by the Mexican banks was the delayed payment of the U.S. dollar checks deposited with them and payable by U.S. banks: at least ten percent of the checks sent for collection took 30 days or more to be returned to MBFODs. In the case of U.S. Treasury checks, the delay often exceeded six months because of the presence of multiple endorsements, which was common with those checks deposited in Mexico. Such multiple endorsements strongly signaled to U.S. drawee/payors the possibility of fraud and the need for investigation. However, since the practice of Mexican banks was to give immediate credit to their depositors for their U.S. dollar checks, these delays caused financial hardships to MBFDs. Eventually, when the unpaid checks were returned, it was often impossible to reverse the final bookkeeping credit entry, as contrasted with the provisional credits granted to their depositors/customers. This was particularly the case when instead of returning the actual check the USDB sent a photocopy, which did not have the same evidentiary value in Mexican law, as the original check did.

⁶³ See *Transcript of the Second Meeting of Representatives of the American Bankers Association, The Federal Reserve Bank, The USCIB, and the Mexican Bankers Association on Drafting of Guidelines for the Clearing and Return of Checks Between Canada, the United States and Mexico*, in TOWARD SEAMLESS BORDERS, *supra* note 62, at 431.

On the northern side of the border, the main problem encountered by U.S. banks with Mexican check collection practices was the recurrent difficulty in ascertaining who was the endorser or the party to whom the check was to be returned in the event of nonpayment (including USPEBs or MPEBs). The Mexican practice was of placing or stamping multiple endorsements on top of each other thereby rendering them illegible. U.S. banks complained that they could not discern who had signed the endorsements. Another serious difficulty encountered by the U.S. banks when attempting to expedite their payments was that, unlike the U.S. (Regulation CC) practice of returning the checks directly to the MBFD, under Mexican law and practice this bank had to receive the check from each of the preceding endorsers in a reverse (latest to earliest) order of endorsement. Further, unlike U.S. law and practice, Mexico had no “midnight deadline” rule that required the payment or rejection of checks by the drawee-payor banks prior to the expiration of a fixed period of time, such as midnight of the day following presentment. This made the collection or rejection of checks payable at Mexican banks dilatory and uncertain.

Even though no complaints were heard about USPEBs or MPEBs acting as funnel banks for each country’s forward and return collections, the rights and duties of these banks had not been spelled out in enforceable regulations. The Roadmap’s assessment was that these banks played such an important role that their standard and best practices should be carefully examined for the purpose of validating them either by inter-bank agreements or by each country’s “internal regulations.” A tri-national drafting committee comprised of knowledgeable and respected Canadian, Mexican, and U.S. bankers⁶⁴ recommended such a validation in its final “Suggested Guidelines.” But before the adoption of new practices, such as a midnight deadline rule following the presentation of the check, say to USDB, or a Regulation CC⁶⁵ rule that would authorize the USDB to send the check directly to the MBFD, bypassing subsequent endorsers, it was necessary to learn if the delegations shared similar objectives. This was another instance in which an archetypal knowledgeable and respected banker provided an acceptable version of the normative purpose for the collection and return rules. As stated by the Canadian Bankers’ Association George Girouard:

In Canada our objective on the forward system is to have as little float as possible. Our objective on the return system is to have unposted items returned to the depositor institution as rapidly as possible. What we need to do is focus our recommendations, our processes and procedures on achieving those objectives, and whether it ends up being a midnight following day rule or [a] . . . Regulation CC rule is a secondary issue.⁶⁶

⁶⁴ *Id.* at 431-35.

⁶⁵ *Id.* at 433.

⁶⁶ *Transcript of the First Meeting of Representatives of the USCIB, the Mexican Bankers Association, and the Canadian Bankers Association for the Drafting of Guidelines*

It did not take long for his Mexican counterparts to agree with these purposes; otherwise, Mexican endorsee banks including the MPEB could decide to profit from their temporary holdings of U.S. dollars at the expense of Mexico's Ps and MBFDs. This was another instance in which resort to an archetypal reasonable banker's version of a practice proved to be the most acceptable to all the regular participants in the transaction.

