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THE ARCHETYPAL MERCHANT IN THE 1889 MEXICAN COMMERCIAL CODE*

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Abstract: *When creating laws, legislators bear in mind the subjects whose activities are to be regulated. This mental picture will affect the regulation of both, the subjects and their activities. Different perceived characteristics can be regulated in various ways. While the laws that regulated commerce in Mexico before 1889 were based on the concept of an honest merchant, the Commercial Code enacted by then President Díaz had a different archetypal merchant. Since 1889, commercial laws in Mexico have been enacted based on the idea of an untrustworthy merchant, someone who needs to be regulated and controlled, which has created a regulatory system riddled with unnecessary costs. Through the study of cases decided shortly after the enactment of the 1889 Code, the change in the perception of merchants and commerce becomes apparent. These cases show the strict application of rules in lieu of commercial customs and practices, and the idea of protecting those who are not merchants in their dealings from those who are. However, these ideas should be eliminated from commercial laws. The laws that regulated commerce in Mexico before the 1889 Code offer an excellent starting point for the reform of commercial laws. Laws that assume that merchants are honest and capable of regulating their own affairs will advance commerce in Mexico, which would in turn allow the country to become an innovator (as opposed to a follower) in commercial matters.*

Keywords: *Archetype, commerce, merchant, customs and practices.*

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Resumen: *Durante la creación legislativa, el legislador tendrá una idea mental de los sujetos cuyas actividades serán reguladas. Esta idea mental afectará la regulación de los recipientes y sus actividades. De esta forma, diferentes cualidades dadas a estos sujetos se regularán de manera diferente. Esto se observa en la regulación mercantil que existía en México antes de la aparición del Código de 1889. Antes de esa fecha, la idea que se tenía en la regulación mercantil era la de un comerciante honesto. Sin embargo, desde la promulgación del Código de 1889, la idea que se ha plasmado en la legislación mercantil es la de un comerciante no fidedigno, alguien que debe ser regulado y controlado. Esto ha conllevado a la creación de un sistema mercantil plagado de costos innecesarios. El estudio de decisiones judiciales dadas poco después de la promulgación del Código de 1889 hace aparente el cambio de actitud. Estos casos demuestran el intento por proteger a los no mercantes y la aplicación estricta de reglas en lugar del uso de prácticas y costumbres mercantiles. Sin embargo, estas actitudes deben ser removidas del derecho mercantil mexicano. Las leyes que regularon el comercio en México antes de 1889 ofrecen una buena base para la reforma mercantil. Leyes que se basan en la idea de un comerciante honesto capaz de autorregularse promueven el desarrollo comercial. Esto permitiría a México el convertirse en un innovador (en lugar de simplemente copiar a otros) en cuestiones comerciales.*

Palabras clave: *Arquetipo, comercio, comerciante, costumbres y prácticas.*

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I. Introduction

This article is a study of the merchant archetype used in the Mexican Commercial Code of 1889,[1] which is the Commercial Code (with many reforms)[2] that currently governs commercial transactions in Mexico. The inclusion or exclusion of commercial archetypes, practices, and principles can affect the development of not only positive law, but also commerce within a country.

The work written by Dr. Boris Kozolchyk, *Comparative Commercial Contracts*, elaborates on this type of studies[3] by examining the history and processes behind the enactment of important commercial texts, including the French *Code de Commerce* and the German civil and commercial codes. His study points to the possible effects of creating a positive law based on commercial principles, customs, and commercial archetypes on a country's or a region's economy.[4]

For example, as to the negative effects of an archetype based on a "bad man" or an "infamous witness", Dr. Kozolchyk indicates that:

> Imagine, for example, the cost incurred by the holders of checks about to be deposited with their banks if the bank's presumption was that their check depositors were (a la Holmes) the "bad men of checks". Such a presumption assumes that check depositors had acquired them in bad faith and that it was their burden to prove that they did not steal, embezzle or fraudulently procure and endorse them. Aside from the high cost of such a negative proof, check depositors could no longer count on receiving provisional credits for their deposited checks as is normally received by check depositors under existing law and practice.[5]

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[1] Código de Comercio [Cod. Com.] [Commercial Code], as amended, Diario Oficial de la Federación [D.O.], October 7–December 13, 1889, Art. 2 (Mex.).

[2] *See* Cámara de Diputados, *Código de Comercio,* LXII Legislatura, *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (last updated March 28, 2018).

[3] Boris Kozolchyk, Comparative Commercial Contracts: Law, Culture and Economic Development 332-340 (2014).

[4] "[B]y archetypal behavior, I mean the representative behavior of average merchants, bankers or professionals as reflected in their standard practices as well as in the practices of highly respected and trusted merchants, bankers or professionals, to which I refer as their best practices". *Id.* at 39.

[5] *Id.* at 41. Kozolchyk takes the example of an "infamous witness" from Andres Bello, and the "bad man" from Justice Oliver Wendell Holmes Jr. *Id.* at 40-41.

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Dr. Kozolchyk's ideas on archetypes and his comparative study of the treatment given to commercial law in different jurisdictions, like France, Germany, the United States, and Mexico, will be used as basis of study for this article.

The different treatment given to merchants and commerce in general can be seen when comparing the French *Code de Commerce* and the German codes. As will be explained later,[6] the French code reflects the negative view, shared by Napoleon, that French society had regarding merchants and commerce in general. This negative view was so widespread that merchants who found fortune tended to pay their way into nobility as a way to eliminate the stigma of being of merchant origin.[7]

In contrast to the French experience, the attitude in Germany regarding commerce was the opposite, as seen in its approach to charging interests in commercial transactions. As Dr. Kozolchyk explains, post-reformation Germany was not burdened with concerns about sinful usury,[8] and this had a tremendous effect on the development of commercial law in Germany.

Dr. Kozolchyk explains the differences in the development of negotiable instruments as means of payment between Germany and countries such as France and Spain.[9] While negotiable instruments developed as contracts of exchange in legislations based on the French *Code de Commerce*, these mechanisms followed a distinct evolution thanks to the efforts of commercial law doctrinaires who used commercial practices as the core of their writings.[10]

According to Dr. Kozolchyk, the dissimilarity in the development of negotiable instruments arises from the attitudes that legislators had regarding merchants and commercial law.[11] Those commercial laws that are free from negative attitudes towards commerce and are based on commercial principles, customs, and practices will further development.[12] Unfortunately, that was not the way the Mexican Commercial Code was designed.

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6 *See infra* "The Influence of French Doctrine".

7 *See* KOZOLCHYK, COMPARATIVE *supra* note 3 at 270-271.

8 "[U]nlike the concern for usury that prevailed in pre-codification France and Spain, commercial and consumer credit did not evoke the fear of prosecution in pre-codification Germany. Not surprisingly, toward the end of the eighteenth century it was neither illegal nor immoral in Germany and Italy to pay interest on periodic payments such as contracts of annuities that fluctuated between four and five percent per annum". *Id.* at 384.

9 *Id.* at 385-391.

10 "[I]n 1839… Dr. Karl Einert, a law professor and commercial court judge, provided the proper direction for Germany's (and many other nations') negotiable instruments law in his monograph, "The Law of Bills of Exchange and the Everyday Needs of the Bill of Exchange Business in the Nineteenth Century". In it, he attacked the theory of the *Code de Commerce* that bills of exchange were part of the contract of exchange…". *Id.* at 390.

11 *See id.* at 390-391.

12 "Commercial credit and access to investment capital became major engines of Germany's commercial and industrial growth during the middle of the nineteenth century. At the

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As I will explain in this article, the Commercial Code was designed as a response to the conditions of its time.[13] Mexican legislators attempted to bring order to a country that had experienced almost a century of internal fighting and even invasions,[14] and so, based the Commercial Code on (among others, but especially) the French *Code de Commerce*.[15] Unfortunately, Mexican legislators dismissed the prevailing legislations that had been used up to that time.

