COMMERCIAL LEGAL RELATIONS BETWEEN ARIZONA AND NORTHERN MEXICO

BORIS KOZOLCHYK*

Resumen

Siendo que el litigio casi nunca ocurre en negocios relacionados con el mercado transnacional entre los Estados Unidos y la región norte de México, aparentemente aparece que el comercio entre estas dos regiones al momento está siendo trabajado a su máximo. Sin embargo, diferencias de actualidad en las leyes de comercio de los Estados Unidos y México están dañando la confianza de los comerciantes transnacionales, y esto impide el crecimiento del comercio entre ambas regiones. Éste estudio discute la necesidad de mejorar el comercio transnacional por medio de identificación y resolución de estas fuentes de incertidumbre, por medio de adelantar la consistencia entre las formalidades o las regulaciones de comercio entre las dos regiones, y por el aumento del diálogo entre los comerciantes y abogados de las dos regiones para mejorar lo cooperación judicial.

THE STATUS QUO

Sonora and Sinaloa export to the United States produce, fish, assembled or semi-assembled hard goods, and handicrafts. Arizona, in turn, exports to Sonora and Sinaloa industrial, agricultural, and mining machinery; replacement parts; chemical products; and, increasingly, computer hardware and software. In addition, Arizona serves as an exit point for a considerable amount of North American land and air tourism to northwest Mexico.

Despite an annual volume of transnational trade estimated in the hundreds of millions of dollars, very little transnational litigation has occurred in either region. When questioned informally, leading lawyers in Arizona, Sonora, and Sinaloa revealed familiarity with no more than a handful of cases in each region. This may well be a tribute to the civility and spirit of cooperation of traders on both sides of the border. It is not, however, the result of harmonic or consistent legal institutions. Take, for example, any of the documents involved in most shipments across the respective borders. Does a Mexican truckers' bill of lading

*Professor of Law, University of Arizona; LL.M., University of Michigan, 1960; S.J.D., 1966; LL.B., University of Miami (Florida), 1959; D.C.L., University of Havana, 1956.

qualify as a bill of lading under United States banking and transportation law? Often certain customs associated with the issuance of truckers' bills of lading in Mexico prevent their acceptability as bills of lading by banks and courts in the United States.[1] Conversely, United States documents such as commercial invoices, certificates of origin, or powers of attorney could easily be unacceptable to Mexican administrative officials, courts, or banks. Moreover, in some instances, such as with documentary credits, the statutory rules in the two countries are diametrically opposed. According to Mexican statutory law, a Mexican bank can refuse to accept or pay a credit on grounds totally unacceptable in the United States' statutory or decisional law.[2]

In practice these inconsistencies are most often ignored or overlooked by public officials and merchants alike. Only occasionally does one hear of borders being closed because of lack of compliance with the respective formalities, or of agents' inability to transact business for their principals in Mexico or the United States because of the insuffiency of power of attorney or the limitation of their visas.

If, despite inconsistencies and ambiguities, commercial legal relations are peaceful, why awake the "sleeping dogs?" The answer lies in the goals ascribed to trade and investment. Once the measure of success of commercial legal relations is seen as not merely whether it has preserved the existing levels, but rather whether it has raised them to where they could be if there were ample and inexpensive commercial, consumer, and investment credit available, the malfunction of commercial legal institutions becomes apparent.

Scarcely ten years ago a significant percentage of Arizona banks' portfolios included loans to Mexican growers, ranchers, and tourist entrepreneurs. Numerous Arizona developers were actively pursuing investment opportunities in the Sonora and Sinaloa tourist resorts. Sonoran and Sinaloan growers and exporters became joint venturers with publicly held corporations in the United States. Currently, these loans or placements only take place exceptionally.

Surely the decline in lending and investment in Mexico has not been solely the fault of legal inconsistency or uncertainty. It is clear that the international debt crisis has been a major factor. This crisis was prompted by an ill-advised policy to recycle the exhorbitant payments

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[1]*See* Marine Midland Grace Trust Co. v. Banco del Pais, 261 F.Supp. 884 (S.D.N.Y. 1966), and comment thereto in B. Kozolchyk, Letters of Credit, in 9 International Encyclopedia of Comparative Law, Ch. 5, p. 85, n. 485 (1978).

[2]*See* Kozolchyk, *supra* note 1, at 11, for a contrast between Article 320 of the Mexican *Ley de Titulos y Operaciones de Credito* of 1934 and Article 5 of the Uniform Commercial Code (1982 revision).

made to OPEC by Western industrial nations and received from OPEC as short term deposits. The recycling consisted of lending these OPEC deposits to developing nations such as Mexico. Eventually Mexico as well as the other borrowers were unable to repay. The default was caused in part by the reckless and unproductive use of the borrowed funds. In part it was caused by the drop in the purchasing power of United States consumers subjected to a recession in order to tame the prevailing inflation which ironically had been fueled by OPEC's exhorbitant prices. As United States consumers purchased fewer Mexican products or postponed their Mexican tourism, Mexico found it more difficult to repay the petro dollar-inspired loans. As Mexican exports to the United States declined, so did United States exports to Mexico, a reflection of the organic interdependence of the two countries. Significantly, while the price of Mexican tourist real estate was, from a dollar standpoint, extraordinarily cheap, very few United States tourists or investors rushed to buy. The main reason was no longer a recession-induced lower purchasing power but a widely perceived legal and political (another form of legal) uncertainty. This situation has persisted until the present time.