B. Suggested Guidelines (Guidelines) for the Collection and Clearing of Checks in the NAFTA Region

During the first Drafting Committee it became apparent that the agreed upon new uniform standard and best practices had to address not only the collection, but also the clearing of checks. This was needed because a large number of the checks deposited and forwarded for collection in Mexico did not bear a micro-encryption that would expedite their collection in the United States and Canada by forwarding them via the quickest route to the paying banks. In anticipation of such a micro-encryption, the drafters asked their bankers' associations to list their textual and formatting requirements.⁶⁷ It was also apparent that it would take longer to implement the suggested new uniform encryption practices than to standardize practices that would not immediately require them.

Accordingly, guidelines were drafted for the collection and return of checks without the electronic enhancements. Two of the most important rules were (1) a midnight deadline for the payment of a successfully routed check, and (2) an expeditious return:

When returning a check, the drawee/payor bank must return the check to the bank specified under the country's internal regulations (the point of entry bank) by its midnight deadline as defined in Section XI (h) below, unless it complies with the provisions on expeditious return in Section V (a) 2.1 below.⁶⁸

In relevant part, Section XI (h) defines the midnight deadline as:

With respect to a returned check is midnight of the next banking day on which the bank receives the relevant check. . . .⁶⁹

for the Clearing and Return of Checks Between Canada, the United States and Mexico, in TOWARD SEAMLESS BORDERS, supra note 62, at 387.

⁶⁷ TOWARD SEAMLESS BORDERS, *supra* note 62, at 473-74 app. (discussing the guidelines Paper Size, Weight, and MICR standards in Subsection II(a) and Routing Number in Subsection II(b)).

⁶⁸ *Id.* at 475-76 app. (discussing the guidelines for midnight deadlines and a return of check in Subsection III(a)(1)).

⁶⁹ *Id.* at 482 app.

Section V (a) 2.1, in turn, defines the expeditious return of a drawee bank such as in the earlier illustration the Dallas, Texas bank (USDB) in relevant part as:

The return is expeditious if a drawee/payor bank returns the check to the point of entry bank in a manner such that the check would normally be received by the point of entry bank no later than 4 pm . . . of the fourth business day following the banking day on which the check was presented for payment to the drawee/payor bank.⁷⁰

Thus, the USDB must have either paid or returned the check by midnight of the next banking day after receipt, and if it rejected payment, its return would be expeditious if it arrived by four in the afternoon of the fourth banking day after the check was presented to it for payment to Gene Saunders's Valley National Bank in Nogales, Arizona.

In addition, there was a reasonable "safe harbor" rule in Subsection III prompted by one of the above objectionable practices:

If any returning bank is unable to return a check or send wire advice . . . because of the illegibility of the endorsements on the check, because of other circumstances beyond the control of the bank, it is allowed to hold the check beyond the deadlines specified in the above sections and until it can reasonably determine to whom the check should be returned.⁷¹

An attached explanatory statement stated the standard of reasonableness should be ascertained by establishing the prevailing banking custom in the locality of the USDB. Accordingly, before an MBFD complained about USDB's Dallas bank's delay in returning the item in the prescribed manner to the MBFD in Hermosillo, it would have to establish what an honest, knowledgeable, and fair banker in Dallas, Texas would have done with illegible endorsements as found on the reverse of P's check.

It should be noted that one of the MBA's most respected bankers as well as one of its equally respected legal counsel acknowledged the problems with the present Mexican endorsement practices and the need for a reasonable practice:

We have internally recommended in Mexico that our banks use the uniform endorsement location since 1984. However, the reality is that not only has it not happened, it can't happen. Article 69 of the banking law requires that each bank use a specific stamp on each check that it takes up the entire first space of the check, and any additional endorsement will take up

⁷⁰ *Id.* at 479 app.

⁷¹ *Id.*

the rest of the space. I have a copy of a check if anybody wants to look at it. This check never got out of my bank but it is still covered with endorsements.⁷²

In sum, note the role played by the Roadmap in accurately describing the existing practices and their problems, both mechanical and attitudinal. Also notice the costly consequences of a supposedly up to date banking law provision that in fact relies on an obsolete and dysfunctional return-of-the check practice. Further, note the contribution of an archetypal and legal version of reasonableness in creating a practice that is as necessary to the collecting bank as it is to the drawee/payor bank, especially in a banking relationship in which today's endorser/collecting bank is tomorrow's payor bank and vice-versa.

