# LEGAL REASONING AND LATIN AMERICA' S ECONOMIC DEVELOPMENT

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ABSTRACT

This article discusses how a method of legal reasoning employed first by French and Spanish legislators and judges and subsequently by their Latin American successors hindered the economic development of their respective countries.[1] It suggests that significant economic development would be possible if legislators helped enact honest, reasonable and fair versions of successful market practices in a manner consistent with their nations' or region's developmental goals.[2] It

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This article is dedicated to the memory of three great Costa Rican jurists and dear friends: Professors Carlos José Gutierrez, Octavio Torrealba and Eduardo Ortiz, whose support and devotion to the *Proyecto de Reforma Jurídica* (1966-70) at the University of Costa Rica School of Law made possible the creation in 1992 of the Kozolchyk National Law Center and, with it, the enactment of economic development laws as uniform international banking customary rules and as uniform secured transactions law in and out of the Americas. I am also most grateful for the spiritual and professional support provided in difficult times by my good friends and colleagues Horacio Gutierrez, Roberto Laserna, Dr. Marek Dubovec (especially for his very special commentaries and suggestions) and to Perla Amaya-Furquim for her usual indispensable contributions.

[1] For illustrations of hindrances to the economic development of European and Latin American countries, *See infra*–Section V(C).

[2] For an example of how a set of international secured transactions honest, reasonable and fair practices were transformed into the Organization of American States (OAS) Model Inter American Law of Secured Transactions of 2003 and were adopted by 10 nations of the Americas' *See* BORIS KOZOLCHYK, COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT 73-86 (2nd ed. 2019) [hereinafter KOZOLCHYK CCC]. This Hornbook also describes how similar practices on commercial and standby letters of credit were transformed into the customary law of 170 national banking associations as the "Uniform Customs and Practices of Documentary Letters of Credit of the International Chamber of Commerce (UCP) 500 (1993 revision) and as the United Nations Convention on Independent Guarantees and Standby Letters of Credit (UNCITRAL 1995). On the adoption of this customary and statutory law, *see infra* note 114.

further suggests that Latin American judges can contribute to the attainment of such goals by adopting a method of reasoning that differs from their present method.

The proposed method requires that in disputes caused by the disabling effects of obsolete statutory, case or customary law on promising new customs and practices the judge act as a quasi-legislator. In that capacity, he should carefully consider not only the pivotal facts of the dispute and the applicable law but also his nation's socio-economic conditions and economic development goals. Then, by placing himself in the archetypal position of a reasonable merchant, always having in mind the interest of his contractual and third party "others" the judge's decision should enable Justice Oliver Wendell Holmes Jr.'s "prophecies" of what courts will decide in future cases with similar facts and legal issues.[3] Thus, he will also be heeding the advice of the distinguished Mexican legal philosopher Eduardo García Máynez, who urged judges to fill the inevitable obsolete and unfair normative gaps with equitable judicial "individual" norms.[4]

Finally in updating practices and correcting injustices the judges' methods of reasoning should be guided by a broad definition of good faith adopted by 19th Century German Civil and Commercial Codes as well as by the 20th century Uniform Commercial Code of the United States (UCC) as will be discussed throughout this article. In essence, it requires that legislators and judges take into account the honesty, reasonableness and fairness of the new practice before it becomes a binding norm.

[3] *See*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457,460-61 (1897).

[4] On the importance of Professor García Máynez' contribution to contemporary Legal Philosophy; *See* Luz María Zalza Delgado, *Eduardo García Máynez,* INSTITUTO ELECTORAL DEL ESTADO DE MÉXICO (2006), https://ensayistas.org/critica/generales/C-H/mexico/garcia.htm; *see* also *infra* note 105.

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## I. INTRODUCTION: THE PURPOSE, PLAN AND CONTENTS OF THIS ARTICLE

This Introductory Section (Section I) describes the overall purpose, plan and contents of this article. Section II illustrates why it was necessary to replace numerous obsolete statutory rules found in France's Civil Code of 1804 (hereinafter French CC) that rendered unenforceable some of the most presently relied upon unilateral promises to give or do something at a future time. Section II also lists the 2016 amendments to the French CC enacted in response to the growing national and international demand for the modernization of France's contract law.

Section III explains how cultural values and attitudes on commerce and usury influenced the drafting of the French and Spanish civil and Commercial Codes and contrasts these with the cultural values and attitudes that influenced the drafting of the German Civil and Commercial Codes as well as the English law on negotiable instruments, among other commercial laws. It also explains why it was not possible for France and Spain (and for the Latin American civil and Commercial Codes inspired by these countries' codes) to develop viable credit and financial markets until the beginning of the 20th century.

Section IV studies the legal reasoning of Roman and Medieval jurists when deciding on the proper judicial actions for breach of contract as an illustration of their methodology. It also evaluates the reasonableness and fairness of the Roman and Medieval classifications of contractual obligations "to do" and "to give" which were adopted by the French CC as criteria to apply its remedies of damages and "specific performance." It concludes that such an application often did not produce reasonable and fair remedies. Meanwhile, the methodology employed by the French drafters of the French CC ignored the most important remedial contribution of Roman jurists to the modernization of the interpretation of contract law as well as on remedial contract law: The reliance on the

opinions of a *Bonus Vir* i.e., an archetypal honorable merchant capable of wise suggestions on how to balance the altruistic and egotistic components of contractual practices.

Section V focuses on the pitfalls of the Aristotelian Syllogistic (also referred to as formal logic) reasoning employed by the drafters of the French CC provisions on binding contracts and non-binding unilateral promises, especially when disregarding the economic importance of market practices including, prominently, the need for commercial and consumer credit at reasonable and fair rates of interest. Section VI describes the Logic of the Reasonable as an inseparable companion of the *Homo Sapiens* and especially of the *Bonus Vir* when engaged in commerce. For, to be trusted and succeed as a merchant, man must act as a cooperative being, albeit always aware that he or she is perennially subject to conflicting egotistic and altruistic impulses. By requiring a merchant to consider the "good of others" (including third parties) as well as his own welfare, he becomes aware of the importance of acting in good faith, i.e., honestly, reasonably, and fairly.

Finally, Section VII discusses Latin American judicial decisions that illustrate the negative socio-economic consequences caused by the above referred to formal logic that disregards honest, reasonable and fair contractual practices. It contrasts the application of the Logic of the Reasonable in landmark German and United States appellate court decisions and in a similarly landmark Costa Rican Supreme Court decision.

## II. ECONOMIC DEVELOPMENT IN 19TH CENTURY FRENCH AND SPANISH CODE PROVISIONS

### A. PROMISES TO DO OR GIVE SOMETHING IN THE FUTURE

One contractual promise of the French CC illustrates the reasons and consequences of the legislative failure to adopt reasonable commercial practices. Article 1589 of the French CC set forth the following rule (which remained in effect until its abrogation in 2016): "The Promise of a

sale is deemed a sale only when both parties reciprocally agree on the thing sold and its price" (Author's translation, and parenthesis added).[5] In other words, "the declaration of contractual intent" of Article 1589 of the French CC was unenforceable, unless it became part of a subsequent enforceable contract. In contrast, Section 130 of the German Civil Code of 1900 (*Bürgerliches Gesetzbuch,* hereinafter BGB) set forth a sharply different rule: "A declaration of (contractual) intent that is made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him." (Parenthesis added).

Assume that you are doing business in a European Union country, and you receive a promise of sale of a truck you need urgently from a French truck dealer, and that his promise is governed by the above Article 1589 which requires the signing of a contract of sale before an earlier promise to sell the truck could be enforceable. Contrast such a promise to one issued by a German truck dealer governed by the above quoted Section 130 of the BGB: Whose promise or declaration of intent would you rely on to get your urgently needed truck?

Or, in another more economically significant contemporary context: Assume that you are an issuer or recipient of promises linked to "futures" transactions that involve the future purchase, sale or exchange of equity securities or of commodity "futures" that are traded daily in the billions of US Dollars in more than a hundred Exchanges or Bourses in four continents, and which often require only sending a "buy" or "sell" electronic instruction/message to an intermediary.[6] Could your

[5] *See* Article 1589 *La Promesse de vente vaut vente, lorsqu íl y a consentement réeciproque de deux parties sur la chose o sur le Prix*…"in CODICE CIVILE [CIVIL CODE], Paris: Dalloz (1992/1993).

[6] *See* Wikipedia, *List of futures exchanges*, https://en.wikipedia.org/wiki/List_of_futures_exchanges (As of July 7, 202, 9:38 GMT) (describing the list of World-Wide Futures Exchanges compiled by the International Encyclopedia Wikipedia on July 7, 2021. It shows that the number of Exchanges or Bourses for the sale or barter of promises for future delivery of agricultural, commercial, industrial and banking goods and services exceeds one hundred. Of these, there are 3 such Exchanges in Africa, 42 in the Americas, 46 in Asia, 25 in Europe, including

brokerage, or securities, or commodities business be successful if the promises to buy or sell future goods or services were governed by French CC Article 1589? It is true that the present day market for "futures" promises and transactions did not exist in 19th century France, and even less in Robert Pothier's 18th Century France (the provider of many of the definitions, classifications and contractual and promissory restrictions adopted by the French CC).[7] Yet, if Pothier had only observed the borrowing practices of 18th century small French businesses, including those of Parisian seamstresses who earned their living from issuing and receiving promises of future performances, he would have learned that they did their business by relying on a "book debt" basis. In this method, the book-debtor promised to pay his or her owed future installments by merely acknowledging their debt to their creditors/ promisees with a mere handwritten entry in the "book of debts". [8]

### B. ILLICIT A PRIORI AND A POSTERIORI CONTRACT CAUSES AND THEIR EFFECT ON CONTRACT CERTAINTY.

Yet, before you assume that the serious uncertainty of the French CC rules affects only unilateral promises of future performance and not concluded contracts, consider the effect that Article 1131 of the French CC had on the certainty of the payment of some French life insurance policies. According to this article: "A (contractual) obligation without a cause, or with a false or unlawful cause (*cause illicite*) has no effect."[9] What did French courts understand by an "illicit" *cause*? In

only one in France, the Bourse "Euronext" in Paris. Contrast this number with the 23 Futures Exchanges in the US alone).

[7] *See* I Robert J. Pothier, *A Treatise on Obligations, Considered in a Moral and Legal View* 5 (Francois-Xavier Martin trans., 1802) [hereinafter, Pothier, *Treatise on Obligations*).

[8] *See* KOZOLCHYK CCC, at 319, citing Professor Amalia D. Kessler, *Enforcing Virtue, Social Norms and Self Interest in an Eighteenth-Century Merchant Court*, 22 LAW AND HISTORY REV. 71, 107 (2004).

[9] Prior to 2016, According to Article 1108 of the French CC (Dalloz, 1992/93) Four conditions are essential to the validity of an agreement: 1) The Consent of the party that obligates himself or herself; 2) His or her capacity to contract; 3) An object certain that is the subject matter of the agreement; 4) the lawful or licit cause of the obligation

accordance with a frequently cited 1976 French Supreme Court decision, an illicit cause is one generally regarded as an immoral conduct by the French population. The appealed trial court decision [10] also pointed out that this immorality was manifested when the beneficiary of the life insurance policy was the mistress of the deceased purchaser, an adulterous married head of a family. Thus, the trial court decided that such a designation was null and void because of its immoral cause. The *Cour de Cassation* (Supreme Court) agreed and held that such a designation "was affected by nullity because of its immoral cause…(*causa*)" [11] Yet, as noted by Professor Paul Esmein, a respected French legal commentator: "…both decisions followed well established case law which clarified that a stipulation benefitting a mistress is not null and void solely because it benefitted her… But, if the buyer of the insurance policy's purpose was to induce, initiate or continue to reward an immoral adulterous relationship, then the provision would be null because it was the cause of a relationship that violated good moral standards." [12] (Emphasis added). In other words, the nullity of the *causa* in this case stemmed from the payment of a "*Pretium Stupri"*(the price of a rape or of a continuing adulterous sexual affair).

I discussed this French decision during one of my comparative secured transactions law classes at the *Aix en Provence* School of Law in France in 1985. During one class, a student, who was also a lawyer for an *Aix en Provence* bank had just returned from a bankruptcy court meeting of creditors. In this meeting, the court announced that it had annulled, as morally illicit promises, a

(author's translation and emphasis added). As apparent in the text accompanying *infra* note 16, requirement 4 (a licit cause) was eliminated from the above list.

[10] *See* HENRY CAPITANT ET AL., Cie d'assurance Le Secours-Vie de Dame Avenia c. Veuve Gueneboudet Caise National d'assurances, *in* LE GRANDS ARRETS DE LA JURISPRUDENCE CIVIL (7th ed. 1976), discussed in KOZOLCHYK CCC at 296-298.

[11] *Id.,* at 299.

[12] *Id.,* at 298.

large number of secured transactions claims against a "*Salon*" Dancing school that surreptitiously was also a brothel. The bankruptcy judge added that among the annulled claims many were secured by invoices issued by the Salon Dance School whose proceeds were traceable to payments for "immoral sexual services." Yet, if neither the lending bank nor any other *bona fide* secured creditor had any notice or information on the hidden source of the revenue, was it fair or equitable to annul their secured claims, especially when the immorality of the cause was not present *A Priori* or when the contract in question was entered into but came about *A Posteriori* after the financing agreement had been concluded ? Clearly, the drafters of Article 1108 of the French CC had not thought about the possible effect of this provision on rights of innocent third-party creditors unaware that the payments of their secured loans did not come from an ostensibly moral source.

Finally, in 2003, shortly before the death of Professor Jean Carbonnier, one of France's most respected French CC scholars, I sent him a copy of my Spanish Coursebook on Comparative Contract Law (we exchanged our writings since our acquaintance as Tucker Lecturers at the Louisiana State University). In the introductory section of this Coursebook I stated:

> Despite the presence of many national and international contemporary commercial contract practices that are indispensable components of the commerce among the world's most advanced economic nations (including members of the European Union), these practices are still unavailable in countries governed by the French and Spanish Civil Codes. This state of affairs is detrimental to the growth of France's and Spain's economies as well as of the economies of numerous developing nations in which the French and Spanish Civil

> Codes are highly influential. I submit that the time for the replacement of these obsolete 18th century codified rules was a long time ago…[13]

Professor Carbonnier replied saying that he was optimistic about France's adoption of the much-needed legal reform, especially in light of the presence of a competing, "more advanced commercial law", in other European Union nations. Unfortunately, that revision took another 13 years. Meanwhile, France and Spain's increasing contractual difficulties in their trade with other European Union partners [14] and the continuing criticisms of their law by entities such as the World Bank and in scholarly writings[15] provided the final impulse for the revision.

### C. THE IMPORTANT BUT MUCH DELAYED 2016 AMENDMENTS TO THE FRENCH CC

[13] A more "diplomatic" version of this paragraph became part of BORIS KOZOLCHYK, LA CONTRATACIÓN COMERCIAL COMPARADA 5 (2006) [hereinafter KOZOLCHYK, LA CONTRATACIÓN].

[14] *See*, BORIS KOZOLCHYK, LA CONTRATACIÓN COMERCIAL COMPARADA: DERECHO, CULTURA Y DESARROLLO ECONÓMICO 949 (2020) (for the statement by Spanish Professor María Paz García Rubio, a member of the Spanish General Codification Commission on the reasons of the French 2016 revision and forthcoming Spanish revision of their respective Civil Codes. She blamed "legal norms…that are incompatible with Spain's commerce with the other member nations of the European Union, (nations) who can count on a more modern commercial law" ("*normas…incompatibles con el comercio entre España y las demás naciones de la Unión Europea que cuentan con un derecho commercial más moderno").*

[15] *See* for example, Thorsten Beck and Ross Levine, *Legal Institutions and Financial Development* (World Bank Policy Research Paper 3136, Sept. 2003) (these authors refer to social science, economic and legal studies which express negative views on the role of French legal institutions in promoting the economic development of poor countries). For example, s*ee* p. 8: "Whereas the Napoleonic Code was designed to be immutable, the BGB was designed to evolve. For instance, France technically denies judicial review of legislative actions, while Germany formally recognizes this power; p. 11 the late John Merryman, a Stanford Law School Professor's 1996 study stated: The export of the Napoleonic Code had more pernicious implications in French, Belgian, Dutch, Spanish and Portuguese colonies than in France itself.…This export… crippled the judicial systems of many French legal origin countries and hindered their ability to develop efficiently adaptive legal systems. In addition, p. 12 states that "The French rigidly imposed the French CC in its colonies even though there were and remain serious conflicts between the French CC and local laws. And p. 13 points to the "absence (among French legal commentators) of a culture of openly discussing the application of the law to evolving conditions hindered the development of efficient legal systems around the world..." For an analysis of French cultural institutions incompatible with the commercialization of the world's private law; *See* Boris Kozolchyk, *The Commercialization of Civil Law and Civilization of Commercial Law*, 40 LOUISIANA L. REV. 3 (1979) [hereinafter Kozolchyk, *Commercialization*]; Boris Kozolchyk, *Fairness in Anglo and Latin America Commercial Adjudication*, 2 BOSTON COLLEGE INT'L AND COMPARATIVE L. REV. 319 (1979).

In February of 2016, the President of the French Republic issued the *Ordinance* of 2016-231 on the "Reform of the Law of Contracts and the Regime and Proof of Obligations."

The following extracts are among the most important amendments whose purpose was to remove the uncertainty of unilateral promises or offers and to address other problems with contemporary commercial promises: [16]

> Art. 1116. – An offer may not be withdrawn before the expiry of any period fixed by the offeror or, if no such period has been fixed. before, the end of a reasonable period…". (Emphasis added).
>
> Art. 1117. – An offer lapses on the expiry of the period fixed by the offeror or, if no period is fixed, at the end of a reasonable period (Emphasis added)
>
> Art. 1127-1. – A person who, in a business or professional capacity, makes a proposal by electronic means for the supply of property or services, must make available the applicable contractual stipulations in a way which permits their storage and reproduction. A person issuing an offer remains bound by it as long as it is made accessible by him by electronic means…." the contract or by reference to usage or the previous dealings of the parties, without the need for further agreement."

The following provision eliminated the former requirement in the same text of a licit (and moral) cause as a requirement for validity of a contract:

> Art. 1128. – The following are necessary (elements) for the validity of a contract: the consent of the parties; their capacity to contract; content which is lawful and certain. (Parenthesis added).

[16] *See* John Cartwright et al., The Law of Contract, the General Regime of Obligations and Proof of Obligations, The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016, https://www.trans-lex.org/601101/_/french-civil-code-2016/.

The following provision replaced the customarily relied on behavior of "a good faither family" (*Bon Pere de Famille"*) with the contractual behavior of a reasonable person as a tool of contractual interpretation. (Emphasis added).

> Art. 1188. – A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it. (Emphasis added).

The following provision validated the obligation to do a future promised act or to make the delivery of a thing and introduced the United States' Uniform Commercial Code's reliance on previous dealings between the parties as well as usages of trade to facilitate the determination of the feasibility of the future performance. (*See* U.C.C. §1-205).

> Article 1163.- An obligation has as its subject-matter a present or future act of performance. The latter must be possible and determined or capable of being determined. An act of performance is capable of being determined where it can be deduced from the contract or by reference to a usage of trade or to the previous dealings of the parties, without the need for further agreement.

Please note the presence of the concept of reasonableness as an element of the performance and interpretation of contracts in 8 of the preceding provisions. Highly welcomed as was and is this revision, merchants, bankers, insurers, brokers and other intermediaries in France, Spain, Central and South America (among other regions) should be aware of the serious loss of honest, reasonable and fair business transactions experienced by their countries over more than two centuries (1804-2016) because of the absence of similar provisions. I would also suggest that French, Spanish and Latin American legal scholars would do well to explore the influence that cultural values and

attitudes have had upon their methods of legal reasoning including the creation of some of their key legal concepts, definitions and classifications. The following sections are intended as a contribution to such an identification.

## III. CULTURE, COMMERCE AND USURY IN SPANISH AND FRENCH CODES

### A. COMMERCE IN CATO THE CENSOR'S ROME AND IN 18TH AND 19TH CENTURY FRANCE AND SPAIN

According to Theodor Mommsen's Nobel Prize winning "History of Rome", the Rome of Cato the Censor admired farmers and soldiers for their "thinking good and dignified thoughts" and disdained Rome's merchants' "constant preoccupation with their profits."[17] This characterization of commerce as a profession lacking in dignity had a strong influence on Spain's views on commerce. Henry Lepeyre, a French historian and biographer of the Ruiz family, a well-known 16th century Spanish commercial family, transcribes part of a 1512 - 1513 report to his government by an Italian ambassador to Spain. It describes the Spaniards as "not devoted to commerce because they consider it a dishonorable or shameful endeavor."[18] In turn, Wyndham Beawes, an English Consul to the ports of Seville and Sanlúcar and the author of the 1751 *Lex Mercatoria Rediviva,* the most popular English commercial law manual in its day, agrees with the preceding description and describes the Spanish attitude towards trade as follows:

> They have very considerable ports, equally well situated for commerce… where large concerns are transacted, though principally by foreigners, as the Spaniards in general

[17] Due to the temporary unavailability of its English version, I have used THEODOR MOMMSEN'S, 1 HISTORIA DE ROMA 1059- 60 (Luis Alberto Garcia Moreno trans., 2003).

[18] *See* HENRY LAPEYRE, UNE FAMILLE DE MERCHANDS: LES RUIZ (1955) cited by Kozolchyk CCC, at 133-134.

consider traffick to be a mean employ, and consequently a derogation from that gentility, they almost all affect being born to…" [19]

The French had a more complex view of commerce inspired by difficult economic circumstances and by the dominant presence of a "bourgeois" social class. On the one hand, they shared Cato the Censor's view of commerce as an undignified profession or occupation. Thus, contracts that involved the entrustment of things between or among contracting parties, such as those of agency, deposit and bailment of things for the use of the bailee, were presumed to be gratuitous or free of charge in the French and Spanish French CC's consistently with the parties' expected dignified social comportment. [20] On the other hand, the *bourgeois* as the "strongest social class" (or the class that paid most of the French taxes) were not only landowners, and farmers but also merchants and usurious moneylenders. The effects of such a dual role on or about the conclusion of the French Revolution in 1790 were succinctly and lucidly described in William Doyle's The Oxford History of the French Revolution[21]:

Poverty was France's most visible social problem. The poor... numbered at the best of times almost a third of the population, 8 million people, and at bad times two or three million

[19] *See* Wyndham Beawes & Joseph Chitty, *Lex Mercatoria a Complete Guide of Commercial Law* 24 (6th ed. 1813) (cited by Kozolchyk CCC at 152).

[20] Article 1986 of the French CC tersely describes the contract of agency as gratuitous, unless the parties agree otherwise (*Le Mandat est gratuit, si'l n'y a convention contraire*); Similarly, Articles 1876 and 1917 of the same French CC define a bailment and /or the deposit of a thing as "essentially gratuitous" (*Ce Prêt est essentiallement gratuit*) and (l*e dépõt proprement dit est un contrat essentiellement gratuit*). Meanwhile, Article 1711 of Spain's CC provides: "Unless otherwise agreed an agency agreement is presumed gratuitous" *(A falta de pacto en contrario, el mandato se supone gratuito)*… And Article 1741 of the same code defines a bailment for the use of a thing (*comodato*) as a contract in which if a payment is made, it ceases to be a bailment *(si interviene algún emolumento que haya de pagar el que adquiere el uso, la convención deja de ser comodato)*; similarly, Article 1760 of the Spanish CC defines a deposit agreement as a gratuitous contract unless otherwise agreed (*un deposito es "un contrato gratuito, salvo pacto en contrario).*

[21] *See* WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 14-25 (2d ed. 2002) [hereinafter, Doyle] (extensively discussed in KOZOLCHYK CCC at 272-282).

more might join them…Peasants accounted for 80% of the French population…In contrast with the penury suffered by most inhabitants, the *bourgeois*, whether of rural or urban origin, did not have to worry "about the price of a four-pound loaf of bread." In the countryside they were the largest employers and owners of agricultural equipment and animals and were also the principal lenders to needy farmers. And when their debtors defaulted, which was quite common, they would foreclose on their mortgages and thereby accumulated more land. In time… (they were able to retire) and live on the yield of their real property. Perhaps the most important reason for their political and economic power was the taxes they paid as members of the "Third Estate"…a social class that…did not include the nobility or the clergy…quite often (their) taxes (were) periodic payments for their massive acquisitions of public offices " [22] (Parentheses and emphasis added).

Yet, their interest in holding public offices reflected "their embarrassment…with their commercial origins. Doyle's Oxford History similarly quotes from a letter by a Lyon litigant condemning the widespread prejudice against merchants. According to Doyle, the writer was also a judge (and I would add that in all likelihood his judicial office had been bought with bourgeois tax payments as had been those of many others):

I ought not to pass in silence (since I who am the offspring of a generally loved and respected merchant) the outrage done by Mr. Gesse to commerce in describing those who exercise the profession as "persons from the dregs of the people", it is thus that he speaks

[22] *Ibid*., the quoted text is my synthesis of an already succinct description in the above cited pages.

of a person as honorable as it is honored in this country; yet remember that Mr. Gesse is as I am, a merchant's son, as I am; he dishonors his stock, whereas I honor mine. [23]

As noted in one of the preceding excerpts, the *bourgeois* relied on notarial deeds as the legal tools with which to recover their agricultural collateral in their commonly defaulted loans. Not surprisingly, the contracts that involved most of the work of French Notary Publics during the 19th century were for purchases and sales, mortgages and leases of real property as reflected in a French law of 1803 whose purpose was to "organize the notarial profession.[24] These notarial deeds required that the parties officially and punctiliously state their respective contractual intent to their Notary. This notarial practice lead Professor George Ripert, one of the most influential French commercial law scholars of the first half of the 20th century to assert that the French notarial public deed (*Acte Authentique)* embodied not only what the French CC referred to as the "law of the parties"[25] but also their "Contractual Justice" (*Justice Contractuelle)*.[26]

In other words, the literal text of the notarial deeds and nothing extrinsic, regardless of how relevant in the determination of the intent of the parties, such as their previous or contemporary contractual conduct, the usage and customs of their locality or of their trade or profession were admissible sources of their contractual intent. [27] This statutory and judicial attitude was surprising because Article 1156 of the French CC did require, in general terms, that contractual interpretation

[23] *See* DOYLE, *supra* note 21 at 24.

[24] On the role of French notarial Public Deeds or *Actes Authentiques* in documenting the sales and mortgages of real property *See*, KOZOLCHYK CCC, at 221: "Approximately 50% de work of French notaries consisted of drafting deeds of sales of real property and mortgages, leases and construction contracts."

[25] *See*, French CC Article 1134: "Contracts legally executed are the law between the parties" ….(*Les conventions légalement formées tiennet lieu de loi à ceux aquí les ont faites*).

[26] *See* GEORGES RIPERT, LA RÊGLE MORALE DANS LES OBLIGATIONS EN GENERAL, Paragraph 41 N. 2 (3rd ed. 1935) discussed in Kozolchyk, *Commercialization supra* note 15 at 8.

[27] *See*, for example § 1-205 of the U.C.C.

should consider the common intent of the parties over and above literal meaning of the terms of the contract (*plutõt que de s'arreter au sense litèral de ses termes*).[28] Similarly, the doctrine of Justice Contractuelle was unconcerned with stipulations that might negatively affect the rights of third-party creditors or purchasers to or on the same property. This lack of concern was especially troublesome in many regions of France that lacked the adequate land or personal property registry system. Finally, the power given by this doctrine to private parties to create their version of the contractual justice did not carry over to their possible reliance on extra-judicial adjudication. Once a contract was breached and the remedies were exclusively judicial; self-help or extra-judicial recission, resale or purchase of the breached contracts' goods, as allowed in German and United States law were unavailable under French and Spanish law. [29]

### B. The Merchants and Their Typical Contracts in Codified France and Spain

In contrast with the formality and rigidity of the French and Spanish French CC's, the French *Code de Commerce* of 1807 and the Spanish Commercial Code of 1885 were informal enough to treat oral contracts as enforceable. Thus, Article L110-3 of the *Code de Commerce* provides that "With respect to merchants, their acts of commerce can be proven by any means, unless the law requires otherwise".[30] And Article 51 of the Spanish Commercial Code provides: "Commercial Contracts are valid and enforceable in court, whatever their format and language in which they are concluded,

[28] *See* Article 1156 in Dalloz Code Civil (1992,1993).

[29] *See* Kozolchyk *Commercialization*, *supra* note 15 at 15. *See* also Kozolchyk CCC, at 1231-1239. For a discussion of this subject by French commentators *see* Legifrance: *Trade Code,* L. 110.3 *https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006133171/#LEGISCTA000000613317*, (Last accessed July 8, 2021).

[30] *See* Jane Ball et al. *Commercial Code: Article L-1-103 990* (2015) https://halshs.archives-ouvertes.fr/halshs-01402645/document.

their type and the amount involved, as long as their existence is established by any of the means provided by the Civil Law. [31]

Given the often "mixed" nature of the French bourgeois merchant, was there a "chemically" pure merchant in early codified Spain and, if so, who was he? Did he have access to credit and, if so, on what terms? I asked these questions to Professor Joaquin Garrigues (one of 20th century Spain's most respected commercial law scholars) during a class he taught, and I attended, at the *Faculte International de Droit Compare in Luxembourg in* 1958. His thoughtful, context-inspired, response was the following:

> The merchants whose Commercial Code contracts you are concerned with were small shopkeepers, doing business in their own or in rented premises, or in market or periodic fairs' stands, or as peddlers, including salesmen of secondhand clothes ("*ropavejeros*"). Many of them were descendants of Jews whose ancestors had converted to Catholicism (*Conversos*); others were of Moorish extraction (remember that "pure blooded" Spaniards were not interested in commerce as a profession). Their contracts were informal, oral and almost universally *inter presentes*, and their revenues were at best modest. Officially they did not have access to, or facilitated their customers' credit, usury being defined as "as any interest charged for the use of money or of things." Extra-officially, they did extend credit by charging higher "final" prices for their installment sales, but their charges were modest enough to remain affordable "and not patently usurious." Consequently, their businesses rarely grew. Their social status was

[31] *See* Article 51 of the Código de Comercio de España, 1885 (Madrid 2012): (Serán válidos y producirán obligación y acción en juicio los contratos mercantiles, cualesquiera que sean la forma y el idioma en que se celebren, la clase a que correspondan y la cantidad que tengan por objeto, con tal que conste su existencia por alguno de los medios que el Derecho civil tenga establecidos…".

in sharp contrast with that of Spain's large scale or wholesale and warehousing merchants (*comerciantes de almacenamiento o almacenistas*) or manufacturers of consumer goods (*fabricante*s) who were part of Spain's commercial "upper crust." The large size of the latter's transactions required the formality of their "public" deeds (*Escrituras Públicas*), which were governed not by Spain's transactionally informal commercial code but by the Spanish CC. Unlike the small merchants, the large Spanish merchants (as did the Spanish government) often sought credit from foreign lenders, mostly German. Occasionally, their Christianity was questioned by those perennially suspicious of usurious practices. In such a case, it was common for these large-scale merchants to obtain letters from their priests confirming their Christianity as well as that of their transactions. [32]

### C. USURY IN FRANCE AND SPAIN

Considering the low regard in which commerce was held in France and Spain it is not surprising that Pope Urban III 1188 decretal, recalling Luke 6:35, urged Christian lenders to "lend but hope for nothing thereby" *( mutuum date nihi inde sperantes*).[33] The most influential argument in favor of the Catholic Church's repression of usury was proffered by St. Thomas Aquinas in his *Summa Theologica*:

[32] *See*, Boris Kozolchyk, Class notes on Comparative Commercial Law lectures at the *Faculte International de Droit Compare*, Luxembourg (1958) available with the author. On the need to obtain priests' and other notable persons' letters confirming the Christianity of contracting parties and the validity of possibly usurious transactions, *See* LAPEYRE, UNE FAMILLE DE MERCHANDS*, supra* note 18.

[33] *See* Rowan William Dorin, *Banishing Usury: The Expulsion of Foreign Moneylenders in Medieval Europe 1200-1450,* 113-115 (July 2015) (Ph.D. dissertation, Harvard University, Graduate School of Arts & Sciences) (https://dash.harvard.edu/bitstream/handle/1/23845403/DORIN-DISSERTATION-PAP2015.pdf?sequence=16&isAllowed=y).

> In those things that are consumed by their use…; whence to whomever is given the use of such things is conceded their ownership…When therefore someone lends money under the agreement that the money be integrally restored to him…it is manifest that what he sells is consumed by its use.[34]

St. Thomas' definition of money as an object consumed by its use and thus uncapable of earning interest was a close variant of Aristotle's characterization of the permanent and universal "essence" of money as a "sterile" thing whose Latin version became '*Pecunia non Parit Pecunia*" or "Money does not Beget Money." Yet as pointed out by the English philosopher Jeremy Bentham, if Aristotle had only carefully examined the productive or reproductive capabilities of money, he would have agreed with Bentham that the gradual abandonment of the medieval usury laws in the West was caused by the realization that easy access to credit would "unleash economic growth" [35]

Yet, according to the Cambridge Financial History Review even after France's 18th Century Revolution, including during the 19th century, France, had an "obsession with the usurer which can be explained by the crucial role played by usurious practices in the credit economy of the period. As such, the prosecution of usury tended to focus on the character of the usury rather than the actual practice of illegal lending."[36] Similarly a Spanish law enacted in July 1908 still declared

[34] Thomas Aquinas, II Summa Theologica 78(E) (1265) (cited by John T. Noonan, The Scholastic Analysis of Usury 11 (1957)).

[35] *See*, Stanford Encyclopedia of Philosophy, *Philosophy of Money and Finance,* (Nov. 14, 2018), https://plato.stanford.edu/entries/money-finance/; *see* also Bentham, *infra* note 105.

[36] *See* Financial History Review, *A subject of interest: usurers on trial in early nineteenth-century (Abstract) in France (*OXFORD UNIVERSITY PRESS, 2017*),* https://www.cambridge.org/core/journals/financial-history-review/article/subject-of-interest%20st-usurers-on-trial-in-early-nineteenthcentury-france/E66559CAD37D4905DABF2EE3E482D0CF.

any usurious contract as null and void.[37] Not surprisingly merchants and bankers continued to search for a transaction that would shield them against the accusation of usury. Raymond de Roover, a highly respected 20th century historian of usury described the most popular transaction to avoid the accusation of usury; it was linked with the Roman law characterization of a loan agreement as a "real" contract, meaning a contract that required the delivery of a thing (*res*) i.e., money by the creditor to the debtor. His description can be summarized as follows:

> Since the direct taking of interest was ruled out, the bankers had to find other ways of lending at a profit. Their favorite method was by means of a bill of exchange (*cambium per literas*). (It relied on ) … bills (of exchange) payable in another place and…in another currency. Interest, of course was included in the price of the bill…Although the presence of concealed interest is undeniable, the merchants argued -and most of the theologians agreed -that a bill of exchange transaction was not a loan but either (an exchange) of money (a permutation) or a buying and selling of foreign money (*emptio venditio*). In other words, the exchange transaction was used to justify the credit transaction and the speculative profits in the exchange (of currencies) and served as a cloak to cover interest charges. [38] (Parentheses added).

The typical parties to such a transaction, were a merchant "B" in Venice, buying Dutch guilder from a Venetian money exchanger "E" who had a correspondent "C" in Amsterdam. E, the "exchanger" of money merchant and his correspondent banker C used a bill of exchange (or order

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[37] *See* Agencia Estatal Boletín Oficial del Estado, *Ley de 23 de julio de 1908 sobre nulidad de los contratos de préstamos usurarios,* 351-352 (GACETA DE MADRID núm. 206, July 24, 1908), (Spain), https://www.boe.es/eli/es/l/1908/07/23/(1).

[38] *See* Raymond De Roover, Business, Banking and Economic and Economic Thought 32 (1976) (cited by Kozolchyk CCC, at 157).

of payment) that instructed C to debit E's guilder account with C in order to deliver the instructed amount to B or his agent in Amsterdam. The guilders could be delivered "at sight" (at the presentation of the bill of exchange by B or his agent D, or they could be delivered at a future time. In that case the Bill of Exchange would have to stamped or marked as "accepted" (in its acceptor's column) and would be deemed an "accepted bill" until paid.

### D. AN EFFECTIVE NEGOTIABLE INSTRUMENTS LAW IN 19TH CENTURY GERMANY AND GREAT BRITAIN

In contrast with the unavailability of commercial credit at reasonable rates of interest in France and Spain, "partnership" loans at approved interest rates were already available in 16th century Germany. An authoritative study on the history of interest rates found that the so-called "five percent" or "triple" contracts, in which the active partner promised his silent partner a five percent return on his investment in the partnership, were common at that time in Germany and were unofficially approved in 1567 by Pope Pius V.[39] The Reformation had indeed accepted the charge of interest in some commercial loans, as long as the rate of interest did not exceed the prescribed market rate:

> Martin Luther, 1483–1536, declared that a Christian was under no obligation to observe dead Mosaic ordinances forbidding the charge of interest to religious brethren. At first, however, he opposed the "census" (a secured land loan) and the wealthy rentier class as even worse than manifest usurers. . . . [Subsequently,] Luther's position seemed to change. It was not, he said, complicity in sin to pay usury. The common man must obey the temporal authorities. . . .

[39] *See* SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES 73 (4th ed., 2005) (cited also by KOZOLCHYK CCC at 392).

> Reform must come from the princes and not from the people. The Christian man was free to lend his money. Considerations of public utility should regulate loans at interest. Those who take 5–6% should not be treated as extortioners. Even 8% was permissible as long as it was from redeemable security on land [40] (Parentheses added).

Consequently, by the middle of the 19th century, Germany was considered "the first home" of credit unions or credit cooperatives which lent to small businesses at "non usurious rates."[41] Similarly, in England, as described by the Encyclopedia Britannica: "With the expansion of trade in the 13th century…the demand for credit increased, necessitating a modification in the definition of the term. Usury penalties then were applied to exorbitant or unconscionable interest rates. In 1545 England fixed a legal maximum interest, and any amount in excess of the maximum was usury." [42] This continues to be its present status not only in England but in most of the United States.

### E. HENRY DIEDRICH JENCKEN AND THE NEGOTIABLE INSTRUMENTS LAW AND PRACTICE IN "LATIN RACE" COUNTRIES AND IN GERMANY AND GREAT BRITAIN

Henry Diedrich Jencken was a London barrister who authored some of the 19th century's most succinct and reliable comparisons between, on the one hand, German and English laws and practices on bills of exchange and promissory notes, and, on the other, the laws and practices of

[40] *Ibid*.

[41] *See* KOZOLCHYK CCC 392 (and especially note's 3 description of the development of credit unions in the publication "Missouri Credit Union Association, *Credit Union Difference)*.

[42] Britannica, T. Editors of Encyclopedia, *Usury* (ENCYCLOPEDIA BRITANNICA, Apr. 13, 2018), https://www.britannica.com/topic/usury.

France and France-inspired jurisdictions on the same instruments. His analysis also highlighted some of the economic consequences of these differences.[43]

The French system, which Jencken described as "all but universally adopted by the Latin races",[44] based the enforceability of the bill of exchange on the above-described contract of exchange (*Contrat de Change*). As was just described, this contract was perfected by the delivery of the bill of exchange to its payee-holder in exchange for the payee's delivery of a corresponding amount of local currency in payment for the delivery of foreign currency given to him or his agent at a designated "distant" place and specified time. Accordingly, Jean Marie Pardessus, a leading commentator of the French *Code de Commerce* of 1807, characterized the bill of exchange (*Lettre de Change*) simply as: "[A] contract, (and not a promise or order of payment) by virtue of which one of the parties . . . agrees to pay to the other at a given place a certain sum of money he has received at the former place."[45] (Parentheses added).

Please notice Pardessus' characterizations of the bill of exchange as a contract, as contrasted with its present-day characterization as a binding promise of payment at a future time by its issuer which, in the hands of a "holder in due course" becomes a promise independent of the defenses derived from underlying transactions that preceded its issuance, as enumerated by the respective laws of negotiable instruments. [46] In addition, unlike with the earlier discussed French CC Article

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[43] *See* Henry Diedrich Jencken, *The Codification on the Law of Bills of Exchange and Negotiable Securities in Europe and the United States, Jurisprudence*, 80–95, *in* THOMAS PITT TASWELL-LANGMEAD ET. AL., 2 THE LAW MAGAZINE AND REVIEW: A QUARTERLY REVIEW OF JURISPRUDENCE (1877) [hereinafter Jencken, *Codification*]; *See also* HENRY DIEDRICH JENCKEN, A COMPENDIUM OF THE LAWS ON BILLS OF EXCHANGE, PROMISSORY NOTES, CHECQUES, AND OTHER COMMERCIAL NEGOTIABLE INSTRUMENTS OF ENGLAND, GERMANY AND FRANCE (1880) [hereinafter JENCKEN, COMPENDIUM].

[44] Jencken, *Codification, supra* note 43 at 85.

[45] *Id.*

[46] Jencken, *Codification, supra* note 43, at 85- 88.

1589 promises to do or give something in the future (which as will be recalled were unenforceable promises until a final contract was executed [47], the English and German bills of exchange promises of payment were enforceable from the moment they were issued and did not require their acceptance by the promisee or payee to be binding on their drawer- promisor.[48]

Despite his characterization of the bill of exchange as a special contract of exchange, Pothier described its execution as one in which: "A Bill of Exchange coupled with an endorsement, and perfected by delivery, constitutes the mode of fulfilment [sic] of the original contract between the parties." [49] In other words, once the bill of exchange was delivered to its payee, the contract of exchange was deemed executed, and whatever rights were transferred to third parties were the result of the rights acquired by the original payee and assigned to his assignee the holder of the Bill. Such an assignment was subject to the terms and conditions of the original underlying contract of exchange and assignment the right to claim it (*Cession de Creance*) and was not the product of a "negotiation" which, as just noted, conveyed "independent" rights of enforcement to its endorsee/ "holder in due course." [50]

As also noted by Jencken, the French characterization of the bill of exchange did not differ from the medieval practice of purchasing and selling (*Emptio Venditio)* foreign exchange by means of an instrument known as *Lettera di Cambio* or plain *Cambiale*.[51] This culturally (and religiously) inspired characterization impeded the negotiability of the bill of exchange because its assignee

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[47] *See* principal text accompanying *supra*-Section II(A) note 5.

[48] *See* Jencken *Codification supra* note 43, at 87- 88.

[49] *See* Pothier *supra* note 7 at 5.

[50] *See, e.g.,* Michele de Cesare, *La Questione delle Lettere di Cambio nel Sec. XVII Presso la Regia Dogana di Puglia*, https://www.yumpu.com/it/document/view/16416166/la-questione-delle-lettere-di-cambio-nel-secxvii-presso-la-regia-(describing the seventeenth-century Italian *Lettera de Cambio* or *Cambiale*).

[51] *See* Jencken, *Codification, supra* note 43 at 89 (referring to Articles 115–117 of the original *Code de Commerce*).

(even if named an endorsee of the bill) had the same (and no better) rights to the funds deposited with the drawee as did the drawer. If the drawer could not claim these funds because of underlying transaction causes, such as a suspicion of usury, neither could the payee-endorsee. Indeed, to ensure the drawee's ability to pay according to the instruction of payment of local currency that the *Code de Commerce* required, the drawer of the payment order had to provide the drawee with an equivalent amount of foreign currency in advance of the claim of local currency by the payee. And, in turn, the Bill of Exchange had to signify such a provision of funds by a reference to the availability of those funds in "value clauses" such as "value received" or "value credited in the account of the drawee." [52]

Yet, what if the parties to the bill of exchange did not really desire to purchase and sell foreign currency and even less to do it at a distance from each other (*distantia loci*) as required by many national or provincial laws? What if one party just wanted to borrow money from the other and have the lender or a third-party drawee disburse the money either upon presentation of the promise of payment or of a bill of exchange or at a number of days or months after its presentment? The need to access credit at market or reasonable rates was not only experienced by merchants or other private parties; it was also experienced by European governments in order to finance their increasingly costly wars as well as their construction of housing, transportation and industrial projects. It prompted the increasing issuances of governmental *bonds or debentures* by these governments since the beginning of the 18th century.

### F. SPAIN'S COMMERCIAL CODE OF 1829'S ADOPTION OF THE BILL OF EXCHANGE PROVISIONS OF FRANCE'S COMMERCIAL CODE OF 1807

[52] *See* Jencken *Codification, supra* note 43 at 87-88.

In Professor Carlos Vargas Vasselot, *Evolucion Historica del Derecho Mercantil y su Concepto*,[53] described the drafting of Spain's Commercial Code of 1829 with France's Commercial Code of 1807 as follows:

> In Spain, the Commercial Code of 1829 amounts to an extraordinary legislative accomplishment for its time (the second Commercial Code of the world following the Napoleonic Code of 1807). It was drafted by a jurist of extraordinary talent: Sainz de Andino, who had the merit of taking advantage of all the accomplishments of the French Commercial of 1807…" [54]

Thus, Professor Vargas Vasserot confirmed that the Spanish Commercial Code of 1829 did adopt the French Commercial Code's section on Bills of Exchange. Consistently with that Code, the Spanish Commercial Code section on the Bills of Exchange was labeled: "Of the Contract and Bill of Exchange" (*Del contrato y letras de cambio*). And Article 428 of the Spanish Commercial Code requires the presence of clauses that reflect the receipt of the money to be exchanged by the exchanging bank, referred to as "value deposited in the account of the exchanging bank) and assumed value (*valor en cuenta y valor entendido*).

These clauses make the holder of the bill responsible for the payment or reimbursement of the amount mentioned to the issuer of the Bill of Exchange in the manner and time agreed upon when they entered into the Exchange Contract. To which Article 439, adds the anti-usury requirement of the above mentioned "*Distantia Loci"*: It is forbidden to draw bills of exchange payable in the same city and at the time of their issuance" (*Se prohibe girar letras de cambio pagaderas en el*

[53] *See* Carlos Vargas Vasselot, Evolución Histórica del Derecho Mercantil y su Concepto (2010).
[54] *Id*., at 62.

*mismo pueblo de su fecha).* In other words, reflecting the prevailing cultural anti- usury values the Spanish Bill of Exchange was only a contract of exchange. As its French ancestor, it was not the negotiable instrument needed to make possible in Spain the voluminous public and private credit available in Germany and Great Britain. Hence, I would beg to differ with Professor Vargas' Vasselot's characterization of the enactment of Spain's Commercial Code as "an extraordinary legislative accomplishment."

### G. The Effect of Contrasting Values and Attitudes in the German and English Negotiable Instruments Law and Government Bonds

The liquidity of private promises of payment, or their ability to be converted into cash quickly and inexpensively, can differ sharply from that of official currency or it can approximate it. Where their liquidity approximates that of official currency it is because their holder is able to convert these private promises into money quickly and inexpensively. However, the ability to monetize private promises requires that their holder in due course be protected as much as possible against claims, defenses or equities raised by the parties to the transaction or transactions that prompted the issuance of the promise, especially if their "causes" were unlawful, such as usurious loans.

Further, in commercial practice, the objections to being paid with money must be very few and confined to instances of clearly illegal conduct by the holder or his predecessors such as their forgery, alteration or their use despite an earlier withdrawal from circulation. These objections are incidentally echoed in the very short list of "real" defenses that can be raised against negotiable instruments in the hands of holders in due course as found in Commercial Codes of nations with active financial centers.[55]

[55] *See, e.g.,* U.C.C. § 3–302.

Thus, unrestricted conditionality, whether imposed by statute or by contractual stipulation, causes crippling uncertainty of payment. It is for this reason that the promises of negotiable instruments are, by now, universally, defined as unconditional promises to pay sums certain.[56] As was just discussed, this was not the case with the promises that resulted from the assignment of the claims of the *Code de Commerce* of 1807 or of the Spanish Commercial Code of 1829.

Following the French Commercial Code of 1807, the promises of payment, that were first incorporated into promissory notes and bills of exchange circulating in Germany during the 17th and 18th centuries were conditioned upon stipulations in their underlying contracts of monetary exchange. These conditions rendered the bills and notes non-negotiable because, as just noted, they could be used by their drafters as defenses against third party holders. Consequently, Jencken assessed the status of German negotiable instruments law during the first decades of the 19th century as:

> Tardily introduced, reluctantly adopted, the important juridical questions involved in the creation of a negotiable instrument were not even thought at that time. It was not until the close of the 18th century that [German] jurists turned their attention to the important question of the true juridical character of negotiable instruments.[57]

[56] *See, e.g., Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes*, THE LEAGUE OF NATIONS (Geneva, 1930), Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) The League of Nations (uio.no) (last accessed July 14, 2021)[hereinafter Geneva Convention]. Article 1 defines a bill of exchange as an instrument that must contain: "1. The term 'bill of exchange' inserted in the body of the instrument and expressed in the language employed in drawing up the instrument; 2. An unconditional order to pay a determinate sum of money. . . ." *Id.,* This Convention has been widely adopted by civil law countries. Common law countries' definition of a negotiable instrument is almost identical. *See* U.C.C. § 3–104(a) ("negotiable instrument" means an unconditional promise or order to pay a fixed amount of money . . . ."). (Emphasis added).

[57] Jencken, *Codification, supra* note 43, at 86.

In retrospect, the tardy introduction and reluctant adoption of bills of exchange and promissory notes as instruments of credit and payment was a blessing in disguise. For it was only in 1839 that Dr. Karl Einert, a law professor and commercial court judge, provided Germany's (and many other nations') the proper direction for the drafting of an effective negotiable instruments law. In his monograph, "The Law of Bills of Exchange and the Everyday Needs of the Bill of Exchange Business in the 19th Century"[58] he attacked the assumption of the *Code de Commerce* that bills of exchange were part of the contract of exchange. As summarized by Jencken, Einert's main points were:

> [A] Bill of Exchange . . . and a Promissory Note . . . partake of the same characteristics, and are, juridically speaking, identical . . . [t]he only difference between the two instruments is that the maker or drawer of a Bill of Exchange guarantees not only the payment, but also its acceptance, whilst the maker of a Promissory Note guarantees only payment. . . . A Bill of Exchange . . .[is] only an acknowledgment of a debt, a promise to pay, rendered, however, negotiable by adding the word[s] (to the) "order" [of]. . . ." The usage of bankers of blank (*in blanco*) drawings, that is, drafts issued without (having mention the provision of funds to the drawee…points to the creation of paper money, analogous to banknotes, with the only difference that the acceptor of the bill guarantees its payment.[59] (Parentheses added).

The support for Dr. Einert's viewpoint did not come from those German scholars who revered *Justinian's Corpus Juris Civilis Romani* (hereinafter CJC) also known as *Pandekts* and

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[58] *See* KARL EINERT, *DAS WECHSELRECHT NACH DEM BEDURFNIS DES WECHSELGESCHAFTS IM NEUNZEHNTEN JAHRHUNDERT* (Leipzig Vogel, 1879).

[59] Jencken, *Codification, supra* note 43, at 87–88.

*Pandektenrecht*.)[60] It came from the Northern and Central European banking sector that were aware of Dr. Einert's familiarity with their customs and usages. As summarized by Jencken:

> [I]n support of his theory, (Dr. Einert) pointed to the widespread custom of creating a circulating medium by drawings in blank, that is without having funds in the hands of the drawee; a custom resorted to by the great Northern European banking firms to an enormous extent.[61]

Einert's theory was at first vehemently attacked by his Pandektist colleagues, but gradually it was adopted by most delegates to the National Assembly of the Confederate States of Germany on May 1, 1849.[62] Dr. Einert was thus responsible for the first European rejection of the *Code de Commerce*'s contract-of-exchange approach.[63] In addition, by adopting Dr. Einert's recommendations, Germany's negotiable instruments law acquired the same characteristics of English law. As summarized by Jencken as:

> Bills of Exchange in both countries functioned as negotiable and not merely assignable instruments.[64] (They) could be drafted in any manner…although they had to bear the label "Bill of Exchange" on their face.[65] They could be endorsed in blank as well as in a nominative fashion (by naming the endorsee), or they could be endorsed "to the order of" any future endorsee.[66] Drawers as well as previous endorsers were deemed co-principal debtors, but…only for the amount and terms stated in the instrument. The value clause

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[60] JENCKEN, COMPENDIUM *supra* note 43, at 18–19.
[61] *Id*., at 18.
[62] Jencken, *Codification, supra* note 43, at 81.
[63] JENCKEN, COMPENDIUM *supra* note 43, at 18–19.
[64] *Id.,* at 18.
[65] *Ibid.*
[66] *Ibid.*

required by the Code de Commerce did not have to be stated. And, importantly, the only defenses allowed against a holder in due course or in good faith were fraud, forgery, alteration of the debt or of "the sum payable after the drawing of a Bill . . . ."[67]

These common statutory and practice features made it possible for mid-19th century Germany and England to issue bonds for purposes as diverse as the financing the construction of public works, housing and transportation, or the financing of local and foreign wars. It also became possible for these governments to create primary and secondary regional and international financial markets. The presence of these markets stood in sharp contrast with their absence in France and Spain, an absence reflected in those countries' dependence upon German and English public and private credit sources. The changes in the law and practice of negotiable instruments inspired by Dr. Einert's writings remain a dramatic illustration of how law making, starting at the transactional or micro level, can make possible major national, regional and international macro-economic development.

## H. PRELIMINARY CONCLUSIONS:

The negative economic effects of pre-existing cultural values and attitudes toward commerce were apparent in concepts such as: 1) a "*Pollicitation*" that renders unenforceable unilateral promises to do or give something at a future time until that promise becomes part of a bilateral contact; 2) the definition of usury such as "any rate of interest charged by a lender is usurious and punishable; 3) the judicial and doctrinal concept such as "*Justice Contractuelle*" that imposes a strictly literal (and thus exclusive of course of dealing or custom or usage of trade) interpretation upon notarial

[67] *Ibid.*

and other formal contracts; 4) the French and Spanish 19th century Codes' characterization of the Bill of Exchange as a "contract of exchange" usable only to exchange currencies by parties in different cities; 5) The obsolete definitions and classifications of numerous present commercial and for profit contracts such as agency and or deposit as "civil" (and not for profit) contracts. In order not to suffer the same consequences caused by these values and attitudes it is important to identify the legal reasoning used to by the drafters of these 19th century codes to justify the adoption of the anti-economic growth rules. And it is also important to learn how to replace such a reasoning with one that takes into account contemporary and foreseeable socio-economic realities including the presence of honest, reasonable and fair new commercial practices, and of new rules, definitions and classifications consistent with these practices.

## IV. THE JUDICIAL ACTIONS FOR BREACH OF CONTRACT IN ROMAN, MEDIEVAL AND FRENCH CODIFIED LAW [68]

### A. THE UNEVEN CONTRIBUTION TO DEFINITIONS AND CLASSIFICATIONS OF CLASSICAL ROMAN LAW (FIRST TWO CENTURIES A.D.) INCLUDING HOWEVER, THE FIRST ARCHETYPE OF AN HONORABLE AND REASONABLE COMMERCIAL BEHAVIOR

According to the celebrated Roman Jurist Gaius,[69] (AD 110-180) Roman praetors instructed judges that in the judicial actions for breach of contract the remedy was the payment of damages, as opposed to the specific or judicially enforced performance of the contract.[70] Despite the apparent clarity of Gaius' opinion this clarity disappeared while Emperor Justinian's *Corpus Juris Civilis*

[68] *See*, generally, John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1958- 1959) [hereinafter Dawson) one of the truly great historical /comparative law studies of the 20th century.

[69] Among Gaius' writings was his textbook on the "*Institutes"*, or principal elements of Roman law, and his treatise on the *Edicts of the Roman Magistrates (Praetors).*

[70] Dawson *supra* note **Error! Bookmark not defined.** at 496

(CJC) was being drafted by his commission of jurists. [71] One of the compilers decided to "update" Gaius' opinion by adding a Justinian decree which required that : "If the defendant is in possession of the thing or merchandize claimed, he will be deprived of it by military force (*manu militare offficio iudicis*) following the Iudex's authorization." [72]

As noted by Prof. Dawson, the Justinian compilers of the CJC could have hardly foreseen the consequences of his addition, especially during the codification of French contract law many centuries later.[73] In addition, the compilers decided to add 2 opinions by the Roman jurist Celsus, a Gaius' contemporary. In one, Celsus analyzed the judicial remedies against a breach of a guarantee contract and concluded that if the breach caused losses to the plaintiff, the guarantor should be condemned to pay "a sum of money, as happens with all the obligations to do something"[74] (Emphasis added). Professor Dawson clarified that while it was true that Roman classical jurists often referred to obligations "to give or do something", they did so only to describe the facts of a controversy and not to justify the granting of judicial remedies to either or both breaches of contract. At the same time, Dawson pointed to an opinion in the CJC's Digest that attributed to the jurist Paulus a statement that eliminated the main reason for the distinction

[71] As described in Britannica, T. Editors of Encyclopaedia, *Corpus Juris Civilis* (ENCYCLOPEDIA BRITANNICA), Code of Justinian | Definition & Creation | Britannica, the Byzantine Emperor Justinian I commissioned to a Commission of Jurists to compile the legal materials with which to draft a "body of civil law" which consisted of 4 books: 1) The *Codex Constitutionum, (2) A Digesta, or Pandectae, (3) Institutiones, and (4) Novellae Constitutiones Post Codicem*. Of these, the most important books were the *Digesta* (Or Digests) or extracts of legal opinions on legal disputes by renowned Roman jurists, and a legal textbook (*Institutiones*) (largely a restatement of Gaius' above referenced textbook. The Encyclopedia also noted that: Strictly speaking these compilations did not constitute a new binding legal code. I would add however that the Digest became a "received" and applied law by Germany's associated states in or during the 15th century and remained in force in the Holy Roman Empire until its end in 1806. Despite the absence of formal adoptions, Roman law continues to be an important source of law in civil law countries. *See* KOZOLCHYK CCC at 119-121.

[72] Dawson, *supra* note **Error! Bookmark not defined.** at 500, 501.

[73] Ibid.

[74] *Ibid.,* DIG. 45.1.2. (Jurist Celsus) of the Justinian Digest transcribed in the CJC which provides that: "some contractual stipulations imply the duty to give and others the duty to do".

between promises to give and to do: "The term to do *(facere)* includes every kind of doing such as giving, paying, judging…" [75] (Parenthesis and emphasis added).

Upon reading some of the Roman jurists' opinions, my first impression was that they were mostly descriptive in nature, i.e., they did not analyze the consequences of their factual assumptions but merely described contractual practices and assumed that the mere existence of these practices justified their binding effects, such as with "consensual" or "real" contracts. [76] Yet, decades later, in preparation for my first comparative commercial law coursebook, I noticed that some of the jurists definitions and classifications were indeed analytical and relied on a logic that, for lack of a better term, I described as "geometric": For it provided the criteria for measuring the "dimensions" of, say, contractual or proprietary and possessory rights and duties, and implemented those measurements with the *Praetors*' grants of the appropriate judicial actions or remedies based upon the "sizes" of their rights.

Thus, these jurists' opinions distinguished, say, between the "larger" proprietary and the "smaller" possessory rights and, in the case of proprietary rights, the Praetors granted to the proprietors the judicial action for the recovery of their property from any holder thereof (*rei-vindicatio*). In contrast, "smaller" possessory rights, such as held by tenants or usufructuaries of land owned by someone else were protected in their possession by "possessory interdicts" that entitled the tenants only to temporarily repossess their lawfully possessed property but did not empower them to sell their possessory rights. [77] Similarly, "larger" degrees of care were imposed upon bailees who

[75] *See* DIG. 45. 1.2. cited by Dawson *supra* note **Error! Bookmark not defined.** at 501.
[76] *See* KOZOLCHYK CCC at 124-128, on Roman contracts enforced simply "because of their contents".
[77] For the "gradations" of possessory interdicts in Roman Law, *See Possession Law*, ENCYCLOPEDIA - THEODORA.COM, Possession (Law) - Encyclopedia (theodora.com) (last accessed July 8, 2021).

benefitted from using things in their care (*utilitas contrahendis*) than upon bailees not entitled to such benefits. [78] I also noticed an opinion by Ulpian in which he identified the contractual disputes in which it made sense to rely on the opinions of honorable and reasonable men of affairs (*Viri boni*). The following is my summary of the facts in an Ulpian opinion on when to rely on the viewpoint of an archetypal Roman "man of affairs" (*Bonus Vir)*:

> A slave owner sold a slave who had managed his owner's affairs and periodically rendered accounting reports of his management to his master. (Apparently, the sale of the slave came about abruptly enough so that the latter did not have sufficient time to prepare his last management report). Hence, the owner/seller of the slave included a conditional clause in the sale agreement that stated that in the event that the sold slave did not render an acceptable final report to the satisfaction and discretion of his former owner (*compatasset arbitrio*), the entire sale would be null and void. (Emphasis and Parenthesis added).

Ulpian then asked:

> Is this condition supposed to be interpreted based on the total discretion of the seller of the slave (*quum impleta fuerit conditio)*? or should it be interpreted based on the discretion of an honorable and reasonable man of affairs (*bonus vir*)? For if we interpret this clause as one to be applied at the former slave master's discretion, such a condition should be null because it was similar to a situation in which someone obligates himself to sell something but, then, when the buyer asks for the thing, the seller says that the sale is unenforceable

[78] *See* KOZOLCHYK CCC at 113-15 and 1022 for a French law (Roman law inspired) bailee duty of care of another person's property. The Roman criterion was known as *utilitas contrahentis* (the higher the utility derived by the bailee the higher his duty of care.

> because he was to sell only "if he wanted to" (*si voluerit*)…(Clearly such a promise) cannot be interpreted as subject to the seller's discretion (*arbitrium rei)*/ Accordingly, it was thought proper by earlier jurists that such an obligor's discretion be replaced by the discretion of honorable/reasonable men (*viri boni*) (Parentheses added). [79]

It was clear that Ulpian was doing more than describing a practice, he was suggesting how a particular clause should be interpreted and why; in addition, he was also suggesting a reliance on the discretion of an archetypal merchant whom his predecessors referred to as a *Bonus Vir*. As I was reading Ulpian's opinion, I remembered a statement on the importance of the *Bonus Vir* in Professor Levin Goldschmidt's "World History of Commercial Law (*Universalgeschichte des handelsrechts* (1891).

> The ethical-juristic genius of classical antiquity, and especially that of the Roman jurists, created an archetype valid for all time, an honest (reasonable) man of affairs (*bonus vir*) equally distant from brutal egoism and from other-worldly altruism.'" (Parentheses added). [80]

The reason why I suggest adding the term "reasonable" following the term "honest" is because, as Ulpian explained, no reasonable contracting party could assume that a firm promise to give or do something was equal to its opposite, an ongoing discretionary condition (*arbitrium rei*). In

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[79] *See* DIG, (Ulpian, Sabinus 28) quoted in KOZOLCHYK CCC at 136, 137.

[80] *See* the Italian translation of LEVIN GOLDSCHMIDT'S *UNIVERSAL GESCHICHTE DES HANDELSRECHTS, "STORIA UNIVERSALE DEL DIRITTO COMMERCIALE* 35 (Vittorio Pouchain e Antonio Scialoja trans., 1913) [hereinafter Goldschmidt): *Il genio ético-giuridico dei populi dell' antiquita classica, in especie dei Romani, ha creato il tipo valevole per ogni tempo, dell uomo d' affari onesto (bonus vir) igualmente lontano cosi dall egoismo brutale, come dall' ultraterrena rinunzia a ogni mira personale…*" (Parenthesis added). For the most insightful analysis I have read on the influence that Professor Goldschmidt's and Profesor JG, Busch's (a German trader and legal historian's) ideas had on Karl Lellellyn's codification of "nature of things" (commercial) in the UCC, *see* James Whitman, *Commercial Law and the American Volk. A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156-66 (1987-1988).

addition, Ulpian relied on the opinion of a "man of affairs" who must have been familiar with the facts of such transactions, including the prevailing and thus must acceptable practices. Hence, Goldschmidt credited Ulpian and his predecessors with adopting the concept of an archetypal man of affairs as well as an archetypal interpretation of contractual intent. Paraphrasing Ulpian's suggestion: "Act in the same manner as an archetypally honest, reasonable and respected man of affairs would have acted or would have interpreted his or another person's contractual intent."

Yet, as we have learned since Ulpian's days, there are other versions of contractual reasonableness. For example, the questioner of what is reasonable could ask himself: What would I have done, or how would I interpret contract clause "X" if I were in "the contractual shoes" of my counterparty? Or how would a reasonable regular participant in the same transaction as my counterparty and I have interpreted clause C? Or only that which is based on experience can be reasonable. [81]

Please note that regardless of the version of what is reasonable, reasonableness is generally associated with the conduct or opinion of another or of other participants in the same transaction or of respected persons very familiar with it. Thus, it should not be surprising that in our time the customs and practices or usages of trades and professions involved with the transaction in question

[81] *See* for example Section 8(2) of the United Nation's Convention on Contracts for the International Sales of Goods (1980):

"If the preceding paragraph is not applicable, payments made by, and other conduct of a party, are to be interpreted according to the understanding that a reasonable person of the same kind of the other party would have had in the same circumstances".

In his illuminating monograph, The Nature of the Judicial Process (Yale University Press 1960) at 22, 23, Justice Benjamin Cardozo, implicitly characterizes the judicial determination of the reasonable as part of an experimental method of philosophy. He warns that "The Common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from (factual) particulars." (Emphasis added) He quotes Monroe Smith for the conclusion that judges in their effort to give to the social sense of justice articulate expression in rules and in principles, rely on a method of law finding based on experience: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in these great laboratories of the law, the courts of justice…"

are often applied as the most reliable source of reasonableness, even if that reliance entails their replacement of applicable statutory law.[82] Finally, it should also be noted that Goldschmidt's extraordinary insight about the socio -economic importance of the *Bonus Vir* and of his co-existing selfishness and altruism was verified scientifically (socio-biologically) in our time by the work of Harvard's Professor E. O. Wilson, the scientific world's most respected zoologist and one of the founders of the science of socio-biology. Wilson and his socio biologist colleagues proved that:

> (A)s a quintessentially social and cooperative animal, humans not only interact with others but, as all animals with advanced social organizations do, but not to a unique degree, humans also cooperate and enmesh themselves in social networks , including business ventures and transactions. This tendency…is the product of a drive deeply ingrained in *homo sapiens*. Evolutionary biologists attribute this socialization that led humans and other animals to "eusociality" i.e., the ability to form groups that include multiple generations who cooperate with each other and are also prone to perform altruistic acts as part of their division of labor……Thus was born the human condition, selfish at one time, selfless at another, (although) the two impulses often conflicted." [83] (Parenthesis and Emphasis added).

B. THE CONTRIBUTION OF THE MEDIEVAL GLOSSATORS AND COMMENTATORS.

[82] Thus, in 1964, the State of New York, which houses the United States' and the world's most important financial and banking centers adopted a "non- conforming" amendment to Section 5-102 of the U.C.C. which subjected the application of statutory law as found in Article 5 of the U.C.C. (on Letters of Credit) to the prior application of the Uniform Customs and Practices for Documentary Credits (UCP). The UCP is a compilation of international banking customs and practices promulgated by a private entity, the International Chamber of Commerce (ICC). The amendment states: "Unless otherwise agreed, this Article 5 does not apply to a letter of credit (LOC) if by its terms or by agreement, course of dealing or usage of trade such LOC is subject in whole or in part to the UCP fixed by Thirteenth or any other Congress of the ICC." On this amendment, *See* KOZOLCHYK CCC, at 1122. For the role of reasonableness in the 1994, 1995 and 1996 international modernization and uniformity of this law, *see infra* note 114.

[83] On E.O Wilson's contribution to a better understanding of the cooperative nature of the *Homo Sapiens*, *see* KOZOLCHYK CCC, at 12-13 discussing Wilson's "The Social Conquest of Earth." U.S. President Joseph R. Biden Jr. must have had E.O Wilson's "Social Conquest of Earth" in mind when he concluded in a Television speech of 7/9/21, that "Capitalism without competition only leads to the exploitation of the other."

The Bolognese "Glossators" (who were the first medieval interpreters of Justinian's CJC and who started their studies of it circa 1100 AD) were aware of the existence of a maxim with respect to specific or enforced performance of a contract: "*Ejercicio Nemo Potest*" (no one can be forced to perform a contract if he refused to deliver a thing he owed). Some attributed this maxim to Roman jurists of the Classical Period and associated it with the judicial action for damages against the breaching party. Other Glossators, and especially the Glossator Martinus (known for his frequent radical opinions) opposed such an interpretation and posed the following hypothetical case: "You have sold me bread and you do not deliver it as promised even though I am actually starving to death, would a remedy that only gives me money (damages) be truly a sufficient and just remedy? [84] Despite the rhetorical and imprecise nature of Martinus' hypothetical situation (for, why would money in hand (as a result of an award of damages) with which to purchase the supposedly life-saving bread not be a quicker life saver than a judicial order compelling the delivery of the bread? Nonetheless, despite his disregard of this fact, his opinion became part of the same rule added by Justinian's compiler to the CJC: It prescribed a *manu militari* "specific" performance remedy for breached promises to give something.

Unexplainably, the same view prevailed among many of the "Commentators", or the Medieval jurists who succeeded the Glossators as interpreters of the CJC during the 14th to the 16th centuries. This was the case even though Baldus de Ubaldis, a highly respected Commentator pointed out that the judicial action for specific performance of a promise to do and deliver or give something such as a completely built or rebuilt house could take a long time thereby transforming the

[84] *See* Dawson *supra* note **Error! Bookmark not defined.** at 503.

defendant into the plaintiff's temporary slave. He also reminded his readers that in accordance with the Roman Maxim *no cogitur praecise ad factum* ("no one should be forced to act against his own will").[85] Finally, the Commentator Bartolus of Saxoferrato (1257-1314) perhaps the most respected by his medieval colleagues exposed the logical weakness of the "to do and to give" dichotomy by asking: Why is it that the same contract obligation cannot be considered by one of the parties as an obligation to give while the other considered it as an obligation to do? [86] To which he added: " I have searched and have not found an answer to this question. [87]

In sum, despite the doubts expressed by respected Roman and Medieval Jurists on the lack of conceptual precision and soundness of the "to give and to do" classification/ dichotomy as a conceptual basis for granting different judicial remedies for breaches of contracts, it was as will now discuss, unhesitatingly codified by the French CC and by its heirs world-wide.

### C. PROMISES TO GIVE AND TO DO OR NOT TO DO IN THE FRENCH CC

In the first volume of his Treatise on Obligations (*Traite des Obligations),*[88] Robert Pothier distinguished between obligations to "give and do something" noting that when a promisor breached his promise "to do" he was only obligated to pay damages; otherwise, the debtor could be forced to become his creditor's slave. This was also unacceptable to 18th century France in which "no one was forced to act against his will" (*Nemo potest praecise cogi ad factum).* [89] He also concluded that the same rule applied to the obligations "not to do something," taking into

[85] *See* the opinion of Baldus in Section 4.49 del CJC cited by Dawson *supra* note **Error! Bookmark not defined.** at 504.
[86] *See* Dawson *supra* note **Error! Bookmark not defined.** at 504.
[87] *Ibid*.
[88] *See* Pothier *supra* note 7, at 84, 87, 92-93.
[89] *Id.,* at 87.

account that in this negative type of obligation, if the debtor had done something that could be undone, the creditor could undo it and charge the expenses to the breaching debtor. [90]

The Drafting Commission that approved the final text of the French CC accepted Pothier's suggestions without discussion. Thus, Article 1142 stated: Any obligation to do or not to do something shall be fulfilled by the payment of damages by the breaching party" [91] And with respect to obligations to give something, such as the delivery of specified sold goods the approved rule was that due to the consensual nature of the sale agreement (which implied the transfer of ownership of the sold goods to the buyer from the moment of the agreement on the goods sold and their price) the appropriate judicial remedy was its specific performance which implied that the goods had to be delivered to the buyer by their seller. [92]

Dawson suggests that cultural as well as historical reasons forbad debtors to do something against their will. Among these were the fall of an imperial and authoritarian government during the French Revolution and the popularity of its libertarian ideas. [93] I would add that a principle such as *nemo potest praecise cogi factum* (no one can be forced to do a specific act) also had the appearance and sound of an axiomatic juristic maxim, i.e., a norm whose overtones of permanence and universality validated it regardless of existing contrary commercial or social practices or of other socio-economic realities that supported it. As will be discussed in the following section, such

[90] *Id*., at 92-93.

[91] *See* Dalloz (1993) *Code Civil* Art. 1142 and Dawson *supra* note **Error! Bookmark not defined.** at 511 with additional reference to Articles 1136, 1138, 1583, 938 y 1703 of the *Code Civil*.

[92] Dawson, *Ibid*.

[93] Dawson, *Id.,* at 510.

an apparent permanence and universality in concepts, definitions, classifications and rules or principles was an Aristotelian "essential" component of the drafting style of the French CC.

On the other hand, regardless of these axiomatic principles, French courts started imposing what appeared to be severe fines known as "*astreintes*" to force delinquent debtors to transfer or deliver what they owed immediately including their lodgings when they had failed to pay their rents. [94] However, the *astraintes* failed to persuade many of those who breached their promises to deliver the personal or real property they held, including as tenants or lessees. The reason of this failure to persuade many debtors was that they soon discovered that the probability of having to pay significant amounts of fines ceased (independently of the accumulated amount) once they simply delivered the thing claimed by their creditors/sellers; secondly, as a result of the prevailing poverty and lack of lodgings in France at the end of the 2nd World War many tenants had no alternative but to try to stay in their present lodgings for as long as possible. Thus, these debtors postponed their "deliveries" indefinitely. In addition, those courts who in a *manu militari* fashion decided to jail defaulting debtors by the thousands were soon admonished by their judicial superiors to discontinue the jailings because they ran counter to another highly popular maxim of the French Revolution of 1789 : "No punishment can be ordered without a previous law that enacts it" (*nulla poena sine lege*). [95]

### D. PARTIAL SUMMARY

A wide analytical gap was apparent between, say, Ulpian's opinion on the advisability of relying on an archetypal *Bonus Vir* and his Logic of the Reasonable when interpreting possibly abusive or

[94] *Id*., at 512-514. *See* also for a thorough analysis of the evolution of the *Astreinte* in French Law, James Beardsley, *Compelling Contract Performance in France*, 1 HASTINGS INT'L & COMP. L. REV. 93, 96 (1977).

[95] Dawson *supra* note **Error! Bookmark not defined.** at 512-514.

other controversial contract clauses [96] and, the Glossator Martinus' justification of the remedy of specific performance as a "lifesaving" judicial remedy. It was also clear that the French codifiers did not rely on what I described earlier as the Roman Jurists" application of a "Geometric Logic" that enabled them to measure the "sizes" of the claimed rights and duties prior to granting appropriate remedies for their breach. Finally, the post 2nd World War French judges who resorted to the remedy of *Astreintes* that imposed large hypothetical fines and, in many cases, the actual imprisonment of thousands of tenants unable to pay for their lodgings relied on a version of specific performance that was illegal, let alone unfair and inequitable during the harsh economic conditions immediately following the end of World War II in France.

It was evident that the shaping of proper remedies for breach of contract promises required a method of reasoning that relied less on rhetorical and unempirical definitions and classifications of existing commercial and judicial practices and more on empirical data on actual or proposed practices that would help measure not only their socio- economic effect but also the reasonableness and fairness of the proposed rights, duties and remedies for their breach. The following section will discuss in greater detail the strongly negative economic consequences of the legal reasoning responsible for French CC contract law inspired definitions and classifications.

## V. THE SYLLOGISTIC/SCHOLASTIC OR FORMAL LOGIC AND HUGO GROTIUS' NATURAL LAW INFLUENCE ON FRENCH CC CONTRACTUAL DEFINITIONS AND CLASSIFICATIONS

### A. INTRODUCTION

[96] *See* text accompanying *supra* notes 79 and 80.

As pointed out by Professor Franz Wiacker, a leading German historian of Europe's private law, the 18th century Dutch lawyer, theologian and philosopher Hugo Grotius (a pioneer advocate of the application of "natural law" to everyday transactions) was one of the most important influences on Robert Pothier's legal reasoning and especially on his drafting of the French CC contract law provisions. Grotius distinguished between what was changeable and temporal and what was "natural" and "immanent" in the law in general, and especially in Roman law.[97] He concluded that according to the law of nature, what was immanent in the law of contracts in general was its voluntary nature or its "voluntarism" i.e., the omnipresence of the will of the parties as the ultimate reason why contracts are binding. Thus, Grotius' and the French CC drafters agreed that the mere consent of the parties was sufficient to be able to claim, among a number of things, the transfer of the thing sold. [98] Yet, the principle that a mere consent bound the parties to a contract did not mean that the same consent of all the possible parties to a contract was required to bind one of its parties who chose to be bound solely by his own consent.

As is apparent in Pothier's reasoning in the following segment from Section 1.1 of his Treatise on Obligations, [99] he missed the preceding distinction.

> A contract includes a concurrence of the will of two persons at least, one of whom makes and the other accept his promise. A *pollicitation* is a promise not yet accepted by the person

[97] *See* Franz Wiacker, History of Private Law in Europe: With Particular Emphasis to Germany 227-228 (Tony Wier Trans., 1996); *See* also Kozolchyk CCC, at 254-256.

[98] This view was reflected in Article 1583 of French CC: (A Sale) is complete between the parties, and ownership is acquired, as of right by the buyer with respect to the seller, as soon as the thing and he price have been agreed upon, although the thing has not yet been delivered or the price paid… Dalloz Code Civil 1992-1993, author's translation; but contrast this attitude with that of the French *bourgeois* and of sympathetic courts that applied the doctrine of *Justice Contractuelle* disregarding the more liberal standard for the interpretation of contracts set forth by Article 1156 of the French CC, *supra note 26* and accompanying text.

[99] *See* the English translation of Robert Joseph Pothier's *Traité des obligations* in *supra* note 7.

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…Hence, I cannot by will transfer to another the property of my goods if his will does not concur in the acquisition of it…[100]

### B. GROTIUS' LAW OF NATURE AND ARISTOTLE'S FORMAL LOGIC DEFINITIONS: THE PROBLEM WITH UNOBSERVED OR POORLY OBSERVED FACTS.

Pothier had unhesitatingly adopted Grotius' definition of a contractual obligation that denied enforceability to promises to do or give something in the future until the will of the two parties manifested itself in their acceptance and signature in an executed contract. Accordingly, as discussed in Section II, Pothier's definition of a contractual promise deprived "firm unilateral promises" (including promissory notes, bills of exchange, promises of reward and others) of binding effects. As was also discussed earlier, Pothier did not arrive at the same conclusion by observing France' existing commercial contract practices but by asking himself (as apparently had also Grotius): What is the "legal nature" of a binding promise, or of a contract (according to the Law of Nature)? [101] In fact, Grotius adjective "immanent" as applicable to the essentially "voluntaristic" feature of all human contractual obligations meant that it was a God given inborne feature of humanity that required that only those obligations accepted by two parties could bind any one of them; regardless of physical evidence to the contrary.

Interestingly, another illustrious thinker had many centuries earlier asked himself a similar type of question. The asker was none other than Aristotle, who, instead of asking himself about the "nature" of things legal as a result of their being part of the law of nature, asked "what is the

[100] Ibid.
[101] *See supra*-Section II(A), text following note 7.

permanent and universal essence of all things, including things legal"? [102] As explained by Wilhelm Windelband's History of Philosophy [103], the objective of Aristotle's scientific and philosophical inquiry was to find the "essences" or the absolutely unique and peculiar features of all things, including legal institutions. And once his observations made it possible to identify those essences, he was able to classify all things in accordance with the peculiarities of each of their species, families as well as of their genus. Relying on these steps, Aristotle created what Windelband described as "the science of logic" or a science that deduced (in syllogistic fashion) unknown findings from the identified, known facts located in the major and middle premises of his syllogisms. [104]

As a young listener to the English philosopher Bertrand Russell radio lectures, I was made aware of the likely data gaps in Aristotelian formal logic conclusions. Thus, if someone had painted a horse white and it was the only horse the syllogistic observer had ever seen, neither that observer's syllogism's major premise ("all horses are white") nor its conclusion ("X is a horse thus he must be white") would be truthful. In fact, this was the same objection expressed by the English Utilitarian philosopher Jeremy Bentham against Aristotle's syllogistic conclusion that money was a sterile or barren commodity that did not earn other money and thus its lender was not justified in charging interest for such an unearned money. As was obvious to Benham, Aristotle had not really searched for the productive or reproductive capabilities of the lent money, for, had he done so, he would have found them [105]

[102] *See,* for example*, supra*-Section III on the definition of usury.
[103] Wilhelm Windelband, History of Philosophy 249-50 (1893).
[104] *Id.,* at 251.
[105] *See* JEREMY BENTHAM, DEFENCE OF USURY, Letter 10-01 (1816). The earlier mentioned Mexican Legal Philosopher Eduardo García Máynez pointed to the same fallacy: "If the conclusion of the syllogism does not reflect

I encountered the same defective formal logic in a question asked of me approximately two decades ago by a beginning contracts law professor who had just arrived to my Arizona class from a French CC inspired country. The topic of my lecture was "The Law of Conditional Sales in United States Law." His question was:

> Could you explain how such sales can legally exist? Is it not true, since the days of Roman law, that contracts of sale are by their nature consensual, meaning that from the moment the parties agree on the things sold and their price, the title or dominium to the things sold belongs to their buyer and no one else? If so, how can such a title be retained by the seller or by anyone else? [106]

Thus, I suggested to my questioner that if he was concerned with a conditional sale's conformity with a legal definition that required that any and all sales must be consensual as defined by the French CC of 1804, he should consider living in a marketplace whose consumer sales were "*synallagmatic*" or, as in Cato's Rome, on a "cash on the barrelhead" basis. But, if he wanted to live in a credit economy when the prices for the goods sold on credit are often paid at a later time to enable such a credit, I also suggested that he keep in mind the advice of the German Romanist and legal philosopher Rudolf von Jhering: Definitional logic considerations should give way to the realization of the socio-economic purposes of legal institutions perceived as needed by the society in question.[107]

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the same data of its premises, there simply is no concluding thought…" *See* Eduardo García Máynez, Essay, *Lógica del Concepto jurídico* 29 (1959) (author's translation).

[106] This professor was in all likelihood referring to Article 1450 of the Spanish Civil Code of 1887, that provides: A sale is perfected between the buyer and seller and will be binding on both if they had agreed on the thing sold and its price even though one or the other had not yet been deliver.

[107] On the importance that Rudolf von Jhering attributed to the purpose of legal institutions, *see* KOZOLCHYK CCC, at 43, 44.

## C. THE ECONOMIC COSTS OF POTHIER'S AND OF THE FRENCH CC DEFINITIONS AND CLASSIFICATIONS

As has become clear with our previous discussion of *Pollicitations* and contractual promises to do, to give or not to do or give, their definitions and classifications were not only redundant but also highly socio-economically costly. In addition, other Pothier suggested definitions would prevent in our day the adoption of highly promising contemporary commercial practices. Consider for example the economic implications of Pothier's definition of a creditor's right to enforce promises to give something:

> The right which the obligation (to give something) gives to the creditor to prosecute the payment of the thing which the debtor bound himself to give, is not a right which gives him…the thing (promised) (*jus in re*), it is only a right against the person of his debtor, so as to have him condemned to give the thing ( *jus ad rem)*. [108]

A contemporary United States commercial lawyer, and especially a litigant, would want to know the implications of defining or classifying a promise to give something as "only" a "*jus ad rem"* especially if such a right was inferior to the rights of secured creditors who held rights in rem such as if they owned the collateral. The validity of such a concern was confirmed by a dictionary that US commercial litigators rely on often:

> *Jus ad rem* is a Latin term of the civil law, meaning "a right to a thing." (Yet), it is a personal right to possession of property that usually arises from a contractual obligation (as a lease). *A Jus ad rem* is a mere imperfect or inchoate right. It is a right exercisable by one person

[108] The quoted English translation is from Robert Pothier, *supra* notes 7 and 99 at 89 available at the Kozolchyk National Law Center Library.

> over a particular article of property in virtue of a contract or obligation incurred by another person in respect to it and which is enforceable only against or through such other person… On the other hand, *jus in re* is descriptive of a right accompanied by possession… which is a complete and absolute dominion over a thing available against all persons. [109] (Parentheses added).

Further, assume that there is a growing practice by secured creditors and their commercial law litigators in the United States (and beginning to expand elsewhere) that relies on "Smart Contract" clauses that allow quick, reliable and inexpensive access to extra judicial remedies against breaches of contact. The Investopedia Encyclopedia defines a "smart contract" as:

> [A]…self-executing contract with the terms of the agreement between (the parties) written into lines of (programmed computer) code. The code and the agreements contained therein exist across a distributed, decentralized "Blockchain" network. The code controls (that) the execution, and transactions are trackable and irreversible. Smart contracts permit trusted transactions and agreements to be carried out among disparate, anonymous parties without the need for a central authority, legal system, or external enforcement mechanism. [110] (Parentheses added).

In other words, by using the "Smart Contract" clause in the coded language of electronic sales, exchanges, leases (financial or regular) transportation and agencies (among other contracts or relationships), if the promisor breaches his promise in the manner described in the smart contract,

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[109] *See* USLegal, Inc., *Jus Ad Rem Law and Legal Definition, https://definitions.uslegal.com/j/jus-ad-rem/* (last visited July 8, 2021). *See* Diamondback Legal, *Diligently Aggressive Legal Representation*, https://diamondbacklegal.com/ (last accessed July 9, 2021).

[110] Jake Frankenfield, *Smart Contracts,* INVESTOPEDIA (May 26, 2021), HTTPS://WWW.INVESTOPEDIA.COM/TERMS/S/SMART-CONTRACTS.ASP.

the applicable law set forth in the smart contract software stipulations will enable the creditor to repossess extra-judicially the described goods or their monetary value wherever located. Obviously, such an economically significant new practice could not be carried out if the applicable law included Pothier's definition and classification of an "obligation to give" restricted the remedies against the breach of obligations *ad rem*.

In fact, from 1960-1964 as a law professor and Director of the Law Institute of the Americas Program at Southern Methodist University School of Law (SMU) I received a steady stream of reports from graduate students returning to their teaching or to their practice of law in Latin America. All evidenced their frustration in trying to convince their local colleagues about the need and feasibility of adopting economic development projects they learned about during their stay at SMU. Despite the success of these projects in other in civil law countries such as in Germany, they failed to persuade their colleagues (many of them legal advisors to government officials) of the importance of adopting new practices and supporting rules for: 1) Promises to do or give something in the future; 2) Conditional sales laws; 3) Public sales of mortgage bonds to finance important public and private construction and industrial projects; and 4)) factoring (i.e., the financing of commercial credit by relying on accounts receivable as collateral.

The uniform response by Latin American government lawyers to my former students was that the proposed new transactions were unenforceable because they were inconsistent with "their law, a law that was inspired by the "mother of all the Civil Codes." Thus, Article 2071 of the French CC contained a definition, that in their opinion, prevented the pledge of accounts receivable whose data was recorded in the debtors' accounting books. It defined a pledge as "a contract whereby the debtor delivers a thing to his creditor as collateral for his debt, and accounting book entries were

not considered corporeal things. Similarly, Article 2073 of the same French CC [111] defined another type of pledge ( *Gage*) as follows: A *gage* confers on the creditor the right to have himself paid from the thing which is the subject of it with priority and preference over other creditors. In the case of the public sale of mortgage bonds to facilitate the financing major public or private projects, the impossibility of their use was caused by Article 2114 of the French CC. It stated in relevant part: "A mortgage is a *right in rem* on real property subject to the payment of an obligation."[112] According to my former students, this provision had been interpreted by local courts as requiring that the issuance of a mortgage bond (creating an "accessory obligation) be preceded by the existence of a "principal" obligation such as the individual loan agreement."

## VI. THE LOGIC OF THE REASONABLE AND COMMERCIAL COOPERATION IN GERMAN AND UNITED STATES LAW

The Logic of the Reasonable guides the choice of legal courses of action, without having to rely on *a priori* definitions and classifications based on unverified permanent and universal essences of things legal, as was the case with Aristotle's formal logic or with Grotius' and Pothier's natural law inspired "immanent" law of nature. Where commercial legal reasoning is concerned, the logic of the reasonable is guided, first of all, by a proven socio-biological fact, such as is the cooperative instinct of the *Homo Sapiens* as the exclusive participant in commerce, one of the most cooperative activities known to man. Recall Professor E.O. Wilson's words:

> As a quintessentially social and cooperative animal, humans…to a unique degree… cooperate and enmesh themselves in social networks , including business ventures and

[111] *See* Dalloz Civil Code Articles 2071 and 2073 author's translation.

[112] *See* Dalloz Civil Code Article which states in relevant part*: "L'hypothéque est un droit reel sur les immuebles affecté à l'aquittement d'une obligation*" (The English translation of this provision in the principal text is by the author.

> transactions…(were they) are also prone to perform altruistic acts as part of their division of labor……Thus was born the human condition, selfish at one time, selfless at another, (although) the two impulses often conflicted. [113]

Hence, according to such proven facts, the Logic of the Reasonable as imbedded in commercial custom and practice is based on past experience, but also must take into account the actual or likely socio-economic consequences of adopting a given new rule or practice. Accordingly, it must help balance the alternatively selfish and altruistic impulses of the archetypal *Bonus Vir* described by Professor Levin Goldschmidt law as a merchant "equally distant from brutal egoism and from other-worldly altruism. " This was a concept that had a profound influence on this author's work on the modernization of international customary and treaty letter of credit (LC) law as well as and on United States statutory LC law. [114]

These impulses are present in a commercial man's attempts to act reasonably by emulating the reasonableness of others, as participants in the same transaction or as members of the same trade

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[113] *See* text accompanying *supra* note 83.

[114] On Goldschmidt's quote, *see supra* text accompanying note 80. On the influence of this quote on this author's modernization of international and US national LC law, *see* Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 (1) BROOKLYN L. REV. 45, 46 (1990) It refers to the adoption by the American Bar Association Task Force for the Revision of U.C.C. Article 5's of the author's proposal to replace the "strict compliance" standard for the examination of LC documents with practices of an archetypal "Reasonable Document Checker "as found in national or international banking document checking manuals. As the Representative of the United States Council for International Banking (USCIB) and member of the Drafting Commission of the Uniform Customs and Practices for Documentary Credits (UCP 500) of the International Chamber of Commerce (ICC), I made a similar proposal. Great Britain's Representative, Bernard S. Wheble, the Honorary Chairman of the ICC Banking Commission objected to the use of the term "Reasonable" stating that in British English the term reasonable meant someone who "was not particularly good or bad at what he or she was doing but just "middling." I replied that, since Lord Mansfield's days, highly respected English judges used the term "reasonable" to depict a merchant or banker who not only knew his trade but also who had the interest of other traders in mind when selecting a course of dealing or a practice that involved him as well (on this exchange of views, *see* KOZOLCHYK CCC at 1129 (note 137). Eventually, UCP 500 (1994) Article 13(a) adopted the "reasonable care" standard of examination, "as determined by international standard practices." Subsequently, similar standards were adopted by §5-108(e) of the U.C.C. (1995) and Article 14(1) of the United Nations Convention on Independent Guarantees and Standby Letters of Credit (1996).

or profession whose conduct is often reflected in the written customs or usages of their trade or profession.

As was discussed by H. Diedrich Jencken, the English historian of European of comparative negotiable instruments' law (See Supra Section III E), it was Germany's Karl Einert who observed how German and Northern European bankers used instruments such as promissory notes and bills of change- not as bilateral contracts of exchange- but as unilateral firm promises of future payments and thus drafted Europe's and the world's first such a law ( the *Wechselgesetz* of Germany's Confederate States of 1849). Similarly, it was the German Civil Code of 1900 (BGB) which introduced the first binding unilateral contractual promise; it was in the form of a public promise of a reward (*auslobung*) as set forth in Section 657 of the BGB:

> A person who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if the latter did not act with a view to the reward.

This pioneering rule was thereafter adopted by the Brazilian Civil Code of (1916), the Italian Civil Code (1942) and a number of other Latin American Civil Codes, including Mexico's Code of the Federal District (1928), and the Civil Codes of Paraguay (1985) and Peru (1984) . [115]

These new practices embodied a new and cooperatively and experience minded version of the Logic of the Reasonable. It linked what was reasonable with the duty to act in good faith and in a cooperative manner; a manner that required a loyalty to a party's contractual "others" as well as

[115] *See*, *Pablo Lerner, Promises of Rewards in Comparative Perspective*, 10 (1) ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 53, 62,63 (2004).

to unknown third parties (such as consumers) and a manner also generally consistent with the tried and tested commercial practices or usages of their respective trades or professions. Thus, Section 157 of the BGB states: "Contracts are to be interpreted as required by good faith, taking customary practices into consideration." [116] Similarly, and as if Section 157 were not enough, Section 242 of the BGB provides that "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration" [117] (Emphasis and Parenthesis added). And Section 347 of the German Commercial Code (HGB) requires that the participants in a transaction cooperatively "use care in protecting the interest of another party…and be responsible to such a party for the use of the ordinary care of a prudent and orderly merchant (*Ordentlicher Kaufmann*).[118]

Another important feature of these German good faith provisions is that they are considered by Civil and Commercial Code interpreters alike as "Super-Eminent norms" and expressly or implicitly part of the Introductory of "General Part" Section of the BGB. The absence of a similar approach as well as the absence of a clarification of the normative hierarchy of good faith, reasonable and fair practices and rules will be apparent in the two selected Mexican court decisions where one of the courts was faced with inconsistent principles of contract law adjudication. Thus, the *Viteri and Heirs* decision does not explain how should a court reconcile the former Mexican CC's requirement that an equitable interpretation be used in for profit ("onerous") contracts

[116] The English translation of BGB Section 157 is available in GESETZE IM INTERNET, http://www.gesetze-im-internet.de/ (last visited July 8, 2021).

[117] *Id., at* BGB Section 242.

[118] As pointed out by Eduardo García Máynez, the German Philosopher Immanuel Kant had distinguished between moral and legal categorical imperatives by pointing out that while moral categorical imperative required a conduct that could become universal, the legal imperative required a conduct whose freedom was consistent with that of another's, *see*, EDUARDO GARCÍA MÁYNEZ, ESTUDIO DE LAS RELACIONES QUE MEDIAN ENTRE LA MORAL Y EL DERECHO 26 (1930).

requiring reciprocity of profits, with the procedural law principle of "prayed for justice" (*justicia rogada*) that forbids the courts' granting procedural remedies other than those expressly requested by the parties to the dispute.

It should be noted that the formal logic the French CC seems to be, slowly but surely giving way to the Logic of the Reasonable. As was shown in Section II C of this Article, the 2016 amendments to the French CC acknowledged the new role of the Logic of the Reasonable in France's contemporary commercial contract law. In fact, as was noted in Section II C, 8 of these amendments rely on the Logic of Reasonable for various normative purposes.[119] Similarly, the adoption of the NatLaw inspired OAS Inter American Model Law of Secured Transactions of 2003 and its accompanying 12 Natlaw Principles of the Law of Secured Transactions[120] introduced 10 Latin American nations to the Logic of the Reasonable that guides secured transactions law and its practices. Hence, thanks to the reasonableness of these principles and rules, commercial credit at reasonable rates of interest have become available for the first time to large numbers of small businesses in the Americas.

The following Latin American, German and United States decisions are representative of the application of the formal logic by Mexican courts and of the Logic of the Reasonable by German and United States appellate courts as well as by the Supreme Court of Costa Rica, and, despite

[119] *See supra*-Section II(C).

[120] *See*, *NLCIFT 12 Principles of Secured Transactions*, KOZOLCHYK NATIONAL LAW CENTER http://natlaw.com/report/nlcift-12-principles-of-secured-transactions/ (last accessed July 14, 2021). Among other examples of reasonable principles of secured lending, Principle 2 dispenses with the traditional formal requirement of the debtor's title to the collateral, replacing it with the more accessible and thus reasonable requirement of the debtor's lawful possession of it. This "cooperative" principle has enabled large numbers of borrowers in developing nations to access commercial and consumer credit at reasonable rates of interest.

their age, they continue to be influential precedents in their respective jurisdictions, which was a key reason for their inclusion.

## VII. FORMAL LOGIC V. THE LOGIC OF THE REASONABLE IN CONTEMPORARY COMPARATIVE COMMERCIAL JUDICIAL ADJUDICATION

### A. MEXICAN DECISIONS

#### *1. María Trinidad Gómez Jiménez—Supreme Court of Mexico Direct Civil Amparo (125 SJF5a 355 (1955)* [121]

Summary of Supreme Court Opinion. [122]

A promise to sell only creates obligations to do and is only binding on either party once it becomes part of the text of the future sale agreement. Its enforceability also requires that the final contract be in writing, and that it contain all the essential elements and characteristics of a final contract. Articles 2163 to 2167 of the Civil Code of Jalisco clearly state that a promise to sell must include the elements particular to a sale agreement, i.e., its description of its agreed upon object and price. A promise to sell does not transfer ownership of the offered goods; it only creates an obligation to do something—i.e., that of the granting the final contract by the obligated party provided that the other party requests it within the term stipulated in the promise…

Third Paragraph: The appellant refers to the violation of various articles of the Civil Code of the State of Jalisco and others of its Code of Civil Procedure. According to the appellant, the court disregarded the law which only requires the transfer of property rights from the seller to the buyer for a sale agreement to be enforceable, provided that the parties had agreed on an identifiable thing

[121] *See*, KOZOLCHYK CCC at 1004-1007. First published in the United States in WOODFIN L. BUTTE, SELECTED MEXICAN CASES 305–08 (1967).

[122] Summary by the author of this Article.

and its price, even when the former has not been delivered or the latter has not been paid, in the absence of an agreement otherwise.

This allegation has no merit because Articles 2163 to 2167 of the Civil Code of the State of Jalisco apply only to preparatory contracts, specifically those in the form of a promise to do or give something in the future. (As apparent in these provisions) it is established law that one can undertake the obligation to execute a future contract, allowing for this contract to be a preliminary contract or a promise, whether unilateral or bilateral. It is also established that the promise of a sale only creates an obligation to do something in the future, and that future something consist of the seller agreeing to the final contract of sale in accordance with what was offered. (Emphasis and Parentheses added).

Comment: Notice that the Mexican Supreme Court not only accepted the Roman law inspired classification of promises to give and to do but also relied on a post Roman classification of contracts as "final" or "preparatory." Hence, the present preparatory contract created a future obligation to do (i.e., "execute the sale contract") instead of an immediate obligation to give ("transfer now the property rights to the real estate property to the holder of the option to purchase). Please note the importance of formal logic classifications in this adjudication of breaches of contract in contrast to an experience, market transactions-based logic.

Yet, what about the "living law" of options to buy and sell in Mexican real estate practice? What do everyday buyers and sellers, or their brokers do if a bona fide buyer needs a period of time to find out if the parcel in question fulfills basic business operational needs such as good access to, electricity or water, or to a reliable terrain upon which to build a multi-story building? Such a buyer would be willing to pay a reasonable amount of money to be allowed to answer those

questions within a reasonable amount of time and if he is satisfied with the answers immediately and without the need of legal proceedings proceed to buy the property. Why not allow such binding options to buy or sell, which have proven to be the rule and not the exception in most economically developed nations?

Natlaw used this case to illustrate the need for the modernization of various areas of Mexico commercial law and with the cooperation of the Federal District Court of the Mexican Federal District organized a 2009 Symposium on the Enhancement of Mexican Commercial Adjudication and invited judges, legislators, lawyers, notary publics and real estate brokers as participants and published its proceedings in 2010.[123] The following was the reaction of AMPI, Mexico's Association of Professional Intermediaries (mostly brokers) to the *Maria Trinidad Gomez* decision:

> As real estate brokers, we would not be able to engage in transactions to purchase real property by relying on the very needed binding options to buy or sell the discussed urban real properties. Without these options, it would be particularly difficult to obtain judicially the public deeds of sale by the same seller who agreed to sell such a property. How could we justify to our clients the time and expense that such a circuitous pre-judicial and judicial procedure would take? …In answer to your question, we do not think that the procedure set forth by the Supreme Court in the Amparo by Maria Trinidad Gomez is in touch with realities of the Mexican real estate urban marketplace. [124] (Emphasis added).

[123] See, Symposium, Enhancement of Mexican Commercial Adjudication by Improved Transactional Fact-Finding, Application of Equitable Principles, and Drafting of Standard Contracts and Best Contractual Practices: English Materials**,** 27 ARIZ. J. INT'L & COMP. L. 362-363 (2010).

[124] *See* other comments to this Symposium in KOZOLCHYK CCC who preferred to remain anonymous, at 1007-8.

2. *Ingeniero Jorge Viteri and his Heirs. Supreme Court of Mexico, Direct Civil Amparo 123 SJF 5a 315 (1955)* [125]

Facts: Mining Engineer Jorge Viteri (hereinafter Viteri) agreed with the owners of an unproductive oil well that he would be in charge of a joint project to significantly improve the productivity of the mine and that in doing so would invest his efforts as well as other necessary assets, including the payment of his own salary. In exchange of Viteri's contribution to the joint venture, the oil well owners agreed to pay him 50% of the royalties of the sold petroleum after its production had reached and agreed upon, improved, level of production. Several (unspecified) years after this agreement was signed, production had improved sufficiently such that in 1941 Viteri started receiving his 50% royalties. However, (after an also unspecified time) Viteri died, and the well owners suspended the payments of his agreed upon royalty. They alleged that the legal nature of their agreement with Viteri was of a "strictly personal" (*estrictamente personal*) type of contract[126] or one dependent upon his personal professional capabilities and that upon his death the agreement was automatically terminated, and no further payments were due to his heirs. (Emphasis added).

Aside from alleging the mistaken application of the law by court below, the appellants' heirs of Viteri argued that the court below disregarded the true intent of the joint venture. Their intent was to bring an unproductive oil well into full production by using both Viteri's considerable professional expertise as well as his investment of time and money. Viteri completely performed his contractual obligations transforming, after much effort, time, and money an unproductive into a productive oil well; accordingly, and justifiably they asked for 50% of the profits accumulated

[125] The English Translation of this decision is by the author of this Article. For its complete English text and commentaries *see* KOZOLCHYK CCC at 1068-1075.

[126] Please recall that the use of the term "legal nature" of a legal institution is traceable to Robert Pothier's reliance on the law of nature as a source of the true being of things legal, a reasoning pioneered by the Aristotelian search of the permanent and universal "essence of things", *See* text accompanying *supra* note 101.

after a surplus amount of production had been reached. His function as an everyday manager of an already productive project was secondary to the real purpose of the joint venture which was to make the well fully productive again. This secondary phase of the project could be carried out by any competent project manager, of which there were many. Viteri's death was a fortuitous event that had nothing to do with the contractual obligation to pay royalties for the remainder of useful life of the oil well. The lower court's formalistic and rigid characterization of the joint venture as a "strictly personal" contract between the owners of the oil well and Viteri misinterprets a number Commercial and Civil Code provisions listed hereafter…(citations omitted).

Supreme Court of Mexico Decision: [S]ince Viteri could no longer render the services he was expected to perform, the condition subsequent of Article 1949 of the Mexican Civil Code and its rescissory remedy of termination of the contract between Viteri and the owners of the well were properly triggered…[127] The important thing is not that the technical (general managerial work) could or could not be performed by someone else, but that the legal nature of Viteri's contractual work is strictly personal. Thus, if Viteri could no longer perform it, the other party to the contract had the right to rescind it [128] …It is possible that the first task carried out by Viteri (to bring the oil well into commercial production) was of greater economic importance and might justify greater compensation than did his permanent work as a project manager…It is also possible that Viteri's first task might represent, say 25% of the surplus oil production, and the permanent management work might represent another 25%. If that were the case, Viteri's heirs might have been able to inherit Viteri's 25%...Nevertheless, the complaint was drafted in a manner that made it impossible

[127] Article 1949 of the Mexican Civil Code of 1928 states in relevant part that: The power to rescind (contractual obligations is deemed implicit when they are reciprocal and one of the parties does not fulfill what he was supposed to do.

[128] *Ibid*.

to render a decision against the defendants… The complaint expressly stated it was exclusively for the 50% allegedly owed to the Appellant without any additions or deductions and under this assumption it encompassed all of Viteri's duties and obligations including that of Project Manager. Given the manner in which the complaint was drafted, had this Court held against the Defendant, it would have violated letter and the Spirit of Article 1327 of Mexico's Commercial Code…Consequently, we most hold against the Appellants.

Comment: Article 1327 of the Mexican Commercial Codes states: "The Court's decision shall deal exclusively with the actions and defenses plead by the parties in their Complaint and Answer." [129] This provision is the Mexican law version of a widely followed (Civil law) procedural or remedial law principle of "*Justicia Rogada"* (Only the "Prayed For" justice by the parties can be granted by the courts). [130] On the other hand, Article 1857 the Mexican Civil Code of 1932, in effect at the time of this decision instructed courts interpreting for profit (onerous) contracts to do what was equitable when doubts about the parties' contractual or remedial intent were unresolvable:

> When it is absolutely impossible to resolve the doubts on how to interpret a contract by following the rules set forth in the preceding articles…If the contract was for profit, the doubt should be resolved in favor of the highest measure of reciprocity… *"*[131]

As noted in the preceding section, such likely antinomies are expected in codes that lack the "Super Eminent" principles of adjudication of the "General Part" of the German BGB. [132] Civil Codes

[129] Artículo 1327: *La sentencia se ocupará exclusivamente de las acciones deducidas y de las excepciones opuestas respectivamente en la demanda y en la contestación*.

[130] For a comment of the popularity of this provision in other Latin American jurisdictions, *see* KOZOLCHYK CCC at 1151.

[131] Yet, the present (amended) version of Article 1857 states that when the contractual intent cannot be established the contract should be declared null and void.

[132] *See supra*-Section VI, paragraph following note 114.

such as the French CC not only lack a clear normative hierarchy for their legal principles but are replete with rules and principles of presumed equal permanence and universality, thus rendering judicial adjudication often uncertain when not unreasonable and unequitable.

## B. GERMAN DECISIONS

### *1. Good Faith, Reasonableness and Abuse of Rights: A 1935 Decision of the Imperial Court Commented by Professor Rudolf Schlesinger*

Prof. Rudolf B. Schlesinger was the principal author of one of the 20th century's finest comparative law textbooks.[133] It illustrated the application of the good faith and reasonableness doctrines with a decision on an alleged abuse of corporate shareholders' rights under German law. In this 1935 decision by Germany's Imperial Court, it held:

> Defendant had alleged and offered to prove that the plaintiff, who had been active in other stock corporations as a professional oppositionist was bent on obtaining personal rather than corporate benefits, and was engaged in the same kind of practice in other corporations. . . [H]e obstructed corporate decision-making carried solely for the purpose of acquiring the shares of the "W" family at a cheap price and to compel either his election as a director or the distribution of a higher dividend; and that the present action, again, was to serve plaintiff's own selfish rather than corporate purposes….A shareholder has the right to attack those resolutions of the corporation which are inconsistent with the law, even though they may cause no detriment to him personally. But this right has limits and

[133] *See* RUDOLPH B. SCHLESINGER ET AL. COMPARATIVE LAW 574-575 (5th ed., 1988); for a comment on the importance of this decision, *see* KOZOLCHYK CCC at 1029-30.

where it conflicts with the duty of loyalty and faithfulness which the shareholder owes the corporation in which he is a shareholder, (a duty that permeates all the rules of corporate law) it becomes abusive and unenforceable. . . . The idea of the impropriety of an abuse of rights found statutory recognition in . . . Section 226 of the [BGB]... Beyond the confines of that provision, however, the same principle must apply whenever the exercise of a right constitutes a gross violation of the maxim that dominates the (nation's) entire field of private law, the maxim of *bona fides*. . . . Decisions of this court have repeatedly recognized that the principle of *bona fides* contained in Section 242 of the [BGB] constitutes a general limitation upon the exercise of rights also in the law of stock corporations and of limited liability companies. [134] Thus, Section 226 of the BGB states: "The exercise of a right is improper if it cannot have any purpose other than that of harming another.*"*[135] (Emphasis added).

Comment: As was customary with Professor Schlesinger's analysis, he clearly and precisely identified the abuse of right doctrine as a consequence of the duty to act in good faith. I would add that, consistent with that analysis, the abuse of rights appears as a species of bad faith whose frequency and harmfulness has persuaded some legal systems, such as Germany's, to provide an injunctive remedy against such abuses. Reasonableness plays a central role in awarding this remedy because in principle, the holder of a right, whether *in rem, ad rem*, or *in personam*, is entitled to exercise it; otherwise, why refer to it as a right? The remedial issue, then, consistently with the conduct of the Roman *Bonus Vir* and with the need to balance his selfish and altruistic impulses that Professor Goldschmidt first called attention to, requires a

[134] *Ibid*.
[135] *Ibid*.

court interested in determining whether a right was truly abused to ask whether the use of the right in question was unreasonable.

### C. THE LOGIC OF THE REASONABLE IN UNITED STATES CASE LAW

The application of the Logic of the Reasonable by US courts in contractual and tort disputes has helped considerably the US courts' creation of binding precedents, and on occasion, the drafting of quasi statutory rules of a broad influence on the predictability of disputes involving transactions in the US markets for goods and services. Thus, it has helped to create judicial quasi- statutory rules that have strongly stimulated the economic growth of the United States. The following decisions exemplify such a reasoning and resulting growth

#### *1. The Frigaliment Decision by Judge Henry Friendly*

The central factual issue of Frigaliment Importing Co., Ltd. v. B.N.S. International Sales[136] was the meaning of the term "Chicken" in United States import/ export market of 1960. More precisely, what did the seller and buyer of chicken mean by their use of this term when each had a different version of its agreed upon price? The seller proved (with the help of official regulatory documents and private parties' contractual documents) that there were various types of chicken, and that, depending upon their price, the profits associated with their sale varied considerably. In addition, he proved that if the court determined that the agreed upon price was that asserted by the buyer (which the seller denied accepting) the sale would result in large profits for the buyer and in serious losses for the seller. After examining the numerous documents exchanged by the parties, including

[136] *Frigaliment Importing Co., Ltd. v. B.N.S. Int'l Sales Corp*., 190 F. Supp. 116 (S.D.N.Y. 1960). This case is fully discussed in KOZOLCHYK CCC at 1094-1097.

numerous lists of prices submitted by regulatory authorities and other market participants, Judge Friendly concluded that regardless of the meaning of the term chicken : "Plaintiff (the buyer) must have expected the defendant to make some profit, certainly it could not have expected the defendant deliberately to incur a loss."[137]

With this reasoning, this judicial precedent illustrated the role of reasonable and equitable contracting which requires that each party place himself in the "shoes" of the other party and accept the application of the principle of reciprocity of earnings. Such an expectation was codified by the Uniform Commercial Code of the United States. As pointed out by the Court of Appeals of California, the U.C.C. sets forth an implicit agreement by the parties to "act in accordance with good faith and just treatment which will prevent the parties from doing anything that might harm the other party's rights to earn the profits derived from their agreement. [138]

### 2. *Fiduciary Contracting Parties and the Reasonableness of Entrustment: The Meinhard v. Salmon Decision by Justice Benjamin Cardozo*

Summary of Facts:

On Certain occasions, Anglo American legislators or judges have to address duties of commercial cooperation that exceed those of markets such as for New York's wholesale import and export of chickens. The most demanding duties of cooperation are found in fiduciary transactions, or in transactions in which one of the parties relies on the other party's knowledge, experience or superior bargaining power and entrusts him with his savings and with the key decision-making of

[137] *Id*., at 109 F.Supp.121.

[138] *See Steinmeyer v. Warner Consol. Corp*., 42 Cal. App. 3d 515, 519 (1974). *See* also U.C.C. § 2-609 (1) which in relevant part states: (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired…"

their joint venture. Such was the contractual relationship addressed by Justice Cardozo (at that time an Appellate Judge of the Court of Appeals of New York) [139] in his 1928 decision in *Meinhard v. Salmon* [140] Defendant Salmon was a tenant in a New York's City building originally rented by the Hotel Bristol. Plaintiff Meinhard was a co-investor in Salmond's project to transform this hotel into a commercial building. Meinhard provided 50% of the cost of reconstruction and in return he was promised 40% of the profits produced by the rentals of the rebuilt building. Eventually this investment yielded nice profits for both parties. Yet, as Salmond's lease was about to expire, the owner of a larger contiguous set of buildings offered Salmon that he manages the construction and leasing of a much larger set of buildings contiguous to the former Hotel Bristol. Without informing Meinhard of this offer, Salmon created a new company whose projected revenues were ten times larger than those yielded by the original joint venture.

Meinhard sued Salmon and demanded to be allowed to participate in the new venture because such a new venture would not have been possible without his earlier investment and full entrustment of Salmond as the manager of the successful original venture. Judge Cardozo's decision focused on the relationship between the parties as the original joint venturers and found, in a manner reminiscent of both the German BGB and HGB that:

> Joint venturers, like copartners, owe to one another, while their enterprise continues to do business, "the duty of the finest loyalty" and added that: "Many forms of conduct permissible in a workaday world for those acting at arms' length, are forbidden to those bound by fiduciary ties. A fiduciary is held to something stricter than the morals of the

[139] Subsequently, Cardozo became a Justice of the Supreme Court of the United States.
[140] *See* MEINHARD V. SALMON, 249 N.Y.458 (1928).

marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior…" [141]

This Cardozo holding, became a standard principle of adjudication, especially in arbitration proceedings on the fiduciary duties of brokers entrusted with the management of investments not only in the United States but also in other important financial markets. [142]

## D. THE COSTA RICAN SUPREME COURT DECISION IN J & P COATS LTD V. LUIS JIMENEZ A. SUCS LIMITADA

### *1. Prologue:*

From 1967 to 1970, I was the Director of a Law Reform Project of Costa Rica *(Proyecto de Reforma Jurídica)* (hereinafter Project) sponsored by University of Costa Rica and by the United States Agency for International Development (USAID) in Central America (ROCAP). Part of my work was to help modernize Costa Rica's commercial law by co-authoring a comparative commercial law textbook with Professor Octavio Torrealba of the University of Costa Rica Law School for use in Costa Rica's law schools. The late and lamented Professor Torrealba was one of Central America's most respected commercial law professors and law practitioners; fortunately, we soon developed a close working relationship and friendship. We also agreed that, given his immediate involvement in ongoing litigation at his law firm, the remaining Project researchers and I would select a group of Appellate (*Casación)* Supreme Court and Superior Tribunal (Tribunal Superior) decisions and prepare a chronological index starting in 1900 and finishing in 1966. The

[141] *Id.,* at 464.

[142] Following the publication of KOZOLCHYK CCC (first edition, 2014) and my references to Cardozo's fiduciary standard "of the punctilio of an honor de most sensitive" (*uberrima fides*) as applicable to the financial management of investments (*See* KOZOLCHYK CCC at 951, 998, 1008 and 1013). I received e mails from former Australian, European, Japanese and Korean students indicating that a similar standard was now applied in the arbitration of fiduciary financial disputes in their respective countries.

index would be accompanied by short references to their subject matter. The criterion of selection was the likelihood that the included decision would likely influence the modernization of Costa Rica's commercial law and hopefully its economic development as well. This criterion would also make some of the selected decisions helpful material for class discussion as part of our future textbook.[143]

We discussed this idea with Professor Eduardo Ortiz who enjoyed the same respect among Costa Ricans and Central American Public (especially Administrative) law professors and practitioners as did Professor Torrealba among commercial lawyers. He suggested that we publish the selection of cases in the University of Costa Rica's Law Review *(Revista de Ciencias Jurídicas)* that he directed and where he prologued its publication as follows:

> As one of the first fruits of the Project, the selection and reasons for the inclusion of cases in the Index already evidences its exceptional utility for our developing legal system and nation…Until this Project, Costa Rican researchers had lacked access to its most significant commercial case law. Further, the myth that our case law was not binding on our courts was responsible for the large gap in identifying both our positive and living law; a myth that is still taught in our law schools and that many lawyers repeat in their court pleadings. And all of this, despite that Costa Rica's Supreme Court, and especially its Appellate Branch (*Casación*) is one of the most respected in Latin America. This is a branch that

[143] I owe to Professor Federico Torrealba of the University of Costa Rica School of Law, one of Professor Octavio Torrealba's sons and academic and law practicing successor (who is also a partner of the Facio y Canas Law office of San Jose Costa Rica (the successor to this father's law office) the complete texts of the lower, appellate and Supreme Court decisions in the J & P Coats v. L. Jimenez court decision. Since these texts had to be reprinted and made part of a special copy with consecutive page numbering, I will refer to it, hereinafter, with deep gratitude, as the "Torrealba text", followed by the page number of that text. This text is available to the reading public at the Kozolchyk NatLaw Latin American law collection.

> each day confirms its judicious nature and faithfulness to precedent…(to the point that) presently the most successful Costa Rican litigant is not an academic who aspires to change existing case law with his theories for every case he litigates but one who knows how to incorporate the novelty or significance of his interpretation of the existing law within the boundaries set by judicial precedent.[144]

In the process of selecting decisions, I came across the above-mentioned *J & P Coats Ltd v. Luis Jimenez decision* and immediately noticed how the Supreme Court's discarded a rigid and unfair application of the French "attributive" principle of intellectual property rights in favor of applying what earlier in this article I had described as Germany's CC's "Super-eminent" principle of good faith. Recall that this principle only protected a commercial behavior that was honest, reasonable and fair. [145]

### *2. Facts*

The following summary of facts was prepared by Chief Justice Fernando Baudrit in his Introduction to the case:

> Plaintiff, J&P Coats, an internationally known Scottish manufacturer of sewing machine cotton (*algodón de maquina de coser*) filed a trademark application with Costa Rica's Registry of Trademarks in June of 1912. It included a "thread spool label" (*etiqueta de*

[144] *See*, Boris Kozolchyk, *Jurisprudencia Mercantil (1900-1966),* SEPARATA REVISTA DE CIENCIAS JURÍDICAS, UNIVERSIDAD DE COSTA RICA *(*1966). Unfortunately, since Professor Torrealba was unavailable during the preparation of the Index, it does not bear his name as a co-author, as I had suggested to him that it should, yet he would not accept my suggestion.

[145] *See* text following *supra* notes 116 and 117.

*carreta de hilo*) that bore an English inscription that tersely read: "*J&P Coats, Sewing Machine Cotton.*" The center part of the filed label contained a drawing of a chain (*cadena*) with the words "Best Six Cord" *(Mejores Seis Cabos)* and the word "Trademark" (*Marca de Fabrica)*; it was surrounded by lateral references to the number of yards of thread of the spool in question (such as 300 or 400 yards). The entire text of the filed label was highlighted by a strong blue colored print on a white background that also included a picture of the above-mentioned chain.

For more than 40 years, this sewing machine cotton was known by most users in Costa Rica as well as in other Latin American countries as "*Hilo Marca Azul"* ("Blue Mark cotton thread") or as "*Hilo Cadena, Marca Azul*" (Blue Mark Thread or Chain/ Blue Mark Thread). One of the facts referred to as "proven facts" by the lower court was that the original filings by J&P Coats remained unchanged for more than thirty years. However, in August of 1951, the defendant, a Costa Rican importer named Luis Jimenez and Co. filed an application for a new trademark and described the imported threat as "*Hilo Marca Azul, Legítimo, Seis Cabos"*) (Thread Blue Mark, Legitimate, Six Cords), obviously repeating the widely used popular name for Plaintiff's product. Plaintiff filed an action for unfair and unlawful competition demanding the immediate annulment of the filed trademark and trade name. It alleged that its product had been known by the Costa Rican buying public for more than thirty years precisely by the same name that the defendant was trying to ascribe to his imported sewing cotton thread. In doing this, the defendant had created a deceptive and confusing impression among the vast number of Costa Rican users of a similarly referred

to product, thereby unjustly enriching itself at the expense of the Plaintiff's multi-year labor and good name. [146]

### *3. The Decisions*

The lower and the appellate courts held for the defendant, claiming that the wording of the trademark filed by the defendant differed markedly from the wording filed by the plaintiff. Thus, the description of the thread and its graphic designs differed from those of the J & P Coats descriptions and graphic designs. Similarly, the place of manufacture of its sewing cotton thread (Czechoslovakia) differed from that of the plaintiff's cotton thread which was imported from Scotland. In addition, the cotton thread sold by J&P Coats was of the "combed and flattened" (*algodón peinado y aplanchado*) variety, which was more suitable for making "rough" "men's" shirts, than the "silked" (*sedoso o asedado*) cotton thread used in the making of women and children's clothing by the defendant.[147]

In sharp contrast to the preceding factual and legal analysis by the lower first instance and appellate courts, Chief Justice Fernando Baudrit's opinion pointed first to the lower courts' reliance on facts that they accepted as "proven": 1) the thread manufactured by the Scottish company was known in Costa Rica for more than thirty years by the same name used by defendant's 1951 filing of his alleged trademark, even though the defendant's company was not even in existence during most of that time; 2) it was the same name used by plaintiff's customers during that period of time when ordering sewing machine thread in Costa Rican stores (*Hilos Marca Azul*)… Accordingly the defendant's filing of those well-known "*the facto*" trademarks were the very acts of unlawful and

[146] *See* Chief Justice Fernando Baudrit of the Costa Rica Supreme Court summary of the relevant facts listed in the principal text, *See* Torrealba text at 1 and 2.

[147] For the lower and appellate courts' version of facts and law applicable, *See* Torrealba text at 3-13.

unfair competition that Article 52 of Costa Rica's Trademark Law No. 559 of June 24 of 1946 (in relevant part) defined as "deceiving acts or facts…that violated commercial good faith in a manner that revealed the defendant's intent to take advantage of another's hard work or reputation. Hence the Supreme Court held that the lower court decisions had to be reversed. [148]

In addition, Chief Justice Baudrit's opinion held that the fact that the cotton thread manufactured by J & P Coats was exclusively known by most Costa Rican users as *Hilo Marca Azul* was not the result of a capricious choice of name (*simple capricho*) but because this was the same principal color of the filed trademarked label since 1911. Similarly, the legend "Six Cords" of the same label which was also a part of the J&P Coats filing, appears in the text of defendant's filing of his supposedly new trademark as "Seis Cabos" (the Spanish translation for Six Cords). Finally, the defendant used the Spanish term "*Legítimo*" (Legitimate) as the Spanish equivalent of J & P Coat's reference to its sewing cotton as the "Best."

Chief Justice Baudrit compared the German "attributive" filing system of trademark and trade name protection with the French "declarative" system. [149] The former system was described by respected commentators and courts as one employed by a merchant or manufacturer whose filing relies on the sign that distinguishes his products (*solo el que inscribe el signo con que distingue sus productos*).[150] In other words, the attributive system assumes that the filer either makes or sells or both the same filer's pre-existing products. In contrast, the French declarative system relies on the mere declaration or statement of the filer that the filed name or mark is the one that will be borne by his future products. In the words of Justice Baudrit, the filing of a trademark or trade

[148] For the text of the decision by Chief Justice Baudrit, *see* Torrealba Text at 15-25.
[149] *Id.,* at 18-20.
[150] *Ibid*.

name governed by the declarative system does not reflect or add any market value to a pre-existent (and earned) trademark or trade name right) *(El registro nada agrega al Derecho pre-existente)*. He pointed to a growing case law in countries that have adopted the German attributive system, such as in Argentina[151], where commentators and courts are rejecting practices and rules that are contrary to the principles underlying the ethics of the "strict" attributive system, and thereby encouraging avarice and bad faith by using the pretext or shield of a supposedly rigid or formalistic attributive system. [152] In doing this, the countries that adopted the German attributive system are following what German courts decided when they realized the negative effects of an unreasonable and inequitable application of the attributive system during the decade of 1894 -1904:

Accordingly, a decision of 21st of June of 1907 of the *Reichgericht* turned to Article 826 of the German CC which states that: A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.[153] In doing this, it resorted again to a Super Eminent Principle of good faith and its components of honesty, reasonableness and fairness as used in the German law of torts. Justice Baudrit, acknowledged with pride that his decision in the JP Coats case was inspired by similar principles.[154]

## E. Epilogue and Final Conclusions

In the Fall of 1994, I received a phone call from a Phoenix lawyer who introduced himself as a member of INTEL Corporation's legal staff (and whose name I have unfortunately forgotten

[151] *Ibid*.
[152] *Ibid*.
[153] *Id.,* at 22-24. *See* Article 826 of the German Civil Code in Service provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice – www.gesetze-im-internet.de.
[154] *Ibid*.

during my subsequent senior years). He told me that he had heard that I had directed a multi-year Law Reform Project in Costa Rica and asked me if I could share with him my impressions about the respect for the Rule of Law in Costa Rica, especially by its courts. He added that INTEL was considering a significant investment in Costa Rica and would appreciate my opinion on how Costa Rica's judicial system compared with that of that of other Latin American countries I was familiar with. I told him that I had a very positive impression of Costa Rica's Supreme Court's decisions, and their support for the rule of an honest, reasonable and fair law. I added that I was familiar with a particularly impressive decision by the Costa Rican Supreme which relied on a German law inspired statutory and judicial doctrine good faith to annul a bad faith filing of a trademark thereby creating a binding precedent that encouraged honest, reasonable and fair commercial and administrative trademark practices. I added that decisions such as *J & P Coats Ltd v. Luis Jimenez* were not common in Latin America.

I did not hear back from him but a few years later I was invited to give a talk by the Costa Rican Bar Association. After my talk, two Costa Rican lawyers who introduced themselves as INTEL lawyers told me that since 1997 Costa Rica's INTEL plant had employed thousands of well trained and well-paid workers and had become a "microchip" hub for many other Latin America countries. They thanked me for my praise of Costa Rica's judiciary which they had heard had been considered by INTEL when deciding to invest in Costa Rica, an investment that, in their view had meant much for Costa Rica's economic development.

In conclusion, commerce, as perceived by a long and distinguished list of social and biological scientists, is a cooperative, albeit egotistic and altruistic endeavor. But from a normative legal standpoint, the contrasting economic development experiences between a method of reasoning that

is both amoral and formally logical, and a method of reasoning that is moral, reasonable and fair could not have been starker. The reason for this disparity is simple: neither widespread commerce nor significant economic development can prosper in a distrustful environment. And as shown by Costa Rica's, Germany's, Great Britain's and the United States' experiences, trust is only earned by honest, reasonable and fair commercial practices and by a law that reflects them.