Transnational trade and investment, thus, share some similar difficulties. Investment and investment finance require a considerable measure of reassurance to overcome the nagging uncertainty previously described. Transnational trade, in order to rebound to the levels where both countries and regions need it to be, requires a healthy infusion of commercial credit. Commercial credit, in turn, is at its best when lenders are assured of their borrowers' solvency and honesty. And if borrowers are unwilling or unable to repay, lenders must have access to collateral that is easily and inexpensively convertible into cash. The fact is that Arizona lenders, some of the best situated and skilled in the United States, are not yet in a position to rely on the uniform and certain enforceability of these instruments or documents, whether in the form of a bill of lading or accounts receivable generated by the tourist trade.

The contrast with another area of trade where there is greater certainty through uniformity of treatment of operative documents is instructive. Consider, for example, how easy it is for someone travelling in an Arizona-licensed automobile to drive into Mexico as a tourist, or to prove his/her parental relationship to an accompanying child. Most of the required legal documents are of the type that could only be used in non-judicial proceedings in the United States or Mexico. The benefits derived from such informality and uniformity in terms of encouraging tourism are incalculable. If Mexican customs and

immigration officials, bankers, hotel owners, and shopkeepers were to apply the same standard of proof required in Mexican or United States courts for determinations such as ownership of an automobile, marriage, or paternity, the flow of tourism would certainly suffer.

SOME SUGGESTIONS ON UNCERTAINTIES AND UNIFORMITY

Merchants in both regions, including not only importers, exporters, and growers, but also their brokers, carriers, insurance agents, bankers, and lawyers, must begin the process of identifying the sources of uncertainty and the best methods for their elimination. Where such a source turns out to be the inconsistency of formalities or of rules of interpretation, harmonization and simplification must be explored. The object of the search is to facilitate not only border crossings but also the financing of trade and investment on both sides of the border. An Arizonan as well as a Sonoran banker, commodity broker, exporter, or insurance agent must be able to use instruments of payment and credit, such as checks, drafts, and documents of title such as bills of lading and warehouse receipts, with the reassurance that their validity and enforceability are uniform on both sides of the border. Similarly, an Arizona developer of tourist land in Mexico must be able to plan his/her investment without the uncertainty of what will happen at the expiration of a 30-year Master Trust.[3] For unlike the consumer-producer of a beachfront condominium, the developer or his/her lender can only invest intelligently when able to estimate the flow of income from the development or loan on the basis of sales or rental proceeds dependent upon differing sales and rental plans. Their recoupment or repayment period may or may not coincide with the 30 year limitation of the trust, or with what is left of this period at the time the developer acquires the project or the banker extends a loan.

SOME FRUITFUL DIALOGUES

Fruitful regional dialogues have begun on how to facilitate some of the trade and investment goals described above. Prominent among these is the exchange of professors and students from the National University of Mexico School of Law (UNAM), Mexico's most prestigious Law School, and the University of Arizona College of Law, and the annual meetings of the Arizona-Mexico Commission. In April,

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[3]On the Mexican land trust, see J. Vega, Mexican Real Estate (1976).

1984, some of Mexico's and the United States' most distinguished jurists, scholars, and practitioners met in Tucson, Arizona to discuss judicial cooperation with regard to service of process, taking of evidence, and enforcement of judgments.[4] It was an historic meeting in the sense that judges, professors, and practitioners of both countries, acting in a totally unofficial capacity, agreed on a series of steps to be undertaken directly, from judge to judge, or from practitioner to practitioner, in order to improve judicial cooperation. In addition, recommendations were made for the consideration of official bodies in both countries.

Shortly after the 1984 meeting, the UNAM and University of Arizona law schools signed an exchange agreement that will make it possible to implement, inter alia, some of the suggestions made in the meeting and published in the *Arizona Journal of International and Comparative Law*.[5]

The Arizona-Mexico Commission has already attempted to facilitate trade by harmonizing and making uniform the rules on the payment or return of items such as checks sent for collection across the respective borders. Approximately 10 years ago, the Commission designated various members of the Banking and Legal Affairs committees to draft uniform rules for the handling of such items. Even though the scope of the proposed rules is quite modest, it was a most auspicious beginning. As a participant in the drafting effort, this writer can testify to the good will and cooperation on both sides. While the proposed rules have not been enacted by the Sonoran or Arizonan legislature, they serve as a source of customary banking law, at least persuasive in their application by banks and courts in both countries. There is no reason why the forum of the various committees of the Commission cannot be used to generate much of the data needed for efforts at harmonization and uniformity of practices in other areas of transnational trade.

Clearly some of the problems that fuel the uncertainties in transnational investment and investment banking, such as the duration of the land trust, or the percentage of foreign ownership of tourist development corporations, can be resolved only at a national level by both countries. Nevertheless, the Arizona-Mexico Commission represents the grass-roots level of the respective nations, and a

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[4]*See Historic Symposium Tackles Transnational Procedure*, Arizona Advocate, May 1984, at 5. *See also* 1985 Symposium on Judicial Cooperation Between the United States and Mexico, 1985 Ariz.J. Int'l. & Comp. L.

[5]Symposium, *supra* note 4, at 2.

consensus arrived at in the Commission can be of considerable influence at the respective national levels.

In conclusion, the economic interdependence between Mexico and the United States is nowhere as evident as in the border region that includes Arizona, Sonora, and Sinaloa. Unlike other trade relations of the United States, such as with Japan, this one is perceived by both parties as fairly evenly balanced. Given the central role of dollar financing in the resurgence of trade and investment activities, it is the responsibility of merchants, lawyers, and politicians in both countries to bring about a climate of legal certainty in which creditworthiness thrives. A fruitful although modest dialogue is already in progress in academic institutions and in the Arizona-Mexico Commission that could help promote these goals. This dialogue should be broadened and encouraged.