1. The Checking of Commercial Letter of Credit Documents

Shortly before the ratification of the NAFTA treaty in 1984, the Banking Commission of the ICC promulgated UCP 500 (1993). As a U.S. representative of the United States Council on International Banking (USCIB) to that Commission, I was one of its drafters and was also a proponent of a new standard for the examination of letter of credit documents, the International Standard Banking Practice (also known as the practice of an archetypal Reasonable Document Checker).⁷³ In preparation for the adoption of that standard, I surveyed documentary checking practices of many countries' banks with questionnaires and interviews of average and highly respected letter of credit bankers. The empirical information I gathered strengthened my conclusion of the importance of archetypal bankers in the shaping of standards and best practices worldwide.⁷⁴

⁷² See the statement by Roberto Lyon of the MBA in *TOWARD SEAMLESS BORDERS*, *supra* note 62, at 465. Armed with a supporting letter by the Canadian and United Bankers Associations, Lyon and Arturo de la Cueva, lawyer for the MBA, suggested to the MBA an amendment of Article 69 of the Mexican Banking Law. In their opinion, the expression of a need for a reasonable NAFTA practice might finally carry the day.

⁷³ See Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 *BROOK. L. REV.* 45, 80, n.a.; *see also id.* at 72–80. See Boris Kozolchyk, *Toward New Customs and Practices for Documentary Credits: the Methodology of the Proposed Revision*, *COMMERCIAL LAW ANNUAL* 371 (Louis Del Duca & Patrick Del Duca eds., 1993).

⁷⁴ This process took approximately three years and it brought me in touch with model bankers in the United States and Europe, such as (alphabetically): Alan Bloodgood of Morgan Guaranty Trust. Co; Charles Bontoux of Banque National de Paris; Charles del Busto of Manufacturers Hannover Trust (also the Chairman of the ICC Banking Commission); Ferdinand Muller, head of the Letter of Credit Department for Deutsche Bank; Mike Quinn, Head of Trade finance for Citibank and subsequently for JPMorgan/Chase; Don Smith, head of the Letter of Credit Department for Citibank; Dan Taylor, President of the United States Council of International Banking; Vince Maulella, Head of the Letter of Credit Department for Manufacturers Hannover Bank and

Of all the letter of credit practices, document checking was the one that caused most judicial disputes between or among banks. Often, what was an acceptable invoice, ocean bill of lading, certificate of insurance, quality, or weight in the eyes of the confirming bank was not in those of an issuing or negotiating bank. These disparities were particularly noticeable when the text of the document in question had terms that were unknown or ambiguous to confirming and negotiating banks. This was the case with LOCs issued in the United States and confirmed or negotiated by Mexican banks and vice-versa. And as misspellings in the documents tendered by beneficiaries and negotiating or collecting banks multiplied, so did judicial disputes.

Fortunately, Mexico and the United States had reasonable document checkers willing to participate in NatLaw's roadmap study, whose goal was to identify the disparities in the examination of most common LOC documents and their reasons both *bona* and *mala fides*.⁷⁵ Thus, a group of representatives of the Mexican Bankers Association and members of the United States Council for International Banking agreed to review their respective practices, document by document, to find out the reasons for their disparate practices. This was followed by attempts to agree on a common practice and in the very few instances in which this agreement was not reached, an explanatory note was provided on why the disparity could not be obviated. Finally, with the research assistance of NatLaw, the joint drafting committee prepared the list of standard document checking practices.

In contrast with UCP 500, which also addressed the concerns of LOC customers (account parties) and beneficiaries, the Mexican and U.S. standard examination practices focused solely on documentary examination disputes between Mexican and U.S. LOC bankers, some of whom were correspondent banks. At the opening of the first drafting session, I reminded the drafters that given the interchangeability of their roles (today's issuing bank is tomorrow's confirming or negotiating bank or vice-versa), their attempts at reasonableness were not just to place themselves in the position of the other banker and ask "What would I do in his shoes?" but rather, "What would an archetypal reasonable document checker do?" The result was the first international Standard Practices for the Examination of Letter of Credit Documents (published in English and Spanish).

subsequently for JPMorgan Chase; and Bernard Wheble, formerly of Brown and Shipley London Bankers and Chairman of the ICC Banking Commission.

⁷⁵ The participants, bankers, and lawyers for the Mexican Bankers Association were Jose Banuelos of Banco Banamex; Miguel Angel Bustamante of Banco Bancomer; Ing. Guillermo Jimenez Sepulveda of Banco Banamex; Lic. Jesus Madrazo Yris of Banco Banamex; Jose Manuel Nunez of Banco Banamex; Eduwiges de Olaguibel of Banco Inverlat; Lic. Sergio Olivares of Banco Serfin; and Lic. Jose Manuel Nunez of Banco Banamex. The U.S participants were Alan Bloodgood, Morgan Guaranty Trust Co.; Jack Kurzer, Bankers Trust Co.; Joseph Nielsen, Chase Manhattan Bank; Donald Smith of Citibank; and Dan Taylor, President of USCIB. The participating lawyers for NatLaw were Ana Torriente, Esq., and Boris Kozolchyk.

These Standard Practices reduced significantly the number of cross-border LOC lawsuits and also expedited final payments. They served as a model for the drafting of the ICC Banking Commission's International Banking Practices for the Examination of Documents Under Letters (ISBP, ICC Publication 645) described by the ICC as "a practical complement to UCP 500."⁷⁶ As such, banks and their legal advisors are using it regularly worldwide. Subsequently, in 2007 and in conjunction with the adoption of UCP 600, the ICC published a second edition.

2. A Standard NAFTA Truck Bill of Lading

The Roadmap of a NAFTA truck bill of lading required that NatLaw researchers be present during the issuances of truck bills of lading in Canada, the United States, and Mexico. It also required that these researchers be present when cargo shipped from Canada or the United States was delivered to the consignee/buyers in Mexico. As with the standard practices on check collection, the adoption of the NAFTA truck bills of lading was on a voluntary basis by Canadian, U.S., and Mexican carriers.⁷⁷

One of the first roadmap findings was the radical difference between the documents labeled "bills of lading" in each country. In Canada and the United States, truck bills were, unlike ocean bills of lading, mere receipts for carriage and not documents of title to the goods shipped. They were issued in sets of three copies of different colors, one for the carrier, one for the consignor/shipper, and the third for the consignee/ buyer. The color of the consignor/shipper's document was to signify that as a holder of that receipt, the consignor was the only party who could instruct the carrier to stop his carriage in transit or deviate it for delivery to a different buyer.

For shipments to Mexico, once the cargo had crossed the Mexican border, the Mexican carriers' practice was to treat the truck bill of lading as a single (original) document of title in the sole possession of the truck driver. This driver was commonly instructed by the carrier to not surrender the bill of lading to the consignee or to anyone else until the COD price of the goods and the freight charge was fully paid by the consignee.

This COD carriage and payment practice reflected a persistent distrust among shippers/consignors, carriers, and consignees. The carrier and the truck driver feared the consignee's unwillingness to pay for the freight and his use of his refusal to pay as pressure on the consignor to lower the prices of the goods, especially when his goods were in another country. The consignee in turn distrusted the carrier's delivery of goods of the same quantity and quality as he had ordered. The result was a pantomime version of the "cash on delivery"

⁷⁶ See Maria Livanos-Cattai, *foreword to* INT'L CHAMBER OF COMMERCE, *International Standard Banking Practices*, at 3 (2002).

⁷⁷ NAT'L L. CTR. FOR INTER-AM. FREE TRADE, *North American Standard Transportation Practices: A Guide to Truck Transportation 2* (Gary T. Doyle ed., 1998).

(COD) sale: as described to me by the NatLaw researcher, without much conversation, but with vivid gestures, the truck driver as the holder of the truck bill would gesture to the consignee that he had the bill of lading in his hand and would surrender it once he was paid in cash for the shipment. At that point, the consignee was expected to pay the cash to the truck driver, who upon receipt would hand over the bill of lading to the consignee who would then give it back to the truck driver and obtain the release of the goods.

However, the drafting group of the model truck bill of lading (comprised of Canadian, United States, and Mexican carriers, shippers/consignors, consignees, freight brokers, insurers and transportation department government officials) had to confront a different transactional reality. Upon learning of the above Roadmap finding, cross-border carriage-insurers (also present as part of the Drafting Group of the NAFTA truck BOL) realized that it would be too risky to insure cargo whose only lawful holder was an unknown, and most likely uninsured and impecunious truck driver. This fact made it necessary to retain the Canadian and U.S. practice of using the truck bills as receipts issued in three copies and with the right to stop the carriage or deviate solely in the hands of its unpaid seller/shipper.

The adoption of this practice illustrates an inherent feature of viable commercial and financial practices. If all the participants are likely to benefit from the contribution of a third party, such as an insurer of the risks of a transaction, the “nuclear” or original participants (in this case the carrier, consignor, and consignee) must treat the third party insurer at least as they would treat regular participants. As a minimum, they have to disclose transactional risks of which they are aware and the insurer is not. And then they have to be prepared to help protect the insurer against those risks.

C. The Nuclear Elements of a Viable Commercial Practice

Among other distinguished social and exact scientists, Adam Smith, Emile Durkheim, and E.O. Wilson (the latter with the help of convincing socio-biological evidence) taught us that selfishness and altruism are indispensable ingredients of human cooperation and that commerce, at its best, ranks among humanity’s most cooperative endeavors.⁷⁸ Commerce is comprised of innumerable practices, and a small number of these act as the nuclei for the vast number of others. This is the case, for example, with contracts of sales and purchases, loans, exchanges, leases, agencies, insurance, business associations, and firm and independent promises of payment or extensions of credit.

From the nucleus of a contract of sale have sprung cash, installment, consignment, documentary, short, long, conditional, and repo sales, among other variants. The most viable and long-lasting of these variants are those that provide a reasonable possibility of profit making to its participants. This possibility, in

⁷⁸ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 7–12.

turn, results from the appropriate amount of selfishness and altruism, as part of the transactional rights and duties.

Depending upon the sector, transaction, and business plans of regular participants, these amounts could be present at different stages of the transaction and in differing quantities. For example, a key nuclear component of the agreement to lend money or goods is the initial entrustment of the money or goods to the borrower. In some practices, such as secured lending, the entrustment only takes place when the lender is satisfied not only of the borrower's willingness, but also his ability to repay. In such a practice, no money is advanced until the borrower has provided satisfactory collateral; in others, money is advanced solely against a promise of repayment. And in some, there is an entrustment of money and goods without collateral or a simultaneous promise of repayment. The timing and amount of this initial giving depends on the lender's interest in earning the borrower's gratitude and with it his trust and willingness to be part of a sustained, mutually profitable business relationship. The same will be true with retail sales of certain goods that often require that their buyers or users be given free samples, or free trial-periods at the beginning stage of the transaction.

It generally takes such variants many years of trial and error before their amounts of altruism and selfishness are firmed up and start spawning off variants. Thus, my guess is that it probably took two or three generations before the financial lessors were clearly distinguishable from ordinary lessors. I know that it took the standby letters of credit spawned off by commercial letters of credit at least three decades before their standard and best practices were viable and widespread.⁷⁹

However, in other much rarer instances, it has taken a nuclear practice almost two millennia before one of its variants became a viable and widespread practice. This was the case of commercial loans secured by business assets that remained in the debtor's possession while the loan was being repaid (also known as pledges without the debtors' dispossession in many civil law countries).⁸⁰ Judging from the transactions described in juristic opinions of Justinian's Digest, the Roman law pledge (*pignus*) and mortgage (*hypotheca*) appeared ready to spin off variants during the first three centuries AD.⁸¹ Nonetheless, a viable and internationally widespread secured commercial loan did not come about until the last decade of the twentieth century, following the enactment of Article 9 of the U.C.C. during the middle of the twentieth century.

The Roman *pignus* and *hypotheca* were used as personal or movable and real property collateral (at times interchangeably) to secure the repayment of monetary loans.⁸² A formula of mutual profitability seemed acceptable to lenders and borrowers. The debtor would be allowed to remain in possession of business assets he was supposed to acquire with the proceeds of the creditor's loan while

⁷⁹ Boris Kozolchyk, *The Emerging Law of Standby Letters of Credit and Bank Guarantees*, 24 ARIZ. L. REV. 319, 321–32 (1982).

⁸⁰ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 1039–46.

⁸¹ *Id.* at 1042–44.

⁸² *Id.* at 1042–47.

repaying his loan. If the debtor defaulted, the creditor could resort to various remedies that would enable him to rapidly regain possession of the collateral and retain it or resell it. If the retention or the resale produced a balance over the amount owed, it would be returned to the debtor.

In practice, however, the Roman secured loan closely resembled a zero sum game in which only the lenders, comprised mostly of large and politically powerful landholders, were the ones to profit and did so abusively. A key component of this abuse was their usurious rates of interest; another component consisted of the inequities of the repossession and foreclosure procedures as reflected in the large numbers of Imperial rescripts directed to provincial officials addressing these inequities.⁸³ Another problem with these Roman practices was the absence of a public notice system that would inform third parties, actual or potential secured creditors, and purchasers of the borrowers' products or of the existence of the security interests of previous lenders. This lack of notice prevented the emergence of a competitive asset-based, financial marketplace.

In contrast, Article 9 set forth symmetrical rights and duties for both lenders and borrowers and provided adequate public notice to third parties. In addition, commercial secured lending was bolstered by lenders' policies to charge reasonable rates of interest made possible by the reduced risks of collection of properly collateralized loans.

1. The Contribution of Good Faith: Honesty, Reasonableness, Fairness, and Viable Commercial and Financial Practices

How does good faith influence the drafting of standard and best practice, including those involved in the modernization and harmonization of the transactions discussed in the Trans-Pacific Colloquia?

Roman Praetorial formulas instructed trial judges to accept a contracting party's defense of *dolus (exceptio doli)* (willful harm or fraud) when the other party took advantage, *inter alia*, of strict substantive or procedural rules in a manner that would accomplish a fraudulent, dishonest result.⁸⁴ This requirement of honesty in pleading is consistent with Ulpian's advice on how to live a righteous life: "[L]ive honestly, do not injure another, and give to each that which belongs to him," (*honeste vivere, alterum non laedere, suum cuique tribuere*).⁸⁵ Transactional honesty is linked inseparably to good faith by U.C.C. § 1-201 (19): "Honesty in fact in the conduct or transaction concerned."⁸⁶ Germany's BGB

⁸³ *Id.* at 1042-48.

⁸⁴ *Id.* at 953-54, (citing ZIMMERMAN & WITTAKER, CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW, GOOD FAITH IN EUROPEAN CONTRACT LAW 16 (Reinhard Zimmerman & Simon Whittaker eds., 2000)).

⁸⁵ See THE INSTITUTES OF OUR LORD JUSTINIAN, Book 1, tit. 1 (533), http://www.constitution.org/sps/sps02_j1-1.htm. For a collection of Ulpian's maxims, see <http://latin.dechile.net/?Ulpiano>.

⁸⁶ See U.C.C. § 1-201 (AM. LAW INST. & UNIF. LAW COMM'N 1972).

makes good faith a transactional duty whose import has to be judged in light of customary practice: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”⁸⁷ The U.C.C. agrees with the BGB, requiring that “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”⁸⁸ In addition, the U.C.C.’s version of good faith links it to reasonableness and fair dealing. As provided by U.C.C. § 2-103(1)(b), “[g]ood faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Thus, this definition clarifies the relationship between reasonableness and good faith alluded to in BGB Section 242 by requiring that customary practice be taken into consideration when assessing what is a good faith performance. This interaction between the German BGB, the HGB, and the U.C.C. highlights the importance of the honesty, reasonableness, and fair play components of the most market sensitive version of commercial good faith. As will be shown hereafter, these components play an important role in shaping the standard and best practices of each of the transactions discussed in the Trans-Pacific Colloquia.

2. Honesty and the Viability of Simplified Companies

The profitability of simplified companies (Topic 1 of the Symposium) requires that these companies be able to sell their own products and services while enjoying the necessary legal status or capacity to enter into an open number of contracts with a minimum of bureaucratic obstacles. In addition, they must have full access to investment capital and to commercial credit at reasonable rates of interest. In exchange for such a legal status and access to investment capital and credit, the simplified company must behave honestly with its investors, creditors, and third party buyers in the ordinary course of its business.

The Model Law, which a number of nations and NatLaw proposed for adoption by UNCITRAL’s Working Group 1, was Colombia’s Simplified Companies law of 2008 (*Ley de Sociedad Anonima Simplificada Ley 1258 2008*) (SAS). The authors of this law are Colombia’s present Superintendent of Business Associations and Professor Dr. Francisco Reyes (who is also a NatLaw distinguished visiting scholar).⁸⁹ Article 42 of SAS states in relevant part:

⁸⁷ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242, *translation in* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726 (Ger.) [hereinafter BGB].

⁸⁸ See U.C.C. § 1-203 (AM. LAW INST. & UNIF. LAW COMM’N 1972).

⁸⁹ Boris Kozolchyk & Adalberto Elias, *Second Pacific-Rim Colloquium on Economic Development and the Harmonization of Commercial Law Shanghai, China – January 8-10, 2015: Summary of Discussion, Conclusions and Next Steps*, NAT’L L. CTR. FOR INTER-AM. FREE TRADE, at 1 (2015), http://www.natlaw.com/sites/default/files/Summary%20of%20Second%20Pac-Rim%20Colloquium_Jan_%202015.pdf.

When a Simplified Company is used fraudulently against the law and to the detriment of third parties, the shareholders or officers who have carried out, participated in, or facilitated the fraudulent acts shall be jointly and severally liable for the obligations born from those acts and the damages they caused.⁹⁰

This provision provides the conceptual basis for implementing the procedural practice of “lifting or piercing the corporate veil” (*Desestimacion de la Personalidad Juridica*). Given the widespread culture of simulated transactions and reliance on a corporate veil to evade legitimately assumed obligations, this provision warns bad faith managers and investors that by forming a simplified company they will not be able to escape personal liability.

Another aspect of the honesty of the simplified company that is a part of the proposed Model Law is an accounting system that, despite its simplicity and low cost, reliably shows the simplified company’s credit-worthiness to actual or potential lenders, investors, and purchasers of their products and services.

3. Reasonableness and the Symmetry of Rights and Duties in Secured Transactions and EWR Practices

As illustrated by Ulpian’s reliance on the opinion of a *Bonus Vir* on the reasonableness of discretionary contractual obligations⁹¹ and by the German C. Com and the U.C.C.’s reliance on the behavior of decent merchants, reasonableness is not an opaque, arbitrary, or capricious concept. It is objective and precise when it focuses on the behavior of a knowledgeable, decent, and respected merchant, as identified by his peers.

Granted that this determination is easier when the reasonableness involved is, that of a merchant or banker who is part of a correspondent relationship in which correspondent A’s promise or performance to B is supposed

⁹⁰ L. 1258, diciembre 5, 2008, art. 42 Diario Oficial [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley_1258_2008.html.

Article 42: When a simplified corporation is used to defraud the law or third parties; the shareholders and officers that have carried it out, participated, or facilitated the fraudulent acts, shall be jointly and severely liable for the obligations born of such acts and for the damages caused. (Author’s translation)

(*Artículo 42: Cuando se utilice la sociedad por acciones simplificada en fraude a la ley o en perjuicio de terceros, los accionistas y los administradores que hubieren realizado, participado o facilitado los actos defraudatorios, responderán solidariamente por las obligaciones nacidas de tales actos y por los perjuicios causados.*)

⁹¹ COMPARATIVE COMMERCIAL CONTRACTS, *supra* note 1, at 130.

to be similar to B's later promise or performance to A. The reciprocity and interchangeability of contractual roles makes it easier for A to place himself in the position of an archetypal B, and vice-versa. This version of reasonableness was central to shaping the NAFTA's check collection and LOC document examination practices.

Reasonableness is also central to the drafting of symmetrical viable provisions on the relationship between secured creditors and debtors (Topic II of this Symposium). However, it may be an insufficient standard of good faith for third parties such as consumers, especially as bona fide purchasers in the ordinary course of business, or as borrowers who are contractually too weak and entrusting of the other party's decisions. In such instances the good faith required from the lender is the most demanding (*uberrima fides*) or Justice Cardozo's the "punctilio the most honorable."⁹²

Similarly, the success of the prototypical EWR proposed during the Second Colloquium (Topic III) will depend upon the symmetry of the rights and duties of depositors, warehousemen, and holders of the EWR, including bona fide purchasers and the secured creditors. But the issuance of the EWR may also require a fiduciary or brotherly treatment of those contractually weak or inexperienced farmers who rely on their lenders or warehousemen for guidance on the terms and conditions of the bailment of their products.

4. Reasonableness and Fairness and the Role of Comparative Commercial Lawyers

If to be reasonable means to treat regular parties to the transaction as an archetypal merchant would treat them, to be fair means to treat equals equally. Yet, should non-regular participants be treated equally, or at least in a manner that does not discriminate against them unfairly? As a rule, regular participants in market transactions, as members of a distinct class of merchants or bankers who constantly interact and perform interchangeable roles, expect equal treatment. The same is not true with third parties such as creditors or purchasers from regular participants. Depending upon the circumstances of the third parties' participation, many would expect treatment at least equal to that accorded regular participants. At times, as is the case of contractually weak or totally trusting consumers, their treatment should be more protective than that given to regular participants. At times, as in the case of those who pretend to be acting as regular participants when in fact they are only trying to take unjust advantage of them, they should be denied equal protection.

⁹² In Justice Cardozo's words, "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . The level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

It is my belief that commercial lawyers who are trained as comparative and contextual analysts are the best equipped to determine who should be treated fairly, i.e., protected as equals or better, and who should not.

Consider a question such as: Is a beneficiary of an LOC who presented allegedly fraudulent documents to an issuing bank for its payment entitled to be treated equally to a negotiating bank who regularly participates in the business of negotiating LOC drafts and documents? Assume that the fraud consists of the insertion of an inaccurate shipment date in the shipping documents. The comparison of the laws and practices on the purchase of beneficiaries' drafts and documents in the most active financial marketplaces will reveal to such an analyst that on the whole, courts distinguish between the legal status of a negotiating bank and that of a beneficiary who himself presents the documents for payment or negotiation to the bank that issued the LOC. This is particularly true when the court has credible evidence that on its face, the documents presented by the beneficiary stated the wrong dates of shipment of the goods. In contrast, even when a court is faced with the same credible evidence of fraud, if the presenter of the documents is a bona fide negotiating bank, it will be immune to the claim of fraud and will be entitled to be paid on those documents.

Note that while the negotiating and paying banks are regular participants in the LOC business, the above mentioned beneficiary is only an occasional participant. Yet, are there circumstances under which such a beneficiary could validly claim a fair or equitable treatment that would entitle him to a protection equal to that enjoyed by the negotiating bank? If the facts indicate that he was aware of the fraudulent nature of the documents, his hands would be "unclean" and thus he would be undeserving of the claimed fair or equitable treatment. On the other hand, if the facts could not link him to the fraud, and he alleges that the fraudulent dates were inserted by a deceitful carrier or a freight forwarder, could that possible ignorance of the fraud earn him the fair treatment he seeks? At this point, the analysis would shift to that typical of a transactional roadmap: What does a typical beneficiary reasonably know about shipment dates when the shipping is by ocean carriers as contrasted with rail, truck, or air carriers? And if no knowledge could be reasonably imputed to the beneficiary, what should be the operative presumption, taking into account the importance of the role of negotiating banks as providers of liquidity for LOCs payable at a future time? Please note during the entirety of this excursus, the analyst as a comparative, contextual commercial lawyer, legislator, or judge, is relying on the logic of the reasonable, as inseparably linked to the transactional facts and sectoral facts.

Consider also the following dispute between the purchaser of a maritime all-risk policy and his underwriter, not unlike that in Lord Mansfield's landmark *Carter v. Boehm*, 1766 Kings Bench decision.⁹³ As a lawyer for the purchaser of a maritime insurance policy, your client informs you that his insurance underwriter is fairly familiar with the "perils of the sea" of most of your client's shipping routes. Your client also tells you that quite recently, he heard from

⁹³ See *id.* at 970 (discussing *Carter v. Boehm*, 97 E.R. 1162, 1164 [1766]).

another shipper whose goods were shipped using the same route that it has become quite dangerous as a result of a very shallow ocean floor. Your client asks you to advise if he should share that information with his underwriter knowing that the cargo is valuable enough to require insurance even if it is expensive. Would you tell your client not to worry about having to disclose what he heard because it may well be hearsay and that present-day cargo vessels have electronic equipment that will detect the shallowness of the ocean floor with sufficient time to avoid a disaster? You add that you reviewed the application for the issuance of that policy, and it does not seem to require the disclosure of perils known to the shipper. Would you opine that your client was acting honestly, reasonably, and fairly if he did not inform his underwriter?

The above factual situations illustrate the interaction among honesty, reasonableness, and fairness in different trades. They also illustrate why a contextual comparative commercial lawyer, in command of the applicable positive law, and fully aware of standard and best practices and their cooperative components, is the lawyer best equipped to advise his clients not only in judicial or arbitral disputes, but also in individual and group contractual law making. This lawyer has two important law making functions. First, when his client is about to enter into a seemingly highly profitable, but not necessarily honest, reasonable, and fair transaction, this lawyer not only has the duty but is also in the best position to act as the guardian of the good faith of the individual transaction. The second occasion is when a group of merchants or bankers ask him to be the legal advisor or the drafter of their sector's standard contract and/or standard and best practices, including those for use in arbitration and judicial procedures. These are the times when as a guardian of the good faith of individual transactions or of the usages of the trade, the comparative commercial lawyer becomes the chief preventer of unnecessary disputes and lawsuits, and facilitates optimal commercial cooperation in a society's search for its sustainable economic development.