These *de facto* legislations included some drafted by merchants themselves, which were based on commercial archetypes and practices that reflected the manner in which merchants conducted their business. These archetypes should be brought back to the core of modern commercial legislations.

II. Archetype

Defining an appropriate archetype is important as it will be the basis of the whole system. Moreover, archetypes reflect the attitudes and values of a society or of the legislators.[16] An archetype is defined by Black's Law Dictionary as "the original form from which a copy is made".[17] While not usually given much importance when studying law,[18] the truth is that archetypes have always been present in law; it is possible to find them all the way back to ancient Roman times.

Dr. Kozolchyk describes the use of an archetype used by Roman jurists when discussing contractual clauses,[19] the "*bonus vir*", which is described as "an honorable man" who gives his opinion of a condition in a contract.[20] For Dr. Kozolchyk, this was not the only archetype used in Roman law, as the Romans had an "archetypal pattern of transactional selfishness" that affected the development of commerce.[21]

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same time, following the German French war, Germany emerged as an important financial center for what Braudel referred to as "high commerce" as well as for large industries and railroads". *Id.* at 391-392 (citations omitted).

13 *See infra* "Historical Background of the Mexican Commercial Code of 1889".

14 *See infra* "Historical Background of the Mexican Commercial Code of 1889". Also, *infra* note 71.

15 *See infra* "The Influence of French Doctrine". Also *infra* note 98.

16 Idea from Dr. Boris Kozolchyk. *See* Letter from Boris Kozolchyk to Raul Iturralde Gonzalez (Feb. 19, 2018) (on file with author).

17 Black's Law Dictionary 106 (6th ed. 1990).

18 *Compare* the definition given in the 6th edition of the Black's Law Dictionary *supra* note 17 and accompanying text *with* the fact that the 8th edition does not give a definition of "archetype". Black's Law Dictionary 113 (8th ed. 2004).

19 Kozolchyk, Comparative *supra* note 3 at 109.

20 Cuerpo del Derecho Civil Romano Primera Parte Instituta–Digesto 18.1.7 (D. Ildefonso L García del Corral trans., Jaime Molinas ed., 1889) *in* Kozolchyk, Comparative *supra* note 3 at 130 (translation by Kozolchyk).

21 Kozolchyk, Comparative *supra* note 3 at 112.

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Therefore, defining an archetype is important as it will define the treatment given to subjects of the law, such as merchants. An example that illustrates the creation of archetypes is the famous 1960 *Frigaliment* case,[22] in which Judge Friendly wonders how a merchant would act when presented with an ambiguous contract term.

In *Frigaliment*, after wrestling with different ways to define the contractual term "chicken," Judge Friendly indicates that the "[p]laintiff must have expected defendant to make some profit–certainly it could not have expected defendant deliberately to incur a loss".[23] By questioning this, Judge Friendly was not asking what a regular person would expect from this transaction; rather, he was asking what a reasonable merchant would understand by the word "chicken" in a commercial contract.[24]

Accordingly, Judge Friendly had in mind an archetypal merchant, which is evidenced by his reminder that "when one of the parties [of the contract] is not a member of the trade or other circle, his acceptance of the standard must be made to appear by providing either that he had actual knowledge of the usage or that the usage is generally known in the community".[25]

Even though the *Frigaliment* case is a clear example of the use of archetypes, it is too general as it illustrates the minimal expectation of a regular merchant.[26] For a more specific type of archetype, consider the cooperative banker that negotiates letters of credit.[27] An analysis of this type of archetypical merchant goes beyond the scope of this article; nevertheless, a brief description would be that a banker negotiating letters of credit has to consider that, in later transactions, he may be in the opposite position and any conduct (either good or bad) can be reciprocated.[28] These types of merchants

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[22] Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) [hereinafter *Frigaliment*].

[23] *Id.* at 120. This analysis and the linkage with the concept of reasonableness was performed by Dr. Boris Kozolchyk, *see* KOZOLCHYK, COMPARATIVE *supra* note 3 at 18, 58, 59, 1027, 1030.

[24] "[T]he buyers of chicken in *Frigaliment* were professional merchants who bought and sold poultry based not upon their «eye and hand» inspection, but upon the types of chicken described in catalogues or other printed descriptions of their key features." KOZOLCHYK, COMPARATIVE *supra* note 3 at p. 1030 (2014). For an in-depth analysis of this case see *id.* at 1027-1031.

[25] *Frigaliment,* 190 F. Supp. at 119.

[26] Idea from Dr. Kozolchyk, Letter *supra* note 16.

[27] *See* "Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised [sic] to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation". Uniform Customs and Practices for Documentary Credits, ICC Publication No. 500 (1993), Art. 10(b)(ii).

[28] Analysis carried out by Dr. Kozolchyk *et al* in the reforms of UCP 500. See Letter from Boris Kozolchyk to Salvatore Maccarone 7 (May 30, 1990) (Joint Position on First 20 UCP articles) (emphasis on original) (on file at Kozolchyk National Law Center, *www.natlaw.com*). *See also "*This interchangeability incorporates, organically so to speak, a marketplace standard of fairness as the governing standard of correspondent banks' transactions. The issuing banker

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should be considered archetypes and their practices incorporated into commercial legislation.

An example of these types of archetypes in the drafting of statutes is given in Article 8(2) of the United Nations Convention on Contracts for the International Sale of Goods.[29] This article indicates that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".[30] This wording refers to an archetype by pointing to a hypothetical third person, which in this case is a reasonable hypothetical person operating under the same circumstances as the other party.[31]

By archetypal behavior, as it relates to merchants, Prof. Kozolchyk denotes "the representative behavior of average merchants …as reflected in their standard practices as well as in the practices of highly respected and trusted [or fiduciary types of] merchants….".[32] The commercial behavior of these hypothetical persons should be taken into account when enacting legislation or when compiling widely used usages of trade, as for example the Uniform Customs and Practices for Documentary Credits.[33]

It is important to determine the archetype legislators have in mind when enacting a statute, since the qualities ascribed to the archetype will establish the type and volume of regulation imposed on the activity. In other words, depending on the level of trust accorded to the regulated class (in this case, the merchant class), legislators will impose greater or lesser control (or supervision) over said class.[34]

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who questions whether his confirming banker acted properly when paying or checking documents can obtain his answer by asking himself: What would I have done as an archetypal confirming bank?" Kozolchyk, Comparative *supra* note 3 at 1051.

[29] United Nations Convention on Contracts for the International Sale of Goods [CISG] Art. 8(2), Apr. 11, 1980, 1489 UNTS 3, 19 ILM 671, *http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf*. Dr. Kozolchyk had noted the use of archetypes in CISG as he had discussed the use of commercial reasonableness with the chief drafter of CISG, John Honnold. Kozolchyk, Comparative *supra* note 3 at 950, 977.

[30] CISG § 8(2) (emphasis added). Kozolchyk, Comparative *supra* note 5 at p. 950, 977.

[31] *See* Kozolchyk, Comparative *supra* note 3 at p. 950.

[32] *Id.* at 39.

[33] Uniform Customs and Practices for Documentary Credits, ICC Publication No. 500 (1993).

[34] *E.g.* "[C]ommercial archetypes help the legislator or judge to establish the reasonableness of the terms and conditions of a commercial contract, including its prices." Kozolchyk, Comparative *supra* note 3 at 18. *Also,* "Once the lawmaker becomes aware of how such a business is conducted, he should assume the merchants' skill, decency, good faith, and willingness to emulate the behavior of respected peers…". As a commercial legislator or adjudicator, then, you need not spend much time writing detailed rules on how the good guys should conduct their business. You should spend your time as a legislator "roping off" the bad guys. These are the ones who act dishonestly and in bad faith, who take advantage of their clients' innocence

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III. The Merchant

An important distinction has to be made about the meaning of merchant. For a long time, there was a difference between people who took part in international trade and commerce in large quantities and those who sold their merchandise locally. As an example, Ruiz Guerra points out that not everybody could be a member of an officially recognized association of merchants such as Spain's *Universidad de Comerciantes*;[35] only those who "participated in 'high commerce'" could be part of the *Universidad*, *i.e.*, those who "transport and sell in large quantities, move merchandise between territories by sea and land, and do so on a consistent basis".[36]

In explaining the privileges given to these merchants in Spanish legislation, Solórzano Pereyra says that:

> [T]hose who from their homes and stores purchase and sell [merchandise] at the retail level, and who do not [therefore] expose themselves to shipping and other risks… should not nor do enjoy the above-mentioned privileges and protections, unlike those who transport and sell [merchandise] at a wholesale level and engage in trade between territories by land or sea…[37]

María del Refugio Gonzalez explains that the status of "*mercader*" was acquired only after being registered with the Consulates.[38] This means that the treatment of merchants was based on the person's commercially licensed status —*i.e.* registered status— and not necessarily on the "acts of commerce" performed by said person.

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or of their colleagues' mistakes or of the gaps or ambiguities in the law". Interview with Karl Llewellyn & Soia Mentschikoff, *in id.* at 447.

35 See *infra* "Historical Background of the Mexican Commercial Code of 1889".

36 Ruben Ruiz Guerra, El Consulado de Comerciantes de la Ciudad de Mexico, in Memoria del III Congreso de Historía del Derecho Mexicano 620 (José Luis Soberanes Fernández Coord., Instituto de Investigaciones Jurídicas UNAM 1983) *http://biblio.juridicas.unam.mx/libros/2/700/40.pdf*.

37 "[N]o deben gozar, ni gozan de los privilegios e inmunidades referidas, los que estándose en sus casas y tiendas, sin exponerse a navegaciones y otros peligros, las compran y venden por menudo [las mercancias] …sino los que cargan y venden por grueso y trafican para esto de unos Reynos a otros por mar o por tierra...". Juan de Solórzano y Pereyra, Política Indiana Compuesta por el Señor Don..., in María del Refugio González *Comercio y Comerciantes en la Legislación y la Doctrina Mexicanas del Siglo* XIX, II Anu. Mex. Hist. Derecho 115, 119 (1990) *http://www.juridicas.unam.mx/publica/rev/indice.htm?r=hisder&n=2* (translation by author).

38 The Consulates will be explained later in this book. *See infra* Section "Historical Background of the Mexican Commercial Code of 1889". María del Refugio González, *supra* note 37 at 119-20 (citing Juan de Solórzano y Pereyra, who wrote in the 18th century). Moreover, María del Refugio González indicates that registry was of "capital importance" during the 16th and 17th centuries. *Id.* at 120.

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In an attempt to liberalize the practice of commerce, a scholarly and professional movement in Mexico proposed eliminating the subjective approach to commercial regulation and replacing it with an "objective" method based on the so-called "acts of commerce" performed by the individual and not on whether this individual was a member of a guild or a group.[39] This evolving change in attitude is illustrated by the fact that the last code in Mexico that classified merchants subjectively was the 1854 "Lares" Code, which divided them into "major" and "minor" merchants.[40] The Commercial Code of 1889 not only does not make this distinction, but also indicates that its provisions apply to persons who would not have been considered merchants under the old regime of commerce regulations.[41]

This differentiation is important as it seems that most of the resentment against merchants and their privileges was aimed at those who were members of the Consulates and not those who sold merchandise locally.[42] It is important to bear in mind that the archetypes and regulatory ideas were sharply different in the two principal commercial enactments that have governed

[39] *See* Jorge Barrera Graf, *Evolución del Derecho Mercantil en México en el Siglo XIX, Hasta el Código de Comercio Vigente de 1890* in I Memoria del IV Congreso de Historia del Derecho Mexicano 111, 114 (Instituto de Investigaciones Jurídicas UNAM 1986) *http://biblio.juridicas.unam.mx/libros/2/721/12.pdf*.

[40] The distinction was based on the amount that merchants lent or spent. This distinction was important as the code waived the need for being licensed for minor merchants. *Id.* at 138. *See also infra* "Historical Background of the Mexican Commercial Code of 1889". This was also the approach taken by the German Commercial Code. Kozolchyk, Comparative *supra* note 3 at p. 423.

[41] Art. 4. "Those persons who incidentally, with or without a fixed establishment, perform any commercial transaction, even if they are not regarded as merchants by law, are, nonetheless, subject to the laws of commerce that govern said transaction. Therefore, laborers and manufacturers and generally all those who have established shops or stores in a population for selling the products of their farms, or the products made by their industry or craft, without undergoing any alteration upon the sale thereof, shall be regarded as merchants as far as their shops or stores are concerned". [Art. 4. "Las personas que accidentalmente, con ó sin establecimiento fijo, hagan alguna operación de comercio, aunque no son en derecho comerciantes, quedan, sin embargo, sujetas por ella á las leyes mercantiles. Por tanto, los labradores y fabricantes, y en general todos los que tienen planteados almacén ó tienda en alguna población para el expendio de los frutos de su finca, ó de los productos ya elaborados de su industria ó trabajo, sin hacerles alteración al expenderlos, serán considerados comerciantes en cuanto concierne á sus almacenes ó tiendas"].

Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], Art. 4, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7–December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (translation by author) (original code with no reforms).

[42] "Despite the religious and social acceptability accorded to merchants devoted to «high commerce»…, Cato's …view of the merchant as inferior in morality to the farmer-soldier was quite popular in Spain during medieval times and in the centuries that followed, almost to the present day". Kozolchyk, Comparative *supra* note 3 at p. 145 (internal citations omitted).

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Mexican commerce. Furthermore, while these concepts, rules, and regulations were clearly designed for different types of merchants, they were nevertheless applied interchangeably to *all* of them.

IV. Historical Background of the Mexican Commercial Code of 1889

An analysis of the history of the Commercial Code of 1889 reveals many of the changes needed to adjust the regulatory regime of a guild-based commerce law for it to become a governing mechanism for "acts of commerce", regardless of who performed them (guild members or not), and as intended by the French *Code de Commerce* of 1807.[43] This analysis also shows the alterations the archetypal merchant sustained in the eyes of legislators and legal scholars.

Regardless of the fact that commerce in pre-independence Mexico was clearly a monopoly of the Spanish Crown and Spaniards,[44] the discussion below will focus on the regulation of commerce by the Consulates, which ruled commerce in New Spain until some years after the Mexican independence.[45] Nevertheless, their influence was still felt in the regulation of commerce until the enactment of the 1884 and 1889 Commercial Codes.[46]

The Consulates were the jurisdictional branch of merchant guilds in Spain and the Spanish colonies.[47] Acting as guilds that enacted their own rules, called *Ordenanzas*,[48] the merchants themselves regulated their trade. Thus, during a long period of Mexican history, custom played an important role in the regulation of commerce through the use of these *Ordenanzas.*[49]

By creating Consulates, merchants wanted "to promote the creation of a court where all controversies and disputes between merchants of these provinces could be decided according to merchant rules and practices, thereby avoiding litigation and delays".[50] Consulates decided on all matters that af-

[43] The subjective system was, however, not eliminated completely. *See* María del Refugio González, *supra* note 37 at 149.

[44] *See* Barrera Graf, *supra* note 39 at 114-116.

[45] *Id.* at 128.

[46] *Id.* at 120-121.

[47] *See* Ruiz Guerra, *supra* note 36 at 619.

[48] *See id.* at 619.

[49] Ruiz Guerra explains that "[i]t is true that the sole activity regulated by the *Ordenanzas* was judicial. However, the rest was allotted to the guild by convenience, custom, and contracts entered into with the [Spanish] Crown". ["Es cierto, la única actividad regulada por las *Ordenanzas* era la judicial. Pero el resto fue impuesto al gremio por la conveniencia, por la costumbre y por los contratos establecidos con la Corona"]. *Id.* at 619 (emphasis in original) (translation by author).

[50] "[F]avorecer la creación de un tribunal en que se determinen según estilo de mercaderes, sin dar lugar a pleitos y dilaciones, todas las diferencias y debates entre los mercaderes

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fected merchants and the persons who dealt with them.[51] Nevertheless, Consulates had no jurisdiction over disputes that were unrelated to shipped or stored merchandise.[52]

The Spanish *Ordenanzas* always played an important role in Mexico.[53] The *Ordenanzas* of Seville and Burgos were the basis for the *Ordenanzas* of the Consulate of Mexico,[54] and the *Ordenanzas* of Bilbao regulated commerce in Mexico until the enactment of the Commercial Code of 1884.[55] Moreover, the manner in which *Ordenanzas* were enacted illustrates the influence that merchants had over the legal drafting process.

In contrast to the *Ordenanzas of* Burgos and Seville, the document that established the Consulate in Mexico had no provisions concerning the creation of its own *Ordenanzas.*[56] Merchants in Mexico City requested that the monarch grant them the authority to write their own *Ordenanzas.*[57] In 1594, King Felipe III authorized the *Universidad* to create *Ordenanzas* for Mexico and to use the *Ordenanzas* from Seville for two years while the Mexican ones were being drafted.[58]

Nonetheless, it seems that the *Ordenanzas* of Mexico were not as influential as those from Seville, Burgos and Bilbao.[59] Barrera Graf indicates that the *Ordenanzas* from Burgos were applied as secondary law in the Americas while those from Seville "became Book IX of the *Leyes de Indias*, which were applied as the principal law" in the Americas.[60] Nonetheless, the most influential ones were the *Ordenanzas* from Bilbao, which governed Mexican commercial transactions until the enactment of the Commercial Code of 1884.[61]

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de estas provincias". Ruiz Guerra *supra* note 36 at 623 (quoting other author) (translation by author). Nevertheless, the Spanish Crown had to approve the creation of *Ordenanzas* and to also determine the jurisdiction of the Consulates. *See* Ana María Barrero García, *Las Ordenanzas de los Consulados Castellanos e Indianos (Siglos XVI-XVII), Su Estudio Comparativo,* 14 Revista Chilena de Historia del Derecho, 1991, at 53, 53-58 *http://www.historiadelderecho.uchile.cl/index.php/RCHD/article/view/24794*.

51 The Viceroy decided jurisdictional conflicts between merchants and non-merchants. Ruiz Guerra *supra* note 36 at 624.

52 *Id*. Consulates worked as more than mere tribunals. They also regulated commercial factors, organized merchant activities (such as parties, masses, etc.), ran merchant meetings to solve important issues in emergency situations, and coordinated the recovery of sunken ships and the subsequent division of the spoils among members of the guild. *Id.* at 624, 625.

53 *See* Barrero García, *supra* note 50.

54 *See id.* at 61, 62.

55 Barrera Graf, *supra* note 39 at 120-121.

56 Barrero García, *supra* note 50 at 58.

57 *Id.* at 58.

58 *Id.* The Mexican *Ordenanzas* were enacted on October 20, 1604. *Id.*

59 *See* Barrera Graf, *supra* note 39 at 119-121.

60 "Se convirtieron en el libro IX de las Leyes de Indias, las cuales sí se aplicaron como derecho principal en América." *Id.* at 120 (translation by author) (quoting another source).

61 *Id.* at 120-121.

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As with the *Ordenanzas* of Seville, Burgos, and Mexico, the *Ordenanzas* of Bilbao were the creation of the merchants themselves.[62] In September 1735 the General Commerce Committee of Bilbao decided to name "six people among the merchants of the town, the smartest and most pragmatic, and with the best reputation".[63]

Professor Gorordo[64] explains that the merchants of Bilbao had always ruled commercial law in their geographical area.[65] At first, they used the *Ordenanzas* from Seville, but decided to request permission to create their own due to "the changes of the times, and new cases"[66] that required more precise and clearer orders.[67] The *Ordenanzas* of Bilbao were enacted in 1737.[68] Although enacted in Spain, due to the chaotic situation experienced by Mexico during the 19th century, merchants in Mexico relied on the *Ordenanzas* of Bilbao, among other laws, to regulate their affairs.[69]

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[62] José María Gorordo, Las Ordenanzas de Bilbao de 1737, la Real Compañía Guipuzcoana de Caracas, Ejemplos de "Derechos Históricos", ni Amparados ni Respetados, Blog de José María Gorordo (Apr. 28, 2010), *https://josemarigorordo.wordpress.com/2010/04/28/las-ordenanzas-de-bilbao-de-1737-ejemplo-de-derechos-historicos-ni-amparados-ni-respetados/*. *See also* Barrero García, *supra* note 50 at 53-58.

[63] "[S]eis personas de los Comerciantes de la Villa, los más prácticos e inteligentes y los de mejor concepto". Gorordo, *Las Ordenanzas de Bilbao de 1737, supra* note 62 (quoting another source) (translation by author) (emphasis added). More about the history of the *Ordenanzas, see* Las Ordenanzas del Consulado de Bilbao, Tres Conferencias con motivo del Centenario de su Derogación (Academia de Derecho y Ciencias Sociales de Bilbao, eds., 1931).

[64] Spanish author, Doctor in Law from the University of the Basque Country. José María Gorordo, *Acerca del Autor,* Blog de José María Gorordo, *https://josemarigorordo.wordpress.com/about/*.

[65] Gorordo, *Las Ordenanzas de Bilbao de 1737, supra* note 62.

[66] "La mutación de los tiempos y nueva ocurrencia de casos" *id.* (quoting another source) (translation by author).

[67] *Id.*

[68] *Id. See also* Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] (1737 and 1814), as amended in 1818 (Spain).

[69] *See* "The political struggle to decide the course and characteristics of the young country, with the constant change of governments of contrary ideology and policy, made the survival of Spanish commercial laws possible. Thus, the *Partidas*, the *Ordenanzas* of Bilbao and even the Spanish Commercial Code of 1829 continued to be applied instead of national laws, 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"]. María del Refugio González *supra* note 37 at 133 (internal citations omitted) (translation by author).

In the 19th century Mexico had internal conflicts and wars against France and the U.S., among others. *See* Miguel Ángel Segundo Guzmán, México en el Siglo XIX, de Centenarios y Bicentenarios, Pacarina del Sur, Nov. 14, 2014, *http://www.pacarinadelsur.com/home/huellas-y-voces/156-mexico-en-el-siglo-xix-de-centenarios-y-bicentenarios*.

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After the war of Independence, Consulates were abolished by a decree order on October 16, 1824, and jurisdiction over commercial matters was given to city mayors and judges.[70] Spanish law, including the Spanish Commercial Code of 1829, was applied as secondary law.[71]

On November 15, 1841, Mexican president General Antonio Lopez de Santa Anna issued a decree regarding the organization of commerce courts.[72] Barrera Graf regards this as the first real Mexican Commercial Code.[73] The decree mentioned merchants —both individuals and business associations— and required licensing in order to partake in commerce. However, it also included a list of "businesses" that were deemed commercial.[74] In addition, the decree ordered that the *Ordenanzas* of Bilbao were to be used while a new Commercial Code was drafted.[75]

Mexico's first Commercial Code was enacted in May 1854.[76] This Code is also known as the "Lares Code", in honor of one of Mexico's most renowned commercial law scholars who drafted it.[77] This code covered a large number of commercial contracts, promises and obligations;[78] it was based on the French *Code de Commerce* of 1807 and the Spanish Commercial Code of 1829, while including a list of "businesses" that were regarded as commercial in nature.[79] The applicability of this code was not clear, however, and as with many other laws and regulations of the time, its application depended on who wielded enough political and military power to enforce it.[80]

An 1855 decree granted jurisdiction to lay, or non-merchant, civil judges to adjudicate commercial cases.[81] In April 1884, a Commercial Code was enacted[82] to regulate "acts of commerce" ("*actos de comercio*") as opposed to the previous "businesses". It also oversaw business organizations and intellectual property.[83]

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70 Barrera Graf, *supra* note 39 at 128.

71 *Id.* at 130.

72 *Id.* at 133.

73 *Id.* at 133.

74 Barrera Graf indicates that the French Code of 1807 influenced this decree. *Id.* at 133.

75 *Id.* at 133-134.

76 The code was enacted in the last year of Santa Anna's government. *Id.* at 137-138.

77 The legal scholar's name was Teodoro Lares. *Id.* at 138.

78 That is, commerce on land, commerce on sea, bankruptcies, and commercial procedures. *Id.* at 138.

79 "[C]ontenía una lista de *negocios* que la ley reputaba como mercantiles…" [It had a list of *businesses* that the law regarded as commercial in nature.] *Id.* (translation by author).

80 *See id.* at 139. *Also supra* note 69.

81 Interim president Juan Alvarez, who defeated Santa Anna, enacted this decree. Barrera Graf, *supra* note 39 at 139.

82 *Id.* at 141.

83 *Id.* at 141-142.

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It should be mentioned that a Constitutional reform was required for the enactment of this code because the then in force Constitution of 1857 gave no power to the Mexican Congress to enact a Commercial Code.[84] Article 72(X) of the Constitution of 1857 only indicated that, "Congress has the power… [t]o establish the general basis of commercial legislation".[85] In December 1883, the article was reformed in order to authorize Congress to enact "mandatory Codes for Mining and Commerce throughout the Republic…".[86]

The fact of this Constitutional reform is not as important as the reasons given for it. The original version of Article 72(X) could be read as granting Congress the power of creating general rules that would be complemented with commerce customs, similar to the system in force with the *Ordenanzas* of Bilbao.[87] Nonetheless, it seems that legislators interpreted said article differently.

In his study of the history of Mexican commercial law, Enrique Orozco[88] transcribes a document from the commission charged with drafting a commercial code in 1870.[89] In it, the commission explains that during the creation of the French *Code de Commerce* of 1807, Napoleon opposed the creation of generic commercial rules and instead proposed enacting "general principles",[90] allowing the possibility for them to be implemented later by passing specific rules. This proposal was later discarded as the idea of breaking up commercial law into several parts —rather than having a single Code— was seen as

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[84] *See* Enrique Orozco, La Evolución de la Legislación Mercantil en la República desde la Proclamación de la Independencia Nacional hasta Nuestros Días, in Diario de Jurisprudencia del Distrito y Territorios Federales, tomo XXIII, 104, 111 (Victoriano Pimentel ed., May, June, July and Aug. 1911) (the first part of the study appears on Tomo XXII). *See also* Raul Iturralde Gonzalez, *The Need to Remove the Civil Code from the Mexican Commercial Laws, The Case of Offers and Firm Promises*, 10 Mex. L. Rev. 21, 26-27 (2017).

[85] "El Congreso tiene la Facultad …X. Para establecer las bases generales de la legislación mercantil" Constitución Política de la República Mexicana sobre la indestructible base de su legítima independencia, proclamada el 16 de septiembre de 1810, y consumada el 27 de septiembre de 1821 [C.P. 1857], Art. 72(X), *http://www.juridicas.unam.mx/infjur/leg/conshist/pdf/1857.pdf* (translation by author).

[86] Orozco *supra* note 84 at 111.

[87] *See infra* "The archetypal merchant in the Ordenanzas of Bilbao". Analysis by Orozco *supra* note 84 at 96.

[88] Enrique Orozco was commissioned by the *Academia Central Mexicana de Jurisprudencia y Legislación* to write a research paper on the history of Mexican commerce law from independence to 1911. Diario de Jurisprudencia del Distrito y Territorios Federales, Tomo XXII, 645 (Victoriano Pimentel ed., Jan., Feb., March and Apr. 1911), *see also supra* note 84.

[89] Orozco, *supra* note 84 at 102-103.

[90] "[P]roponiendo al cuerpo legislativo principios generales, á reserva de desarrollarlos después por vía de reglamento…", letter [Exposición de Motivos] from the Drafting Commission to the Minister of Justice (Jan. 4, 1870) *in id.* at 102 (translation by author).

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too difficult.[91] The importance of the history of the French *Code de Commerce* will be apparent later.

Nonetheless, it is important to note that the commercial code drafters had reservations about the creation of a commercial code that established general principles that would later be complemented either by legislation (only federal or a combination of federal and state law) or by custom. As evidence of the issues arising from not having a comprehensive and detailed uniform commerce law, the drafters provided the following quote from Juan Antonio de la Fuente[92] on the enactment of a law regulating commercial agents:

> Treaties had established only the foundations [for a law regulating commercial agents] and some of their powers and prerogatives [or privileges]; whereas our laws… increasingly became an object of doubt and confusion. True, our customs and the authoritative judgments of our courts could have filled such a void; however, more than time, what we lacked was peace, in whose shadow our customary law would have been created and taken hold. Even what was written, limited as it was, has not been faithfully upheld, and only the revolutions that have shaken the country can explain how this essentially practical matter [customary law], which has been much discussed and so fruitful in obtaining far-reaching results, has been… abandoned to chance by an uncertain and unusual law.[93]

The 1870 drafting commission then continues with arguments against allowing states to regulate commerce.[94] Orozco's work illustrates some of the

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[91] *Id.*

[92] Orozco does not give much information regarding Juan Antonio de la Fuente. It appears that Orozco is referring to Juan Antonio de la Fuente, a former Secretary of State. *See* Jorge Pedraza Salinas, Bicentenario de Juan Antonio de la Fuente, REGIO.COM (June 19, 2014), *http://elregio.com/editoriales/cuestion-de-tiempo/93849-bicentenario-de-juan-antonio-de-la-fuente.html*.

[93] "Los tratados habían establecido solamente sus bases, y alguna de sus atribuciones y prerrogativas; mientras que nuestras leyes… venían a ser un elemento más de dudas y confusión. Verdaderamente nuestras costumbres y las autorizadas sentencias de nuestros tribunales hubieran podido llenar semejante vacío; pero más que el tiempo, nos ha hecho falta la paz, a cuya sombra hubiera nacido y cobrado vigor nuestro derecho consuetudinario. Aún el escrito, tan limitado como era, no ha sido fielmente guardado, y solamente las revoluciones que han agitado el país pueden explicar cómo esta materia, esencialmente práctica, tan debatida y fecunda en resultados trascendentales, ha sido… abandonada a la ventura, por un derecho incierto e inusitado". Letter from Juan Antonio de la Fuente to the Governors of the States (1858) *in* Orozco *supra* note 84 at 103 (translated by Mina Goldberg).

[94] "It is easy to understand that, for its development, commerce needs a law that is consistent throughout the Republic". ["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* Orozco *supra* note 84 at 104 (translated by author) (I assume that this was part of the letter, nevertheless, due to the manner in which the study is presented, it is difficult to determine whether this was, instead, written by Enrique Orozco.)

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motivations driving the Commercial Code drafters.[95] While prompted by a distrust of any form of independent creation of commerce laws, they were also strongly influenced by the French *Code de Commerce* and French legal doctrine.[96]

A brief clarification is needed here as to the reasons behind the enactment of two commercial codes in such brief period of time. Quoting other authors, Prof. Astudillo Ursua presents some reasons underlying the sudden reform as the difficulties that the 1884 code created for regulating banks and business organizations, particularly the *Sociedad Anónima.*[97] Even though there were attempts to save the 1884 code with the enactment of regulatory laws and possible reforms, a new code was passed instead.[98]

As will be seen later, the archetypal merchants in the *Ordenanzas* and in the Commercial Code of 1889 are completely different. This change can be explained, in part, as the result of legislators' wariness in leaving the law governing commerce to be established by anyone other than the federal government (a situation that would include mistrust of the use of custom as a tool to create the law). The change can also be seen as a reaction against the guild system and the use of merchant courts promoted by the *Ordenanzas* of Bilbao.[99]

V. The Archetypal Merchant in Mexico Before the Commercial Code of 1889

1. *The Archetypal Merchant in the Ordenanzas of Bilbao*

As indicated above, the *Ordenanzas* of Bilbao were the *de facto* commercial legislation in Mexico until the appearance of the Commercial Code of 1884.[100]

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95 *See* Iturralde *supra* note 84 at 26-27.

96 *See supra* notes 89-91 and accompanying text (the commission tasked with drafting a commercial code in 1870 reviewed the history of the French *Code de Commerce*). *Also,* the French *Code de Commerce* of 1807 and the Italian Commercial Code of 1882 were used as models for the Mexican Commercial Code. Barrera Graf, *supra* note 39 at 111. *See also* Jorge Barrera Graf, Derecho Mercantil 7-8 (UNAM 1991), *http://biblio.juridicas.unam.mx/libros/libro.htm?l=276.*

97 Pedro Astudillo Ursua, *Hace cien años el Código de Comercio de 1989,* commemorative number 1991 Revista de la Facultad de Derecho de México [RFDM] 151, 154-156 (Prof. Astudillo quotes Jacinto Pallares, Felipe de J. Tena, and the Ministerio de Justicia e Instrucción Pública), *http://historico.juridicas.unam.mx/publica/rev/indice.htm?r=facdermx&n=175.5. See also* one of the quoted texts appears on the study by Enrique Orozco. Orozco *supra* note 84 at 111-112.

98 *See* Astudillo, *supra* note 97 at 154-156.

99 *See supra* notes 48-52 and accompanying text.

100 *See supra* notes 55, 69 and 82 and accompanying text. At various points in time, the *Ordenanzas* of Bilbao were the official law of Mexico. For an example of a court using the *Ordenanzas* of Bilbao, *see* "[t]he same *Ordenanzas* [of Bilbao], applicable as per the Judicial Notice of September 29, 1856…". ["Las mismas Ordenanzas, que son las aplicables segun la circular

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It will become clear that the archetypal merchant of the *Ordenanzas* was completely different from the archetypal merchant used in the current Commercial Code.

As a form of self-regulation, merchants are expected to craft an archetype on the basis of how a good merchant is expected to behave. One sound means of determining how legislators regarded the archetypal regulated individual is to see how much trust they put on them by determining how they demonstrated their "good faith".[101]

The *Ordenanzas* mention the use of "good faith" to solve commercial disputes at least ten times.[102] They start by indicating that Consulates have to resolve commercial matters in a brief and expeditious manner by relying, on the basis of merchant customs, on the truth that is brought to light and the good faith of the parties involved.[103] The next article repeats this by indicating which disputes heard by the Consulates are to be decided in a brief and timely manner using the truth known and the good faith of the parties involved.[104] Note the willingness of this provision to allow merchants to testify on their own behalf and according to their own rules, something that 19th century commercial procedure codes only allowed when subject to formal "confessional" procedures.[105]

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de Justicia de 29 de Setiembre de 1856…"] *Benecke v. Zubieta*, *in* Anuario de legislación y Jurisprudencia, año I, Sección de Casación, Colección Completa de las Ejecutorias Pronunciadas por la Primera Sala del Tribunal Superior de Justicia del Distrito Federal, 1884, page 35 (Pablo Macedo & Miguel S. Macedo eds.) (translation by author). *See also infra* Section 2 Examples of archetypal merchants...

[101] Dr. Kozolchyk explains the importance of good faith: "[T]he overarching principles of honesty, reasonableness and fair dealing… are the «nuclear» components of good faith. At times they are found in statutory law, at times in case law and doctrinal writings, but most frequently they are imbedded in standard and best practices". KOZOLCHYK, COMPARATIVE *supra* note 3 at 951. *See also supra* note 34 and accompanying text.

[102] Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 1, Arts. 6, 7, 16, Ch. 5, Art. 12, Ch. 10, Arts. 2, 3, Ch. 13, Art. 21, Ch. 17, Art. 4, 54, Ch. 19, Art. 1 (1737 and 1814), as amended in 1818 (Spain).

[103] "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". [Lawsuits and disputes have to be resolved expeditiously and summarily in said Consulate with the truth known and good faith according to merchant customs.] *Ordenanzas* of Bilbao at Ch. 1, art. 6 (translation by author).

[104] "Atendiendo a los fines arriba expresados, de que en los pleitos y diferencias se haga justicia breve y sumariamente, y solo sabida la verdad, y guardada la buena fe". [In light of the objectives mentioned above, lawsuits and disputes must be resolved expeditiously and summarily relying only the truth known and good faith.] *Ordenanzas* of Bilbao at Ch. 1, art. 7 (translation by author). Good faith is considered not only in the first instance, but also in appeals. *Ordenanzas* of Bilbao at Ch. 1, Art. 16.

[105] KOZOLCHYK, COMPARATIVE *supra* note 3 at 171-174.

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The principle of good faith is again used when the *Ordenanzas* regulate the creation and operation of business organizations.[106] The *Ordenanzas* direct merchants to act in good faith in their interaction with other members of any type of business organization.[107] Good faith is required not only from merchants who are members of business associations, but also in the payment of bills of exchange.[108] The article regarding bills of exchange indicates that "...it is in accordance with good faith in commerce that the payment of bills of exchange must be done efficiently and promptly".[109] This in itself is indicative of a different archetypal merchant: he did not seem to be suspected, as was his French counterpart, of the sin of usury by using a bill of exchange to hide or mask the payment of interest as a "commission for the sale of exchange" (*cambium*).[110]

The good faith and trustworthiness of the merchant are also considered in cases of bankruptcies, which are regulated in Chapter 17. This chapter begins by stating that not all merchants that fail to pay their debts should be treated in the same way, as some are delinquent due to *force majeure* and others due to malice.[111] Therefore, the *Ordenanzas* divide bankrupt merchants into three categories:

1) Those who are delinquent on their payments due to oversight;[112]

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106 *Ordenanzas* of Bilbao at Ch. 10.

107 "En cualesquiera géneros de compañías deberán proceder de buena fe los comerciantes en la parte que se obligaren hacia los demás compañeros…". *Ordenanzas* of Bilbao at Ch. 10, Art. 2.

108 Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 13, Art. 21 (1737 and 1814), as amended in 1818 (Spain).

109 "…conviene á *la buena fe del comercio* la eficacia y puntualidad con que deben hacerse las pagas de las letras de cambios". *Ordenanzas* of Bilbao at Ch. 13, Art. 21 (emphasis added) (translation by Mina Goldberg).

"It should be noted that more than two centuries later, Mexico's article 139 of its securities law still requires the holder of a bill of exchange to formally «protest» its lack of acceptance or payment except when the drawer or endorser waives such a procedure". Letter from Boris Kozolchyk to Raul Iturralde Gonzalez (Dec. 11, 2017) (on file with author). Ley General de Títulos y Operaciones de Crédito [L.G.T.O.C.] [General Law of Negotiable Instruments and Credit Operations] as amended, Art. 139, Diario Oficial de la Federación [D.O.] August 27, 1932 (Mex.).

110 *See* the analysis made by Dr. Kozolchyk on the rejection of Napoleon Bonaparte on laymen getting involved in credit transactions. Kozolchyk, Comparative *supra* note 3 at 328-29. Also see his analysis on the sin of usury. *Id*. at 150-151.

111 "Respecto de que por la desgracia de los tiempos y [sic] infelicidad a malicia de algunos negociantes se experimentan muchas veces atrasos, falencias a quiebras …" [Due to the misfortune of the times and the malice of some merchants there are sometimes delays, fraud or bankruptcies…] *Ordenanzas* of Bilbao at Ch. 17, Art. 1 (translation by author).

112 *Ordenanzas* of Bilbao at Ch. 17, Art. 2.

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2) Those who are delinquent due to *force majeure*;[113] and
3) Those who fail to pay their debts due to fraud.[114]

The *Ordenanzas* state that merchants who are delinquent due to oversight will preserve their good credit, good name and reputation as long as they have enough assets to cover their debts.[115] Those who have had to deal with

[113] Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 17, Art. 3 (1737 and 1814), as amended in 1818 (Spain).

[114] *Ordenanzas* of Bilbao at Ch. 17, Art. 4. Contrast this with the treatment of bankruptcy in the Napoleonic *Code de Comerce*:

"Bankruptcy (*faillite*) was defined as the state of having stopped payments (*cessation de paiements*), but the procedure was started only by a judgment stating that a person or a company (*société*) was in that situation… The bankrupt was supposed to be jailed, and the judge to name a trustee (*syndic*) responsible for the management of the [assets and liabilities and the overall] procedure in the interests of the creditors; this supposed either finding a composition (*concordat*), an agreement with the creditors allowing the perpetuation of the firm (which usually included a reduction and a new schedule for the debts), or organizing the complete liquidation of the debtor's estate (*union*)". Pierre-Cyrille Hautcoeur & Nadine Levratto, *Legal versus Economic Explanations on the Rise in Bankruptcies in 19th Century France* 4 (Paris School of Economics, Working Paper No. 47, 2007) *http://www.parisschoolofeconomics.eu/docs/hautcoeur-pierre-cyrille/wp200747.pdf* in Kozolchyk, Comparative *supra* note 3 at 330.

Also "Established under an authoritarian government aiming at stabilizing a society much affected by the revolutionary years, and especially at re-establishing traditional authorities and property based wealth at the top of society, the 1807 code was considered as excessively severe and inefficient by many contemporaries and the courts themselves, and has been considered so by the historiography. It had an excessive recourse to jail, made difficult reaching a concordat, and the procedure was excessively slow and costly. It was probably efficient in making bankruptcy a threat to all traders, but not in protecting the interests of the creditors, and even less so in allowing unlucky traders having a fresh start, since, except under a concordat, all assets they could accumulate later could always be seized under their bankruptcy case, and they remained marked with the infamous seal of bankruptcy (and deprived of all political and some civil rights) until a very unlikely rehabilitation which supposed a complete reimbursement of all debts with interest. Then, debtors facing payment difficulties tried to avoid the courts by settling their case privately with their creditors, something which frequently led to inequalities among creditors or even fraud, sometime also to belated recourses to the courts with chaotic consequences". Hautcoeur & Levratto, *supra* at 4-5 (original citation omitted) (emphasis added, cursives in original).

[115] "La primera clase ó genero de comerciantes que no pagan lo que deben á su debido tiempo, se deberá reputar por atraso, teniendo aquel ó aquellos á quienes suceda bastantes bienes para pagar enteramente á sus acreedores, y si se justificare que por accidente no se halla en disposición de poderlo hacer con puntualidad, haciéndolo después con espera de breve tiempo, ya sea con intereses ó sin ellos, según convenio de sus acreedores. A semejantes se les ha de guardar el honor de su crédito, buena opinión y fama". [The first class or type of merchants who do not pay their debts on time must be regarded as merely in arrears, as long as they have enough assets to pay their creditors, and if their inability to pay on time is justified by *force majeure*, they must pay shortly thereafter (either with or without interest as per agreement with their creditors). These merchants may retain their good credit, good name and reputation]. *Ordenanzas* of Bilbao at Ch. 17, Art. 2 (translation by author).

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incidents of *force majeure* like a shipwreck or a robbery while transporting their merchandise by land shall be considered bankrupt without fault as long as they have reached an agreement with their creditors to reduce their debt. However, they would not have a voice in the Consulate until they paid such debts.[116]

As we can see, the *Ordenanzas* showed leniency towards merchants' inability to pay their debts. While Articles 2 and 3 deal with situations wherein merchants have acted without malice and their ability to pay their debts in a timely manner has been negatively impacted either by inadvertent oversight or *force majeure*, Article 4 of Chapter 17 provides that merchants who act with fraudulent intent shall be "regarded as vile public thieves, robbers of the assets of others, and shall be persecuted until [Consulate officers] capture them…".[117] Once captured, the *Ordenanzas* stipulate that these fraudulent merchants shall be delivered to civil authorities so they may be tried in criminal court,[118] as Consulates had exclusive jurisdiction over commercial matters, but not over criminal cases.[119]

Regarding the issue of jurisdiction and procedure, it is important to remember that merchants drafted their laws and regulated their courts (the Consulates).[120] The *Ordenanzas* stipulate that judicial procedure has to be followed orally and without many formalities,[121] while making clear that disputes should be resolved without the need for "lawyers' writings."[122]

Further, it is evident that the *Ordenanzas* took the exclusive jurisdiction of the Consulates seriously, as is apparent in a set of orders issued by the Spanish monarch prohibiting civil courts from hearing disputes that fall within the exclusive jurisdiction of the Consulates.[123]

Hence, it is apparent that the image of the merchant archetype in the *Ordenanzas* is that of a trustworthy merchant. The *Ordenanzas* rely on the good faith of the merchants and presume that they act in good faith, such as in bankruptcy cases. Although, this is expected from a "code" drafted by the same merchants whose actions it regulates.

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116 *Ordenanzas* of Bilbao at Ch. 17, Art. 3.

117 "[S]e les ha de tener y estimar como infames ladrones públicos, robadores de hacienda agena, y se les perseguirá hasta tanto que el Prior y Cónsules puedan haber sus personas…" *Ordenanzas* of Bilbao at Ch. 17, Art. 4 (translation by author).

118 *Ordenanzas* of Bilbao at Ch. 17, Art. 4.

119 Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 1, Art. 2 (1737 and 1814), as amended in 1818 (Spain).

120 *See supra* notes 47 and 48 and accompanying text.

121 *Ordenanzas* of Bilbao Ch. 1, Arts. 6, and 7.

122 "In the Consulates, issues and disputes have to be resolved… without delay, legal writings or lawyers' writings…". *Ordenanzas* of Bilbao at Ch. 1, Art. 6 (translation by author).

123 Royal decree, Oct. 1, 1816 (Archive of Bilbao's Consulate) *in Ordenanzas* of Bilbao *supra* note 102 at 348-349.

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2. *Examples of Archetypical Merchants Used in Cases before the Enactment of the Commercial Code of 1889*

The influence of the *Ordenanzas* of Bilbao and the principles expressed therein can be appreciated in the reports of some decisions handed down in Mexico even after the appearance of the Commercial Code of 1884.[124] One example is the decision in the case of *García Torrez v. Bocker & Co.*,[125] which was decided by the Cassation Chamber of the Superior Justice Court of the Federal District.[126]

The Public Ministry argued:[127]

> It is the judgment of the undersigned that it cannot be said that the judicial decision presently being appealed is contrary to the letter or the spirit of [Article 830 of the Commercial Code of 1884], since the judge in his decision presents it as just one example of commerce law accepting the commercial custom of good faith as a basis for commercial transactions, indispensable for expediting transactions, while not undermining the advantages that this principle offers.[128]

The case of *García Torres v. Bocker & Co*. mentioned above referred to a bill of exchange that was given to Mr. García Torres by an endorser of the bill.[129] The convoluted description of the facts explains that the bill was originally

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[124] The cases presented here belong to the reported cases of the Cassation Chamber of the Superior Justice Court of the Federal District from 1884 to 1897, *http://catalog.hathitrust.org/Record/010428106?type%5B%5D=subject&lookfor%5B%5D=%22%20Law%20reports%2C%20digests%2C%20etc.%20Mexico.%22&ft=*.

[125] *García Torres v. Becker & Co., in* Anuario de legislación y Jurisprudencia [Anuario (1888)], año V, Sección de Casación, Collección Completa de las Ejecutorias Pronunciadas por la Primera Sala del Tribunal Superior de Justicia del Distrito Federal, 98 (Mex.) (Pablo Macedo & Miguel S. Macedo eds., 1888). *See also* Iturralde *supra* note 84 at 24-25.

[126] Cassation was an appeal based on irregularities in the application of the law. Julio Bustillos, Surgimiento y Decadencia de la Casación en México, 3 Reforma Judicial, Revista Mexicana de Justicia January-June 2004, at 141, 147, *http://biblio.juridicas.unam.mx/revista/ReformaJudicial/indice.htm?n=3*. For more information on the history of cassation in Mexico and its replacement by the *amparo* procedure *see id.*

[127] The transcripts of the decisions in the Anuarios include the transcript of the arguments presented by the parties. In this case, the arguments presented are those of the Public Ministry and the defendant.

[128] "A juicio del suscrito no puede decirse que la decisión judicial materia de este recurso, haya sido contraria á la letra ó 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 las operaciones de comercio la buena fe, indispensable para la rapidez de las transacciones, y de no destruir las ventajas que trae este principio". *García Torres vs. Bocker & Co., in* Anuario (1888) *supra* note 125 at 100 (emphasis added) (translation by author). *See also* Iturralde *supra* note 84 at 24-25.

[129] *García Torres vs. Bocker & Co*., in Anuario (1888) *supra* note 125 at 99.

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paid the same day that it was endorsed to Mr. García Torres.[130] Mr. García Torres later attempted to collect payment for his bill of exchange, which was actually a duplicate.[131] It seems that the confusion and the basis of the claim rests on the fact that the bill was paid to a dependent of Mr. García Torres, who had received payments in lieu of Mr. García Torres before and who appeared with the bill sealed and signed by Mr. García Torres.[132] From the pleadings by the Public Ministry, it is possible to deduce that the dependent cashed the bill of exchange without notifying Mr. García Torres, after which the dependent disappeared with the money.[133] The appealed decision found that the payment was valid and that Bocker & Co. was not liable.[134]

The Court of Cassation decided against the appellant.[135] In reviewing the case, the court interprets the Commercial Code strictly, without mentioning anything about the application of good faith or commercial customs which the Public Ministry argued in favor of doing.

Another example of the use of good faith and the principles found in the *Ordenanzas* can be seen in the decision of *In re Successors of Agustín Meeser*, which was a review of a decision issued in a bankruptcy case.[136] The trustee in bankruptcy brought the appeal before the court of Cassation.[137] The issues in the case related to the trustee's power to file an appeal and define the order in which creditors should be paid.[138]

Putting aside the main issues of the case, it is important for the purposes of this article to note that the Public Ministry argued the following:

> Much has been said during the debates about how unheard of it is to suppress the privilege given to credits that appear in a simple deed; nonetheless, what is certain is that, given the nature of the business of commerce, which is based on good faith and pure equity rather than on formal requirements, there is nothing surprising regarding said suppression, which existed in ancient laws.[139]

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130 *García Torres vs. Bocker & Co.*, in *id*. at 104.

131 *García Torres vs. Bocker & Co.*, in *id*.

132 *García Torres vs. Bocker & Co.*, in *id.* at 99.

133 *García Torres vs. Bocker & Co.*, in *id*. at 99.

134 *García Torres vs. Bocker & Co.*, in *id*. at 99-100.

135 *García Torres vs. Bocker & Co.*, in *id*. at 112.

136 *In re Successors of Agustín Meeser, in* Anuario (1888) *supra* note 125 at 476. *See also* Iturralde *supra* note 84 at 25-26.

137 *In re Successors of Agustín Meeser*, in Anuario (1888) *supra* note 125 at 476-477.

138 *In re* Successors of Agustín Meeser, in *id*. at 495-496.

139 "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". *In re Successors of Agustín Meeser, in id.* at 487 (emphasis added) (citing another source) (translation by author).

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The court issued its decision declaring that the cassation appeal was legally submitted and that the credit in dispute had to be paid *pro rata*.[140] As with the previous decision, the court decided on the basis of a strict interpretation of the Commercial Code. The court did not discuss the issue of good faith the Public Ministry raised in its argument.

These cases provide a window through which to view commerce law during the transition from the use of the *Ordenanzas*, and their trustworthy archetypal merchant, to the use of the Commercial Code, which did not share such a view, as will be seen later. These cases show that the litigants still saw the use of good faith and customs as tools to resolve commercial disputes, while judges had begun to rely on a strict interpretation and application of the Commercial Code.[141]

VI. The Archetypal Merchant in the Mexican Commercial Code of 1889

1. *The Influence of French Doctrine*

It would seem strange to start talking about French legal doctrine in a discussion that has centered on the Mexican Commercial Code and the *Ordenanzas* of Bilbao. Nonetheless, the fact is that French commercial law doctrine and the French *Code de Commerce* of 1807 heavily influenced the Commercial Code.[142] The French *Code de Commerce* promoted an objective approach to commercial regulation[143] which the Commercial Code of 1889 adopted.[144]

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[140] In re Successors of Agustín Meeser, in Anuario, *supra* note 125 at 501.

[141] The view of judges regarding this strict application of the commercial code is not clear from the case law and it goes beyond the scope of this article.

[142] *See supra* note 96 and accompanying text. *Also see* the adoption of the objective approach to commercial regulation that appeared in the French *Code de Commerce* of 1807, which influenced the development of commercial legislation in Mexico. María del Refugio González, *supra* note 37 at 134, 147. *Also compare* Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], 75, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7–December 13, 1889 (Mex.), *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (original code with no reforms) *with* Code de Commerce arts. 632-33 (Fr.) *in* Kozolchyk, Comparative *supra* note 3 at 334 (the list of acts that will be considered as commercial by the Commercial Code was inspired by the list in the French *Code de Commerce*). *Also* analysis comparing the French and Mexican codes Kozolchyk, Comparative *supra* note 3 at 342-350.

[143] "Among the most influential features of the [French] *Code de Commerce* were the rules on its scope, or on the transactions that it would govern. