



## THE NEED TO REMOVE THE CIVIL CODE FROM MEXICAN COMMERCIAL LAWS: THE CASE OF “OFFERS” AND “FIRM PROMISES”

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*ABSTRACT: In 1889, then Mexican President Porfirio Díaz enacted the Mexican Commercial Code that is still in force today. This code was inspired on the Napoleonic code of 1807. Unfortunately, the Mexican code eliminated the use of commercial customs and practices as an accepted method for breaching gaps in commercial law. Since then, Mexican commercial law has held the civil code as the basis for dealing with gaps and loopholes in the application of commercial law. This has prevented the further development of Mexican commercial law as it is forced to use institutions and doctrines that were not designed to deal with rapidly changing commercial issues. Mexican commercial law would benefit from the reincorporation of commercial customs and practices as a basis to fill in the gaps in the law.*

*KEY WORDS: Commercial law, commercial code, civil code, comparative law, customs and practices, business practices.*

*RESUMEN: En 1889, el entonces presidente Porfirio Díaz promulgó el código de comercio que actualmente rige en México. Este código estaba inspirado en el código promulgado por Napoleón en 1807. Desafortunadamente, el código mexicano eliminó los usos y costumbres mercantiles como fuentes supletorias para el derecho mercantil. A partir de entonces, el derecho mercantil mexicano ha estado sujeto al código civil como guía para llenar las lagunas y vacíos en la aplicación del derecho mercantil. Esta medida ha evitado el desarrollo del derecho mercantil mexicano al utilizar instituciones y doctrinas que no fueron diseñadas para lidiar con la rápida evolución de los negocios mercantiles. El derecho mexicano*

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*se beneficiaría de la eliminación del código civil como fuente supletoria y la reincorporación de los usos y costumbres mercantiles.*

PALABRAS CLAVE: *Derecho mercantil, código de comercio, código civil, derecho comparado, usos y costumbres, prácticas comerciales.*

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I. INTRODUCTION

In the autumn of 1806, while campaigning in Germany, Napoleon received notice of a scandalous bankruptcy in Paris.<sup>1</sup> The bankruptcy of M. Récami-er's bank prompted the Emperor to order the creation of a new, more severe bankruptcy law.<sup>2</sup> The response from Paris was to include the new law in the Commercial Code.<sup>3</sup> It was this event that prompted the Emperor to resume the formulation of a Commercial Code, a task that had been suspended for about five years.<sup>4</sup>

The truth is that the Emperor was not particularly interested in the creation of a Commercial Code. Two were the issues that actually preoccupied him: to "save" non-merchants from the application of commercial law and to enact a law of bankruptcy.<sup>5</sup> This lack of interest may explain why some consider the *Code de Commerce* the most carelessly drafted of all Napoleonic codes.<sup>6</sup>

The French Commercial Code was one of the main sources of inspiration for the Mexican Commercial Code.<sup>7</sup> Napoleon's disregard was based on his

<sup>1</sup> IX THE CAMBRIDGE MODERN HISTORY 177 (A.W. Ward, G.W. Prothero & Stanley Leathes eds., 1907).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 177-178.

<sup>6</sup> This opinion was expressed by Pardessus, according to the CAMBRIDGE MODERN HISTORY, *supra* note 1 at 178.

<sup>7</sup> See Jorge Barrera Graf, *Codificación en Mexico, Antecedentes, Código de Comercio de 1889, Perspectivas* [Codification in Mexico, Background, Commercial Code 1889, Perspectives], in CENTENARIO DEL CÓDIGO DE COMERCIO 69, (UNAM ed., 1991). See also Jorge Barrera Graf, *Evolución del Derecho*

distrust of the merchant class.<sup>8</sup> This distrust was, unfortunately, incorporated into the Mexican Commercial Code [CÓD.COM.].

Article 1 of the CÓD.COM. orders that “[c]ommercial acts shall solely be regulated by this code and other applicable commercial legislation.”<sup>9</sup> Meanwhile, Article 2 removes the possibility of employing commercial practices or commercial customs in the interpretation of the CÓD.COM.: “[l]acking regulations in this code and other commercial legislation, commercial acts will be governed by the Federal Civil Code.”<sup>10</sup>

This was a departure from the way of ruling on commercial law matters in Mexico. Until the enactment of the 1884 Mexican Commercial Code, the *de facto* commercial legislation in Mexico included instruments like the *Ordenanzas de Bilbao*.<sup>11</sup> The *Ordenanzas* were enacted by the guild of merchants of Bilbao, Spain,<sup>12</sup> and relied on the use of commercial customs and practices on their application.

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*Mercantil en México en el Siglo XIX, Hasta el Código de Comercio Vigente de 1890* [Evolution of Commercial Law in Mexico during the 19<sup>th</sup> Century, Up to the Current Commercial Code of 1890], in I MEMORIA DEL IV CONGRESO DE HISTORIA DEL DERECHO MEXICANO, 111, 111 (Instituto de Investigaciones Jurídicas eds., 1986).

<sup>8</sup> “Napoleon Bonaparte’s goal was to protect non-merchants, particularly from the misfortunes of credit transactions that so frequently led to “mobilization” and loss of fortunes and to the dissipation of family assets [...] [H]e strongly wanted to discourage the use of bills of exchange or other negotiable instruments by those who were not in business, and especially by bourgeois fathers of family [...] From a legislative standpoint, it was necessary to ensure that those whom the emperor wanted to protect from the perils of commerce would be governed by the *Code Civil* rather than by the *Code de Commerce*. (Emphasis in original). BORIS KOZOLCHYK, COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT 332-333 (2014).

<sup>9</sup> Código de Comercio [CÓD.COM.] [Commercial Code], as amended, Art. 1, Diario Oficial de la Federación [D.O.], 7 de octubre al 13 de diciembre de 1889, (Mex.) (translation by author), available at <http://ordenjuridico.gob.mx/Documentos/Federal/html/wo38904.html>.

<sup>10</sup> CÓD.COM. Article 2.

<sup>11</sup> See The political struggle over deciding the course and characteristics of the fledgling country, with the ensuing change of governments with divergent ideologies and policies, made the survival of Spanish commercial laws possible. In this way, the *Partidas*, the *Ordenanzas de Bilbao* and even the 1829 Spanish Commercial Code continued in force instead of applying national laws, each of which were only in force for a few years. [La contienda política por decidir el rumbo y las características que había de tener el joven país, con la consecuente alternancia de gobiernos de signo y políticas contrarios, hizo posible la supervivencia de los ordenamientos españoles en la aplicación del derecho mercantil. Así, frente a los ordenamientos nacionales, los cuales sólo estaban vigentes por pocos años, se siguieron aplicando las *Partidas*, las *Ordenanzas de Bilbao* e incluso el Código de Comercio español de 1829.] (Internal citations omitted) (translation by author) María del Refugio González, *Comercio y Comerciantes en la Legislación y la Doctrina Mexicanas del Siglo XIX* [Commerce and Merchants in 19<sup>th</sup> Century Mexican Legislation and Doctrine], II ANUARIO MEXICANO DE HISTORIA DEL DERECHO 115, 133 (1990) available at <http://www.juridicas.unam.mx/publica/rev/indice.htm?r=hisder&n=2>.

<sup>12</sup> See Manuel Torres y López, *El Proceso de Formación de las Ordenanzas de Bilbao de 1737 in*

To give an example of the use of commercial customs and practices, these *Ordenanzas* ordered commercial issues to be solved briefly and summarily using commercial practices and avoiding the use of “lawyers’ writs.”<sup>13</sup> The text of the section stated that: “[l]awsuits and differences should be solved briefly and summarily at the mentioned Consulate with the known truth and in good faith according to merchant practices, without incurring in delays, libels, or lawyers’ writs [...]”<sup>14</sup>

The lack of stability that Mexico suffered in the 19<sup>th</sup> century meant a lack of unified commercial codification.<sup>15</sup> This lack of commercial codification combined with the use of codifications that relied on customs and practices like the *Ordenanzas de Bilbao* meant that commercial issues were solved applying commercial customs and practices instead of strict doctrinal rules.

An example of this can be seen in the case of *García Torres v. Bocker & Co.*,<sup>16</sup> which was a cassation<sup>17</sup> case relating to the wrongful payment of a bill of exchange. The *García Torres* case was solved in 1888, a mere four years after the enactment of the 1884 commercial code and just one year before the enactment of the current 1889 code. This means that the interpretation of commercial law could still be influenced by the judicial practices used before the official codes were enacted.

In the transcript of its request, the public ministry expressed the following:

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LAS ORDENANZAS DEL CONSULADO DE BILBAO: TRES CONFERENCIAS CON MOTIVO DEL CENTENARIO DE SU DEROGACIÓN 45, 51 (1931) available at <http://catalogo.fsancho-sabio.es/Record/km-10690-793> (quoting Lorenzo Benito). See also Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas de Bilbao*] (1737 and 1814), as amended in 1818 (Spain), Confirmación Real.

<sup>13</sup> *Ordenanzas de Bilbao* Ch. 1 s. 6.

<sup>14</sup> “Por cuanto en dicho Consulado deben determinarse los pleitos y diferencias de entre las partes breve y sumariamente, la verdad sabida y la buena fe guardada por estilo de mercaderes, sin dar lugar á dilaciones, libelos ni escritos de abogados...” *Ordenanzas de Bilbao* Ch. 1 s. 6.

<sup>15</sup> See *supra* note 11 See also Barrera Graf, *Codificación*, and *Evolución supra* note 7.

<sup>16</sup> *García Torres v. Bocker & Co.*, in ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA, AÑO V, SECCIÓN DE CASACIÓN, COLECCIÓN COMPLETA DE LAS EJECUTORIAS PRONUNCIADAS POR LA PRIMERA SALA DEL TRIBUNAL SUPERIOR DE JUSTICIA DEL DISTRITO FEDERAL 98 (Pablo Macedo & Miguel S. Macedo eds., 1888). For more on this and other cases see Raul Iturralde Gonzalez, *The Archetypal Merchant in the Mexican Commercial Code of 1889* at 18-21 (2015) (unpublished LL.M. thesis, University of Arizona) (on file with the author) (soon to be available at <http://www.natlaw.com>).

<sup>17</sup> Cassation refers to an appeal of a final decision given by a local court in the event of irregularities in the application of the law. Julio Bustillos, *Surgimiento y Decadencia de la Casación en México [Appearance and Decline of Cassation in Mexico]*, 3 REFORMA JUDICIAL, REVISTA MEXICANA DE JUSTICIA, January-June 2004, at 141, 147 available at <http://biblio.juridicas.unam.mx/revista/ReformaJudicial/indice.htm?n=3>. Cassation disappeared from Mexican law when the process of *Amparo* absorbed these types of appeals. See *id.* at 144.

It is the belief of the undersigned that it cannot be said that the judicial decision being appealed is contrary to the letter or spirit of [Article 830 of the Cód.COM. of 1884] since the sentencing judge presents *it solely as an example of commerce law accepting the commercial custom [practice] of using good faith as a basis for commercial transactions, as good faith is indispensable for the speed of transactions, and not to rescind the advantages this principle generates.* The sentence upholds the general rule that in commerce it is not indispensable to demand from the presenter of a document (for its payment) the identity of the person. The first part of this article, which in this part does not indicate that only acceptance and protest are the only powers that the drawee is obligated to recognize simply due to the possession of the bill, establishes that endorsement in favor of the agent who presents the draft (for payment) is not necessary. The article seems to indicate that the only necessary requirement, as a general rule, is the possession of the bill.<sup>18</sup>

The fact that it was the public ministry that requested the use of commercial customs and good faith in the resolution of a commercial dispute instead of applying strict legal doctrines shows the use of these sources before the enactment of the 1884 and 1889 codes.

Similarly, the public ministry also advocated the use of good faith instead of strict formalisms. In the same volume that contains the *García Torres* decision, it is possible to find the decision of the case of *in re Successors of Agustín Meeser*,<sup>19</sup> which mentions a cassation procedure initiated after the bankruptcy of Agustín Meeser's successors.<sup>20</sup>

On the *in re Successors of Agustín Meeser* case, the public ministry argued that the clash arose when the commercial code uses the civil code system.<sup>21</sup> The

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<sup>18</sup> [A juicio del suscrito no puede decirse que la decisión judicial materia de este recurso, haya sido contraria á [sic] la letra ó [sic] espíritu de [el art. 830 del Código de Comercio de 1884], pues el juez en su sentencia lo presenta solamente como un ejemplo de que *la ley ha sancionado la costumbre mercantil de prestar como base á [sic] las operaciones de comercio la buena fe, indispensable para la rapidez de las transacciones, y de no destruir las ventajas que trae este principio.* La sentencia ocupándose de fundar que por regla general en el comercio se considera que no es indispensable exigir al que presenta un documento para su cobro, la identidad de su persona, estudia este artículo, el que por esta parte no dice que sólo la aceptación y el protesto sean las únicas facultades que esté obligado el girado á [sic] reconocer como consecuencia de la mera tenencia de la letra sino que antes bien al establecer en su primera parte que el endoso á [sic] favor del mandatario que la presenta á [sic] la aceptación no es necesario, parece que ha querido sancionar que no se exija más requisito por regla general que la posesión de la letra.] (Emphasis added) (translation by author). *García Torres v. Bocker & Co.*, V ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA 98, 100 (1888).

<sup>19</sup> *In re Successors of Agustín Meeser*, in ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA, AÑO V, SECCIÓN DE CASACIÓN, COLECCIÓN COMPLETA DE LAS EJECUTORIAS PRONUNCIADAS POR LA PRIMERA SALA DEL TRIBUNAL SUPERIOR DE JUSTICIA DEL DISTRITO FEDERAL 476 (Pablo Macedo & Miguel S. Macedo eds., 1888). Also see Iturralde Gonzalez *supra* note 16 at 20-21.

<sup>20</sup> *In re Successors of Agustín Meeser*, V ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA 476-477 (1888).

<sup>21</sup> *Id.*, at 476, 484 (1888).

issue revolved around the order of priority given to creditors.<sup>22</sup> At some point, the public ministry said:

Much has been said during the debates about the unprecedented suppression of the privilege given to simple notarized credits; nonetheless, it is true that, *due to the nature of commercial business, which is based on good faith and the purest equity instead of formal requirements*, this suppression is not surprising as it had existed in ancient laws.<sup>23</sup>

Again, we see the public ministry arguing that commercial law is not based on the application of strict rules, but, in this case, the application of good faith and equity. Nevertheless, since the enactment of the 1889 code, the resolution of commercial disputes has been based on the application of legal formulas based on Aristotelian logic and legal doctrine.

One possible reason for the departure from the use of commercial customs and practices in favor of the Civil Code's strict rules may be a search for uniformity, which was absent in commercial law at the time. In 1911, the then *Academia Central Mexicana de Jurisprudencia y Legislación* ran a contest to select a writer for the elaboration of a study on the evolution of commercial law in Mexico. The winner was an attorney named Enrique Orozco. His study appeared on several issues of the *Diario de Jurisprudencia* and can be found in Volumes XXII and XXIII of the *Diario de Jurisprudencia del Distrito y Territorios Federales*.<sup>24</sup>

In his study, Enrique Orozco refers to a proposal made by a commission created in 1870 for the preparation of a Commercial Code.<sup>25</sup> The commission expressed concern about the lack of uniformity regarding commercial laws, citing as examples the state of Guanajuato, which had enacted a law on the regulation of priority among creditors that went contrary to the *Ordenanzas de Bilbao*, and Veracruz, which followed the 1854 Code that ran contrary

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<sup>22</sup> *Id.*

<sup>23</sup> [Mucho se ha dicho durante los debates acerca de lo inaudito de la supresión del privilegio en favor de los créditos escriturados simples; pero lo cierto es, que *dada la naturaleza de los negocios mercantiles, fundados más que en requisitos de forma, en la buena fe y la más pura equidad*, nada tiene de sorprendente esa supresión, la cual, por otra parte existió en las leyes antiguas.] (Emphasis added) (citing another source) (translation by author). *In re Successors of Agustín Meeser*, V ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA 476, 487 (1888).

<sup>24</sup> DIARIO DE JURISPRUDENCIA DEL DISTRITO Y TERRITORIOS FEDERALES, TOMOS XXII, XXIII [DIARY OF JURISPRUDENCE OF THE FEDERAL DISTRICT AND FEDERAL TERRITORIES, VOLUMES XXII, XXIII] (Victoriano Pimentel ed., January-Apr., May-Aug. 1911). See also Iturralde Gonzalez, *supra* note 16 at 11-13.

<sup>25</sup> DIARIO DE JURISPRUDENCIA DEL DISTRITO Y TERRITORIOS FEDERALES, TOMO XXIII [DIARY OF JURISPRUDENCE OF THE FEDERAL DISTRICT AND FEDERAL TERRITORIES, VOLUME XXIII] 96 (Victoriano Pimentel ed., May-August 1911).

to the then Constitution that ordered the use of Article 45 of the Act of November 23, 1855.<sup>26</sup>

The commission expressed their support for the creation of a sole commercial law by saying:

However, this diversity of commercial laws would disappear from the moment that Congress, by itself or authorized by the Executive, gives the nation a Commercial Code. In the neighboring republic, it has been the case that while awaiting the enactment of a general bankruptcy law, states were to give whatever they deemed convenient without this meaning an attack on the faculties of the federal powers [...] It is easy to understand that for its development, commerce needs a uniform law for the entire republic.<sup>27</sup>

It seems that the legislators of the 1884 and 1889 codes not only conveyed the distrust against merchants that was contained in the Napoleonic Code, but they were also wary of granting the power to enact commercial laws to anyone, but Congress. This attitude is understandable from legislators coming from almost a century of uncertainty in terms of applicable commercial laws. Nevertheless, combining commercial law with the strict doctrines created for civil law has had detrimental effects on the advancement of commercial law in Mexico.

It is also apparent that Mexican legislators saw the need to use commercial customs and practices when enacting specialized legislation by deferring to them in cases of uncovered issues, as seen in laws like the General Law of Credit Instruments and Operations<sup>28</sup> or the Credit Institutions Law.<sup>29</sup> Nevertheless, several factors limited the application of commercial customs and practices. These included the limited operation of these laws and the fact that these laws first deferred to commercial legislation (that is, the Commercial Code), as well as the Civil Code.

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<sup>26</sup> Letter [Exposición de Motivos] from the Drafting Commission to the Minister of Justice (Jan. 4, 1870) *in id.* at 103.

<sup>27</sup> [Sin embargo, esa diversidad de leyes en materias mercantiles, desaparecería desde el momento en que el Congreso por sí ó por autorización al Ejecutivo, diese á la Nación un Código de Comercio; por que en la República vecina se ha dado el caso de que debiéndose dar una ley general de bancarrotas, mientras ella no fué expedida, los Estados dieron lo que cada cual creyó conveniente, sin que esto importase un ataque á las facultades propias de los poderes federales [...] Fácil es comprender que el comercio necesita, para su desarrollo, una ley que sea uniforme en toda la República.] Letter [Exposición de Motivos] from the Drafting Commission to the Minister of Justice (Jan. 4, 1870) *in* DIARIO DE JURISPRUDENCIA DEL DISTRITO Y TERRITORIOS FEDERALES, TOMO XXIII [DIARY OF JURISPRUDENCE OF THE FEDERAL DISTRICT AND FEDERAL TERRITORIES, VOLUME XXIII] 104 (Victoriano Pimentel ed., May-August 1911).

<sup>28</sup> Ley General de Títulos y Operaciones de Crédito [LGTOC], as amended, article 2, Diario Oficial de la Federación [D.O.], 27 de agosto de 1932 (Mex.).

<sup>29</sup> Ley de Instituciones de Crédito [LIC], as amended, article 6, D.O. 18 de julio de 1990 (Mex.).



Moreover, the wide-ranging application of the Civil Code makes access to other sources difficult as many institutions are already regulated by that legislation. In an “isolated” decision,<sup>30</sup> Judge Leonel Castillo Gonzalez (of the Fourth Collegiate Civil Court) stated that:

The Commercial Code does not have a set of bases for the interpretation of commercial contracts or any regulation regarding other commercial acts, at least not for the general interpretation of all commercial contracts. However, there is a set of rules for the interpretation of contracts, and all juridical acts, in the Federal Civil Code. In this code, Article 1856 expressly provides that national practices and customs will be taken into account when interpreting ambiguities within contracts. Therefore, it is possible to invoke commercial customs and practices since Article 2 [CÓD.COM.] expressly and directly indicates that the precepts of the Federal Civil Code shall apply in the absence of provisions in the [CÓD.COM.].<sup>31</sup>

The biggest issue with this decision is that it relies on customs and practices based on the Federal Civil Code [C.C.F.], which means that it is not commercial customs and practices, but customs and practices of the country as a whole. All these issues make the supplementary application of customs and practices difficult.

The supplementary use of the Civil Code in commercial matters has detrimentally affected the development of commercial law in Mexico. In this paper, I will present a recommendation for the development of commercial law in Mexico. I will start by making a brief study of the Mexican legal system (the civil law system). I will continue by presenting an example of the lack of

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<sup>30</sup> “Isolated” decisions do not have precedential value. Their force is limited to persuasive value. *See* Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LARACPEUM] [Constitutional Law, Regulating Articles 103 and 107 of the Political Constitution of the Mexican United States], as amended, articles 215-224, Diario Oficial de la Federación [D.O.], 2 de abril de 2013 (Mex.).

<sup>31</sup> [En el Código de Comercio no existe un conjunto de bases para proceder a la interpretación de los contratos mercantiles, ni tampoco alguna normativa al respecto en alguna otra ley mercantil, por lo menos de aplicación general para todos los contratos mercantiles. En cambio, en el Código Civil Federal sí existe un conjunto de reglas para la interpretación de los contratos, y por extensión a todos los actos jurídicos. Dentro de este conjunto, el artículo 1856 de dicho ordenamiento general, dispone expresamente que el uso o la costumbre del país se tendrán en cuenta para interpretar las ambigüedades de los contratos, por lo cual cabe la posibilidad de invocar la costumbre y las prácticas mercantiles, porque por disposición expresa y directa del artículo 2o. del Código de Comercio, a falta de previsiones en la legislación mercantil es aplicable la preceptiva del Código Civil Federal.] (Translation by author). USOS Y COSTUMBRES MERCANTILES. VALIDEZ DE SU EMPLEO EN LA INTERPRETACIÓN DE CONTRATOS MERCANTILES, Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [T.C.C.] [Fourth Civil Court of the First District], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXXI, Enero de 2010, Tesis I.4o.C.254 C, Página 2267 (Mex.) This is a criterion expressed in an Amparo proceeding.



adapting commercial law in Mexico in the cases of the doctrines of “offer and acceptance” and firm promises. Then, I will compare the “offer and acceptance” doctrine with the creation of contracts in US law. I will later present an alternative that has been successfully used in international trade law for decades: the use of compilations of customs and practices employed by the merchants themselves.

## II. THE CIVIL LAW SYSTEM

What common law practitioners know as *civil law* is not a single system. Civil law practitioners find the origins of their system in the laws of Ancient Rome.<sup>32</sup> Civil law lawyers aspire to be seen as the successors of Ancient Roman laws. Nonetheless, modern day civil law is not a continuation of the laws of neither the Roman Republic nor the Roman Empire.<sup>33</sup>

Modern day civil law is the result of centuries of experimentation in which hundreds of scholars have integrated Roman law with Aristotelian philosophy.<sup>34</sup> Professors Berman and Reid, Jr. described this amalgamation as follows:

What is most amazing about the Westernization of these three ancient traditions [the Bible, Plato and Aristotle’s philosophy, and Justinian’s Roman Law works] is that in their original forms they were entirely incompatible with each other. The ancient Hebrew culture would not tolerate Greek philosophy or Roman law; the ancient Greek culture would not tolerate Roman law or Hebrew theology; the ancient Roman culture would not tolerate Hebrew theology, and it resisted large parts of Greek philosophy. Yet in the Christian West, over the centuries, they were somehow brought together in new and changing syntheses. All three underwent parallel transformations at each of the principal stages of their historical evolution.<sup>35</sup>

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<sup>32</sup> See “Because of its ancient Romano-Germanic Origins, and the influence of the Code of Napoleon of 1804, appellate decisions have no legal binding in Mexico.” 1 JORGE A. VARGAS, *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* 6 (Jorge A. Vargas, ed., 1998) (original citations omitted). For information on the influence of Roman law on Mexican law, see *Derecho Romano*, ENCICLOPEDIA JURÍDICA MEXICANA (2<sup>nd</sup> ed. 2004).

<sup>33</sup> “It is [...] quite misleading to speak of ‘the’ Roman law, as though it constituted only, or primarily, a particular legal system existing at a particular time. On the contrary, Roman law must be seen primarily as an evolving element of an evolving legal tradition.” Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the JUS COMMUNE: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT. LAW COMM. 1, 1–2 (1994).

<sup>34</sup> See *Id.* See also JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 1-4 (1991).

<sup>35</sup> Berman and Reid, Jr., *supra* note 33 at 2 (internal citations omitted).

Different schools of thought influenced the development of civil law. However, they often relied on the Justinian compilation works of Roman Law and Aristotelian philosophy,<sup>36</sup> which is based on the idea that all things are composed of “essences” (which are necessary) and “accidental properties.”<sup>37</sup>

It was the influence of Aristotle (and the interpretation given by Thomas Aquinas) that inspired Western scholars to seek the “essence” of legal concepts as these ideas were not part of the original Roman law.<sup>38</sup> Through the amalgamation of Roman law and Aristotelian philosophy, civil law scholars developed a legal system structured in such a way that it is considered a science at the same level as other social sciences.<sup>39</sup>

This science is based on the search for the “essence” of legal concepts. Once the essence is found, legal concepts can be classified according to their own particular characteristics. One example would be the form in which “contracts” are classified in the Civil Code.<sup>40</sup> The definition found in the Civil Code reads: “[those] *agreements* that produce or transfer *obligations* and *rights* are called contracts.”<sup>41</sup>

This definition in itself does not seem to indicate very much. Nevertheless, a careful review shows that contracts are defined as the genus of a family, the family of “agreements.” Agreements are defined in the previous article as

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<sup>36</sup> See, e.g., GORDLEY, *supra* note 34 at 1-4.

<sup>37</sup> Aristotle taught that all things – not just living things – have two kinds of properties: essential properties, without which they fail to be the particular kind of thing they are, and accidental properties, which are free to vary within the kind. And along with each kind of thing came an essence. Essences for Aristotle were definitive: timeless, unchanging, all or nothing. A thing could not be *rather* silver or *quasi*-gold or a *semi*-mammal. Daniel C. Dennett, *Darwin's Dangerous Idea*, 35 SCIENCES 34, 36 (1995) (emphasis in original). See also, e.g., GORDLEY, *supra* note 34 at 34.

<sup>38</sup> The difference [between Gaius and Aristotle/Thomas Aquinas] is not that Aristotle and Thomas used concepts that were wholly alien to the Romans. It is rather that these philosophers paid attention to concepts that were helpful in building theories. The Romans were interested not in building such theories but in analysing particular legal problems. Often, principles so universal as to draw the attention of an Aristotle or a Thomas are not stated by the Romans in any general form just because they are obvious. On the occasions when the Roman texts state these principles, they offer them as interesting observations, not as starting points for analysis. GORDLEY, *supra* note 34 at 32.

<sup>39</sup> See José María Martínez Doral, *Sociólogos, Juristas, Filósofos. Apuntes para una Metodología de la Ciencia del Derecho* [Sociologists, Jurists, Philosophers. Notes for a Methodology of Law Science], 17 R. CH. D. 509 (1990). *Contra* Juan Carlos Fitta Quirino, *La jurisprudencia no es ciencia: A 125 años de la muerte de Julius Hermann von Kirchmann* [Jurisprudence is not Science: 125 years after the Death of Julius Herman von Kirchmann], 23 ARGUMENTOS 64, diciembre 2010, at 313-324.

<sup>40</sup> See Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, arts. 1792-93, Diario Oficial de la Federación [D.O.] 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928, (Mex.), available at <http://www.ordenjuridico.gob.mx/Documentos/Federal/html/vo17186.html>.

<sup>41</sup> “Los convenios que producen o transfieren las obligaciones y derechos, toman el nombre de contratos.” (Emphasis added) (translation by author). C.C.F., article 1793.

“the arrangement between two or more people to create, transfer, modify or terminate *obligations*.”<sup>42</sup>

Reviewing the C.C.F., it is possible to see that both “agreements” and “contracts” belong to a higher class, which is the class of obligations.<sup>43</sup> In this way, the theory of contracts resides within the theory of agreements, which is also contained in the theory of obligations. This structure is repeated in the C.C.F. under different legal concepts, such as wills<sup>44</sup> or property.<sup>45</sup>

This order allows legal problems to be resolved through the application of legal theories and code interpretation based on specific facts.<sup>46</sup> Thus, it is possible to give consistent answers to legal problems and to predict the resolution of a legal issue. In knowing the many legal theories and doctrines that compose the civil law system, civil law practitioners are capable of confidently predicting the resolution of a legal problem.

Similarly, strict formulas were created for the formation of contracts based on offers and their acceptance.<sup>47</sup> The Federal Civil Code indicates that a contract “is formed at the moment that the offeror receives an acceptance, which binds him to the offer made [...]”<sup>48</sup> These strict formulas do not always represent the realities of commercial transactions. As will be seen later in the examples from US cases,<sup>49</sup> it is not always easy to identify when an offer was made or accepted. Moreover, sometimes commercial transactions require the enforcement of offers even when these offers have not been accepted yet.<sup>50</sup>

The real problems arise when a branch of the legal system is forced to follow the doctrines and theories created for another branch. Articles 1 and

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<sup>42</sup> “Convenio es el acuerdo de dos o más personas para crear, transferir, modificar o extinguir obligaciones.” C.C.F., article 1792 (emphasis added) (translation by author).

<sup>43</sup> “Obligations” C.C.F., Book 4<sup>th</sup> (articles 1792-2998).

<sup>44</sup> “Sucesiones” C.C.F., Book 3<sup>rd</sup>.

<sup>45</sup> “De los bienes” C.C.F., Book 2<sup>nd</sup>.

<sup>46</sup> While explaining the evolution of contract doctrine, Professor Gordley stated that: “Nineteenth-century jurists no longer claimed that their conclusions followed from larger philosophical principles [Aristotelian philosophy]. They said they were merely describing the law in force in their own countries [...] [I]n France [they claimed to be interpreting] the French Civil Code [...] [Anglo-American, French, and German jurists] purged the doctrines of the natural lawyers of Aristotelian concepts and principles that seemed wrong or unintelligible to them. They bent and stretched the ideas they retained to make them do the work of those they have abandoned. Then, as authority for their conclusions, they cited [...] the French Civil Code [...] GORDLEY, *supra* note 34 at 161.

<sup>47</sup> The development of the theory of offer-acceptance will be seen later. See *infra* section III.

<sup>48</sup> “El contrato se forma en el momento en que el proponente reciba la aceptación, estando ligado por su oferta [...]” (translation by author). Código Civil [C.C.F.], as amended, article 1807, D.O., 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.)

<sup>49</sup> See *Teachers Ins. & Annuity Ass'n v. Tribune Co.* 670 F. Supp. 491 (S.D.N.Y. 1987) *infra* section IV.

<sup>50</sup> See the discussion regarding Letters of Credit *infra* sections IV and V.

2 of the Commercial Code restrict the interpretation of Commercial Law disputes to the Commercial Code and the Civil Code.<sup>51</sup> Article 2 indicates that “[i]n the absence of regulations in this code or in other commercial laws, commercial acts will be regulated by the regulations applicable to civil law according to the Federal Civil Code.”<sup>52</sup>

This and similar articles have forced Mexican commercial law doctrine to follow the stricter doctrine created for civil law (*i. e.* family law, probate law, property law, etc.). This not only discards the history of commercial law, which evolved separately from civil law,<sup>53</sup> but it also impedes the development of exclusive commercial theories. As will be seen later, forcing civil theories on commercial disputes has prevented commercial law in Mexico from adapting to the realities of the market.

### III. “OFFER” AS APPLIED TO COMMERCIAL LAW IN MEXICO

The definition of “offer” has suffered a noticeable transformation from its Roman roots. The modern Civil law theory of “offer” was developed in 18<sup>th</sup> century France.<sup>54</sup> French scholars found their inspiration in the terminology the Romans used for promises and *pollicitations*.<sup>55</sup> According to Prof. Simpson, the origin of the theory is born from the interpretation made of the following passage by Ulpian:<sup>56</sup> “A pact is an agreement and convention of two people, but an undertaking [*pollicitation*] is the promise only of the person who makes

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<sup>51</sup> Código de Comercio [CÓD.COM.], as amended, articles 1, 2, D.O. 7 de octubre al 13 de diciembre de 1889 (Mex.).

<sup>52</sup> “A falta de disposiciones de este ordenamiento y las demás leyes mercantiles, serán aplicables a los actos de comercio las del derecho común contenidas en el Código Civil aplicable en materia federal.” (translation by author). CÓD.COM, article 2.

<sup>53</sup> There did remain, however, even after the Protestant Reformation, two other bodies of law that continued not only to contribute to the family resemblances among the various national legal systems but also to develop as bodies of transnational customary law applicable as such in all the European countries —each of them a genuine common law, though not called that. These were the customary *lex mercatoria*, applicable everywhere in both domestic and international commerce, and the much weaker law of intergovernmental (inter-royal, inter-urban) relations, including what today would be called conflict-of-laws. Concepts, principles, and rules drawn from both Roman law and canon law formed an important component of those two branches of what was called at the time the law of nations (*ius gentium*). Berman and Reid, Jr., *supra* note 33 at 10–11.

<sup>54</sup> Parviz Owsia, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 TUL. L. REV. 871, 873 (1992).

<sup>55</sup> See *e.g.*, *Id.* at 873–75.

<sup>56</sup> A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L. Q. REV. 247, 259 (1975).

it [...] (*Pactum est duorum consensus atque conventio, pollicitatio ver offerentis solius promissum* [...]).<sup>57</sup>

Prof. Simpson explains that a *pollicitatio* is “a promise made, but not accepted” or, “a [*pollicitatio*] is a promise not accepted by the promisee.”<sup>58</sup> Therefore, there was a difference in Roman law between agreements and undertakings (*pollicitations*), which is that *pollicitations* did not bind the person who made them until they were accepted by the promisee (“a promise *accepted* immediately became a contract; for, then, there was the assent of two persons to the thing promised).<sup>59</sup>

French authors, who adopted the Roman doctrine of *pollicitatio*, developed the concept of a chronological order between an “offer” and an “acceptance”.<sup>60</sup> “The contract is the succession of an *offer* (to contract, or *pollicitation*), which is seized by an *acceptance*.”<sup>61</sup> Therefore, under French law, an agreement is considered an “accord of the wills” between a person that makes an offer and a person who accepts it.<sup>62</sup>

This theory was adopted in Mexico<sup>63</sup> as seen in the Federal Civil Code.<sup>64</sup> As an example, Article 1794 of the C.C.F. indicates that: “[f]or a contract to exist, it is necessary to have (I) consent [...]”<sup>65</sup> Article 1796 says that “[C]ontracts are perfected by mere consent [...] From the moment they are perfected, contracts bind the parties.”<sup>66</sup> As such, Mexican authors have accepted the “accord of the wills” theory.<sup>67</sup>

<sup>57</sup> DIG. 50.12.3 (Ulpian, Disputationum 4) (Watson trans., 1985).

<sup>58</sup> Simpson, *supra* note 56 at 259 (quoting JOHN AUSTIN, LECTURES ON JURISPRUDENCE, 906, 980 (1885)).

<sup>59</sup> Simpson, *supra* note 56 at 259 (quoting Joseph Powell, Vol. 1, p. 334) (emphasis in original).

<sup>60</sup> See Owsia, *supra* note 54 at 879. See also Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 TULSA J. COMP. & INT'L. L. 357, 365 (2005).

<sup>61</sup> Owsia, *supra* note 54 at 879 (emphasis in original) (quoting 4 JEAN CARBONNIER, DROIT CIVIL no. 35 [14<sup>th</sup> ed. 1990]).

<sup>62</sup> See Owsia, *supra* note 54 at 878.

<sup>63</sup> See RODOLFO BATIZA, LAS FUENTES DEL CÓDIGO CIVIL DE 1928 [SOURCES OF THE 1928 CIVIL CODE] 141, 846-49 (Porrúa, 1979) (one of the sources for articles 1794 and 1796 of the current Mexican Federal Civil Code is the French Civil Code).

<sup>64</sup> “El contrato se forma en el momento en que el proponente reciba la aceptación, estando ligado por su oferta, según los artículos precedentes.” [A contract is created at the moment that acceptance is received by the offeror. The acceptance binds the offeror according to the previous articles.], (translation by author). Código Civil [C.C.F.], as amended, article 1807, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

<sup>65</sup> “Para la existencia del contrato se requiere: I. Consentimiento.” (translation by author) C.C.F., article 1794.

<sup>66</sup> “Los contratos se perfeccionan por el mero consentimiento [...] Desde que se perfeccionan obligan a los contratantes [...]” (translation by author). C.C.F., article 1796.

<sup>67</sup> “[Consentimiento] [e]s el acuerdo de voluntades para crear o transmitir, modificar o

While this theory of offer has developed over centuries, it has centered on the world of civil contracts. When applied to commercial transactions, the application of French *pollicitation* and the strict order of “offer” and then “acceptance” has hindered the development of “firm promises,” which are essential in today’s business world.

These firm promises, as its name implies, are promises that cannot be revoked by the promisor once expressed. A clear example of firm promises appears in Article 5 of the Uniform Commercial Code [U.C.C.], which regulates letters of credit.<sup>68</sup> The specific provision indicates that “[a] letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.”<sup>69</sup>

In other words, once the issuer has transmitted the letter of credit, it becomes enforceable by the beneficiary even if the beneficiary has not expressed his acceptance of the offer. Moreover, the mentioned article orders that a letter of credit is considered irrevocable unless the parties have expressed the opposite. The reading of the two parts of Article 5-106 prohibits an issuer of a letter of credit from withdrawing his offer even if that withdrawal reaches the beneficiary before the letter of credit (in this case, the offer).

These types of promises become extremely difficult to apply in a system based on the French doctrine of “offer and acceptance.” Even though the Civil Code currently has some examples of firm promises in the form of promises of rewards, contest prizes, offers to the public, and executive documents to be paid to the bearer,<sup>70</sup> the truth is that these forms of legally binding oneself could not develop under the French doctrine.<sup>71</sup>

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extinguir derechos y obligaciones y se forma por la pollicitación u oferta y la aceptación.” [“Consent is the meeting of wills geared toward the creation, transmission or extinction of rights and liabilities. It is created through a *pollicitation* or offer and an acceptance.”] (translation by author). VÍCTOR M. CASTRILLÓN Y LUNA, *CONTRATOS CIVILES [CIVIL CONTRACTS]* 16 (Porrúa, 2007).

<sup>68</sup> U.C.C. § 5 (AM. LAW INST. & UNIF. LAW COMM’N 1995).

<sup>69</sup> U.C.C. § 5-106(a) (AM. LAW INST. & UNIF. LAW COMM’N 1995).

<sup>70</sup> See Fausto Rico Álvarez & Patricio Garza Bandala, *Sobre la Declaración Unilateral de Voluntad como Fuente de las Obligaciones*, in *DERECHO CIVIL Y ROMANO, CULTURAS Y SISTEMAS JURÍDICOS COMPARADOS* 263, 268-269 (Instituto de Investigaciones Jurídicas UNAM, 2006) (original citations omitted).

<sup>71</sup> In laws based on the French-Roman model, such as the Napoleonic [Civil] Code or our [Mexican] Civil Codes of 1870 and 1884, this form of binding oneself abstractly (that is, binding oneself before an unspecified number of people without those people having assented their will, but only with the manifestation of the will of the offeror) was rejected. [En las legislaciones de corte franco-romano, como el Código Napoleón o nuestros códigos civiles de 1870 y 1884 esta posibilidad de obligarse abstractamente, es decir, ante un número indeterminado de personas sin que consintieran en ello a partir de la manifestación de la voluntad únicamente de su autor, fue desechada.] (Original citations omitted) (translation by author). *Id.* at 264-265.

These types of abstract promises were imported into Mexican legislation from German law.<sup>72</sup> Nevertheless, as explained by authors Rico Álvarez and Garza Bandala, the inclusion of Germanic doctrines in Mexican law was carelessly done. These authors explain:

The legislative problem that we want to emphasize is that the legislator of [the Civil Code of] 1928, based on the 1884 Civil Code, which was basically Franco-Roman and therefore considered contracts the most important source of obligations, singly and thoughtlessly incorporated the unilateral declaration of will, the origins of which are found in Germanic legislations.

We consider ourselves at this doctrinal crossroads. Unlike the 1942 Italian Civil Code, in which the differences between French and Germanic doctrines were closely examined to incorporate the most adequate legal text or to reject both and create a new one, the 1928 legislators adopted a more convenient stance by incorporating the various parts of the legal text without correlating them.<sup>73</sup>

This lack of attention can be seen in the Civil Code as this act contains contradictory and confusing rules regarding firm promises. As explained above, the Civil Code contains the obligation of respecting offers to the public, or more exactly sale prices advertised to the public.<sup>74</sup> Nonetheless, this is the only article regulating public prices. The following articles regulate the public offer of rewards,<sup>75</sup> contest prizes,<sup>76</sup> stipulations in favor of third parties,<sup>77</sup> and executive documents to be paid to the bearer.<sup>78</sup>

The Civil Code indicates that a public offer of rewards can be revoked unless the offeror has established a term for the fulfillment of the condi-

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<sup>72</sup> *Id.* at 267-269.

<sup>73</sup> [La problemática legislativa que queremos hacer patente consiste en que el legislador de 1928, sobre la base del Código Civil de 1884, que era esencialmente franco-romano y por consiguiente consideraba al contrato como la fuente más importante de las obligaciones, incluyó de manera aislada e irreflexiva a la declaración unilateral de la voluntad, cuyos orígenes se encuentran en legislaciones de corte germánico [...] Consideramos que nos encontramos en esta encrucijada doctrinal. A diferencia del Código Civil Italiano de 1942 en donde se estudiaron a fondo las diferencias entre las corrientes francesas y alemanas para incorporar al texto legal la más adecuada o desechar las dos y crear una nueva, los legisladores de 1928 tomaron una postura más cómoda sin correlacionar las diversas partes integrantes del texto legal.] (Translation by author). *Id.* at 271.

<sup>74</sup> “The fact of offering goods to the public at a certain price, compels the owner to maintain his offer.” [El hecho de ofrecer al público objetos en determinado precio, obliga al dueño a sostener su ofrecimiento]. (translation by author). Código Civil Federal [C.C.F.], as amended, artículo 1860, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 2918 (Mex.)

<sup>75</sup> C.C.F. articles 1861-1865.

<sup>76</sup> *Id.* Articles 1866-1867.

<sup>77</sup> *Id.* Articles 1868-1872.

<sup>78</sup> *Id.* Articles 1873-1881.



tions.<sup>79</sup> In the case of stipulations in favor of third parties, the benefit can be revoked if the beneficiary has not expressed a desire to accept it.<sup>80</sup> These provisions do not seem to fit with article 1860 C.C.F., which forces those who offer goods to the public at a certain price to fulfill that offer without the need of previous acceptance or an established term.<sup>81</sup>

Moreover, Mexican legislators have also had difficulties in adapting the concept of firm promises even in commercial matters. To give an example of this, the regulation of letters of credit in Mexico does not assume their irrevocability.<sup>82</sup>

Comparing Mexican regulations on letters of credit with those stipulated in the US U.C.C. shows the aversion that Mexican legislators still have towards offers that do not require an acceptance in order to be enforceable. Issues regarding firm promises go beyond mere enforcement. The application of civil law doctrines also affects the result of this enforcement.

A clear example of these difficulties is the enforcement of promises to sell. In Mexico, these types of firm promises are not considered to create obligations to give, but obligations to do.<sup>83</sup> This distinction is borne from the mentioned application of Aristotelian classifications<sup>84</sup> as doctrine and the code has divided contract obligations into “obligations to give,”<sup>85</sup> and “obligations to do.”<sup>86</sup> If a contract is considered to create an obligation “to do,” such as entering into a future contract, it cannot have effects “to give,” such as transferring the property of an object or land<sup>87</sup> even when that was the effect of the future contract.

An example of these effects is the *Amparo* decision given in the case of *María Trinidad Gómez Jiménez*.<sup>88</sup> This case dealt with a person attempting to enforce a

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<sup>79</sup> Código Civil Federal [C.C.F.], as amended, articles 1863-64, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

<sup>80</sup> C.C.F. article 1871.

<sup>81</sup> Compare C.C.F. articles 18061-18072, with C.C.F. article 1860.

<sup>82</sup> Ley de Instituciones de Crédito [L.I.C.], as amended, article 71, D.O. 18 de julio de 1990 (Mex.).

<sup>83</sup> See C.C.F. Articles 2011-2028.

<sup>84</sup> See *supra* section II.

<sup>85</sup> See C.C.F. Article 1824(I).

<sup>86</sup> See C.C.F. Article 1824(II).

<sup>87</sup> See CONTRATO DE PROMESA DE COMPRAVENTA. OPERA SU RECISIÓN DESPUÉS DE VENCIDO EL PLAZO QUE SE ESTIPULÓ EN ÉSTE (LEGISLACIÓN DEL ESTADO DE PUEBLA), Primer Tribunal Colegiado en Material Civil del Sexto Circuito [T.C.C.] [First Civil Court of the Sixth Circuit], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XXII, Julio 2013, Tomo 2, Tesis VI.1o.C.31 C (10a.), P. 1362.

<sup>88</sup> María Trinidad Gómez Jiménez, Semanario Judicial de la Federación, Quinta Época, Tomo CXXV, Página 355 (Mex.) (Tesis Aislada) (Amparo civil directo 1205/54, 11-07-1955) in KOZOLCHYK, CONTRACTS *supra* note 8 at 938-940.

promise to sell real estate.<sup>89</sup> The court decided that a promise to sell could not be enforced to transmit the ownership of land as promises to sell only create obligations “to do.”<sup>90</sup> The claimant had to sue the defendant not for the transmission of the property over land, but for granting a sales contract.<sup>91</sup>

The application of the French theory of “offer and acceptance” and a strict adherence to Aristotelian classifications make it extremely difficult to apply promises to sell real estate in Mexico. Some proposed solutions include the use of escrow accounts similar to those used in the United States and Germany.<sup>92</sup>

#### IV. “OFFER” AS DEVELOPED IN US LAW

To give an example of the different results the independent development of commercial law could bring, I will present examples from US courts dealing with offers in commercial matters.

Instead of the mechanical approach taken by French doctrine (an offer followed by acceptance creates a contract), the US approach asks whether the parties intended to create a legal relation.<sup>93</sup> This “means that even if a valid offer has been accepted, the parties must have intended to create legally binding relations.”<sup>94</sup>

The focus of the US doctrine is not whether there was a valid acceptance of an offer; instead, the focus is on the intention of the parties. While in the French (and Mexican) approach, a contract can be created if there is an acceptance to an offer, in US law, it is necessary to demonstrate that the parties have bargained something in order for the contract to materialize.

Unlike the mechanical approach of French doctrine, the concept of bargaining is better suited for commercial relations. One example is the case of *Teachers Ins. & Annuity Ass'n v. Tribune Co.*<sup>95</sup> In that case, the U.S. District Court for the Southern District of New York had to decide at what moment a binding agreement was created when the parties exchanged several communications.

In *Teachers Ins.*, the Tribune Company was seeking to attract creditors. Tribune created an approximately 50-page brochure describing a proposed

<sup>89</sup> Maria Trinidad Gómez Jiménez, in KOZOLCHYK, *CONTRACTS* *supra* note 8 at 938-39.

<sup>90</sup> *Id. supra* note 8 at 939.

<sup>91</sup> *Id. supra* note 8 at 939, 940.

<sup>92</sup> See Boris Kozolchik, *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 Material: Working Group Reference Materials*, 27 ARIZ. J. INT'L & COMP. L. 441 (2010).

<sup>93</sup> Philippe, *supra* note 60 at 372.

<sup>94</sup> *Id.*

<sup>95</sup> *Teachers Ins. & Annuity Ass'n v. Tribune Co.* 670 F. Supp. 491 (S.D.N.Y. 1987).

mortgage and loan.<sup>96</sup> The only interested creditor was Teachers Insurance and Annuity Association of America, who received a letter from Tribune to begin negotiations on the terms of a purchase-money mortgage.<sup>97</sup>

The facts indicate that Teachers Ins. accepted to enter into negotiations with Tribune and agreed to extend the loan.<sup>98</sup> Teachers Ins. sent a commitment letter to Tribune, but the letter did not mention offset accounting.<sup>99</sup> The letter also stated that the agreement was contingent in the preparation of certain documents and the execution by Tribune.<sup>100</sup> Tribune responded with a letter that purported to be part of the negotiation but not a “binding agreement.”<sup>101</sup> This letter also mentioned nothing about offset accounting.<sup>102</sup>

Due to internal issues, which included the sale of a building and the problem of offset accounting, Tribune backed away from the deal.<sup>103</sup> The main legal question in the case was the “nature of the obligations that arose out of the commitment letter agreement.”<sup>104</sup> The court decided that the letter represented a “binding preliminary commitment” that “obligated both sides to conclude a final loan agreement upon the agreed terms by negotiating in good faith to resolve such additional terms as are customary in such agreements.”<sup>105</sup>

This decision brings up the issue of forcing parties to enter into agreements. However, in order to avoid “trapping parties in surprise contractual obligations [...]”,<sup>106</sup> the court established the concept of “binding preliminary commitments,” which are agreements that bind the parties without being complete contracts.<sup>107</sup> This court’s analysis shows the importance of adapting legal theories to real commercial interactions.

Another case that shows a flexible approach to contract creation and the definition of offer used by US courts is *Leonard v. Pepsico, Inc.*<sup>108</sup> This is an interesting case as it relates to an intentionally misleading advertisement, albeit for comedic purposes.

In the facts of *Leonard*, the Pepsi Company conducted a promotional campaign in the mid-1990s,<sup>109</sup> which consisted of an opportunity to collect “Pepsi

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<sup>96</sup> *Teachers Ins.* 670 F. Supp. at 493.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 494.

<sup>100</sup> *Id.*

<sup>101</sup> *Teachers Ins. & Annuity Ass’n v. Tribune Co.* 670 F. Supp. 491, 494 (S.D.N.Y. 1987).

<sup>102</sup> *Teachers Ins.* 670 F. Supp. at 494.

<sup>103</sup> *Id.* at 495-496.

<sup>104</sup> *Id.* at 496.

<sup>105</sup> *Id.* at 499.

<sup>106</sup> *Id.* at 497.

<sup>107</sup> *Teachers Ins. & Annuity Ass’n v. Tribune Co.* 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

<sup>108</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y., 1999).

<sup>109</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 118.

Points” and exchange these points for products from a catalog.<sup>110</sup> Before releasing the campaign nationally, the Pepsi Company tested the promotion by releasing a TV commercial in the Seattle, Washington, area.<sup>111</sup>

The mentioned commercial featured several products that could be exchanged for “Pepsi Points.”<sup>112</sup> At the end of the commercial, a Harrier Fighter Jet was presented with the following words: “HARRIER FIGHTER 7,000,000 PEPSI POINTS.”<sup>113</sup> Even though the fighter jet has a prominent appearance in the TV commercial, it is not mentioned in the catalog.<sup>114</sup>

The plaintiff in *Leonard* submitted the order form included with the catalog, fifteen Pepsi Points (the minimum number of points needed to claim a prize), and a check for \$700,008.50 since it was possible to send cash instead of Pepsi Points.<sup>115</sup> Pepsi returned the check with a letter explaining that the fighter jet was not part of the promotion.<sup>116</sup>

After reviewing the facts of the case, the United States District Court of New York reached the conclusion that the TV commercial could not be considered an offer.<sup>117</sup> The reason is that in US jurisprudence (and common law jurisprudence in general) mere advertisements are not considered offers.<sup>118</sup>

Advertisements in common law countries are considered mere invitations to bargain.<sup>119</sup> In order for an advertisement to be considered an “offer” (in the same sense as in the French doctrine), it needs to be “clear, definitive and explicit, and [leave] nothing open for negotiation.”<sup>120</sup>

Although these decisions were not strictly based on commercial customs and practices, they demonstrate that US courts are concerned with the realities of the market, such as the problems related with the negotiation of commercial agreements as seen in the *Teachers Insurance* case. This case shows that a strict application of a theory, such as the offer-acceptance theory, is not always in accordance with the form in which commercial contracts take place. Similarly, the *Leonard v. Pepsico* case shows issues with a strict application of said theory.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> The court makes a detailed description of the commercial. *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 118-19.

<sup>113</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 119.

<sup>114</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 119 (S.D.N.Y., 1999).

<sup>115</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 119.

<sup>116</sup> *Id.* at 120.

<sup>117</sup> *Id.* at 132.

<sup>118</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 123-24. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1981).

<sup>119</sup> *See e.g.*, RESTATEMENT, *supra* note 118 at § 26 cmt. b. *See also* *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 123-24 (S.D.N.Y., 1999).

<sup>120</sup> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 124 (quoting *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188 (1957)).

In Mexico, both the Civil Code and commercial legislation compel merchants to respect the prices advertised to the public without any latitude in cases that could be interpreted as non-offers or mistakes.<sup>121</sup> The disposition in the Federal Consumer Protection Law only allows changes to the offer when the consumer gives his consent.<sup>122</sup> It is not difficult to see the problems created by a strict, mechanical application of these dispositions as there are numerous cases in which merchants have been forced to accept extremely low prices advertised by mistake.<sup>123</sup>

Other clear example of US courts acknowledging the realities of the market is the case of letters of credit. Although the U.C.C. did not specify whether the letters of credit were considered as revocable or irrevocable prior to the modification of Article 5 in 1995,<sup>124</sup> by the 1970s courts in the United States had already established that revocable letters of credit are “illusory contracts.”<sup>125</sup> As explained by another court:

The bank’s role in a letter of credit is to facilitate commercial transactions between its customer and the beneficiary by creating an arrangement whereby the beneficiary seller can deal freely with the buyer without fear that payment will be withheld. A revocable letter of credit provides the beneficiary seller with little protection. Therefore, unless otherwise provided in the letter of credit itself, there should be a presumption in favor of irrevocability.<sup>126</sup>

US courts realized that in the specific case of letters of credit, offers that require acceptance in order to be enforceable leave beneficiaries with little protection. Nevertheless, this trend to favor irrevocable letters of credit was not always the norm.

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<sup>121</sup> Ley Federal de Protección al Consumidor [L.F.P.C.] [Federal Consumer Protection Law], as amended, article 42, 24 de diciembre 1992 (Mex.). See also Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, art. 1860, 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

<sup>122</sup> L.F.P.C. article 42.

<sup>123</sup> See *Venden 99 paquetes de cerveza por 396 pesos en Veracruz* [99 packs of beer sold for 396 pesos in Veracruz], PUBLIMETRO, May, 8, 2015, available at, <http://www.publimetro.com.mx/noticias/venden-99-paquetes-de-cerveza-por-396-pesos-en-veracruz/moeh!jnKbRVS89s7TI/> (last visited Oct. 31, 2016). See also, Antonio Rebolledo, *Compran estufa en 13.99 pesos por error en etiqueta* [Oven bought at 13.99 pesos due to mistake in the price tag], EL DIARIO MX, (June 30, 2014 2:23 PM), [http://diario.mx/Local/2014-06-30\\_a56b5dc5/compran-estufa-en-1399-pesos-por-error-en-etiqueta/](http://diario.mx/Local/2014-06-30_a56b5dc5/compran-estufa-en-1399-pesos-por-error-en-etiqueta/) (last visited Oct. 31, 2016). See also, *Compra pantalla de 39 pulgadas por 70 centavos gracias a Profeco* [39-inch screen purchased at 70 cents thanks to Profeco], EXCÉLSIOR (June 18, 2014 7:37 PM), <http://www.excelsior.com.mx/nacional/2014/06/18/966049> (last visited Oct. 31, 2016).

<sup>124</sup> See James E. Byrne, Revised Article 5: Letters of Credit, 6B Hawklnd UCC Series (West) §5-101:2 [Rev], §5-105:3 & n2 [Rev] and §5-106 n2 [Rev] Dec. 2008.

<sup>125</sup> West Virginia Hous. Dev. Fund v. Sroka, 415 F. Supp. 1107, 1111-12 (W.D. Pa., 1976).

<sup>126</sup> Data Gen. Corp. v. Citizens Nat’l Bank, 502 F. Supp. 776, 783 (D. Conn., 1980).

In a work published in 1933, an attorney named Vald Hvidt who was working in Copenhagen, Denmark, explained that back in the 1930s the norm was to use revocable letters of credit.<sup>127</sup> Vald Hvidt explained that the trade world back then was dominated by merchants who knew and trusted each other.<sup>128</sup> Nevertheless, when dealing with strangers, as in the case after the “Great War,” the use of irrevocable letters of credit increased.<sup>129</sup>

Merchants adapt and change their ways of doing businesses according to changes in the market. An adequate commercial law must be able to adapt to those changes promptly and adequately. Binding commercial law to the strict logic created for the civil code impedes this adaptation. The use of commercial customs and practices as the basis for the commercial code and commercial laws is an adequate way of allowing adaptations to be made. An example of how to reach this goal is found in the creation of “soft” law in international law.

## V. UNIFORM CUSTOMS AND PRACTICES

In the theory of international law, scholars have classified international norms as “hard”<sup>130</sup> and “soft” laws.<sup>131</sup> The aspect that differentiates hard law from soft law is whether the instruments are deemed binding.<sup>132</sup> Instruments that have been created by practitioners, but that have not been enacted as national laws or treaties, fall into this category of “soft” law.<sup>133</sup> Although not

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<sup>127</sup> VALD HVIDT, *BANKERS' CREDITS* 9 (Copenhagen-London, 1933).

<sup>128</sup> *Id.* at 9-10.

<sup>129</sup> In particularly troublous periods —such as during and immediately after the Great War— when the reliability of connections was shaken, an increase of irrevocable credits as against the revocable ones is recorded. The war period caused a number of new business houses to crop up, and houses of old standing started trading on new lines. As a consequence the seller’s knowledge of the buyer was not, as a rule, sufficient to afford a sound opinion of the latter’s solidity and respectability. *Id.* at 9.

<sup>130</sup> On a domestic level, law includes constitutions, statutes, codes, regulations, and court decisions. International law includes those rules and norms that the international community deems technically binding or hard law, namely treaties or customary international law. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Finance Instruments*, 30 *Yale J. Int’l L.* 125, 127 (2005).

<sup>131</sup> “Other international rules and norms reside in the catch-all category of soft international law.” *Id.*

<sup>132</sup> *See Id.*

<sup>133</sup> *See* Bottom-up lawmaking tales do not feature state policymakers but rather the very practitioners —both public and private— who must roll up their sleeves and grapple with the day-to-day technicalities of their trade. On the basis of their experiences on the ground, these practitioners create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down processes. *Id.* at 126.

strictly enforceable, these instruments have become extremely important in the regulation of international trade and have even forced changes in domestic laws.<sup>134</sup>

One of these instruments is the Uniform Customs and Practices for Documentary Credits [U.C.P.]. U.C.P. started as national trade rules and statements of views or positions adopted by national banking groups.<sup>135</sup> The International Chamber of Commerce took upon itself the task of grouping these local rules and statements into a single instrument that could be used to regulate the use of letters of credit on an international level.<sup>136</sup> The I.C.C. enacted the *Règlement Uniforme Relatif aux Crédits Documentaires* in 1929.<sup>137</sup> These regulations would be reformed on several occasions, the last one being U.C.P. 600 in 2007.<sup>138</sup>

The compilation of customs and practices that is the U.C.P. has been successfully used by bankers for decades for managing documentary credits.<sup>139</sup> This success has compelled legislators to accept its use in lieu of commercial law, as in the above-mentioned case of the U.S. U.C.C. or even in the Credit Institutions Law of Mexico.<sup>140</sup>

These international instruments show a way in which commercial customs and practices can be employed as suppletory of commercial legislation. Moreover, if trade groups are allowed to enact compilations of their customs and practices, it would also eliminate issues regarding the application of customs in resolving legal controversies, as in the case of establishing when a custom has been created or is valid.<sup>141</sup>

Moreover, allowing trade groups to compile their customs would also reduce issues like choosing between different customs.<sup>142</sup> Furthermore, con-

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<sup>134</sup> See *supra* notes 68, 69, and *infra* 140.

<sup>135</sup> BORIS KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS 83 (1966).

<sup>136</sup> *Id.* at 83-84.

<sup>137</sup> *Id.* at 84.

<sup>138</sup> See THE COMPLETE UCP, TEXTS, RULES AND HISTORY 1920-2007, at 208 (Dan Taylor ed., 2008).

<sup>139</sup> See *Id.*

<sup>140</sup> Ley de Instituciones de Crédito [L.I.C.], as amended, art. 71, D.O. 18 de julio de 1990 (Mex.).

<sup>141</sup> See The term custom, despite its seeming transparency of context, blurs, rather than covers, a wide field of concepts not only in different legal systems but even within the boundaries of a given jurisdiction. As used in relation to commercial law, it has meant in the common-law world both an entire body of law as in the case of the “law merchant.” And also a “course of dealing” or “usage of trade,” persuasive in nature and applicable to “give particular meaning to and supplement or qualify the terms of an agreement.” Civil lawyers, on the other hand, have since the days of Bartolus struggled with the problem of properly defining and delimiting the scope of customs. KOZOLCHYK, AMERICAS *supra* note 135 at 75.

<sup>142</sup> The mere fact that there are different parties to a letter of credit transaction and that they usually belong to different spheres of the mercantile community gives rise to different practices, depending upon the capacities in which the parties interact. Buyers and sellers, im-



cerns with protection of parties not belonging to the trade sector or group are lowered as these sectors or groups know that compiling unequal customs would affect their businesses.<sup>143</sup>

The enactment of compilations of customs and practices by trade sectors or groups would also allow Mexican commercial law to develop in parallel with commerce without having to wait for slow legislative processes. This would also be a return to the commercial law that existed in Mexico before the enactment of the 1884 Commercial Code (with merchants playing a more important role in the creation of the laws that regulate them).

However, these changes would also require a deeper change in Mexican commercial legislation. It is necessary not only to accept the use of commercial customs as the grounds for commercial law instead of the civil code, but also to change the anti-merchant attitude inherited from the French Commercial Code. Moreover, misgivings about allowing parties other than Congress to enact commercial legislation need to be eliminated.

## VI. CONCLUSION

The reliance on the Civil Code to fill the gaps in commercial law has prevented Mexican commercial law from evolving. The Civil Code did not develop as a tool to regulate the rapidly changing environment of commerce. The doctrines created to regulate the lives of citizens, with their Aristotelian logic of unchanging “essences,” are not adequate for a world where certainty may not be as important as expeditiousness.

Legislators in Mexico should allow commercial legislation to develop independently from the Civil Code. It should be left to merchants, judges, and scholars to develop commercial doctrine. Removing the Civil Code as an

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porters or exporters bring about different usages when dealing among themselves than when acting as parties in a transaction in which the presence of one or several banks alters the nature of preexisting practices by introducing greater certainty, redistributing duties, and shifting burdens of proof. *Id.* at 76-77.

<sup>143</sup> It could be argued that the UCP, without clearly violating public policy, could still effect an unfair result especially for parties such as customers, beneficiaries, shipping and insurance companies not directly represented in their formulation, and that their application should be precluded in such cases. However, while the earlier versions of the UCP were essentially the product of the views of the international banking community, the later versions, particularly the 1962 and 1974 Revisions, have sought to incorporate the views of importers, exporters and the shipping and insurance industries as well as judicial decisions and doctrinal writing. Although there are still one-sided provisions, experienced bankers and banking lawyers are aware that unfairness toward customers when arbitrarily invoking these provisions, can only result in an eventual loss of business. Consequently, the problem of unfair results in the application of the UCP is more a function of the circumstance of a given case —reflecting an unconscionable or sharp practice by an individual bank or banker— than an endemic unfairness of the text. 5 *Int'l Encyclopedia of Comp. L.* §5-30 (Boris Kozolchik, n.d.).

auxiliary of commercial legislation and allowing the use of commercial practices, usages of trade, and customs would allow commercial law to develop in a way that reflects the reality of the Mexican commercial market.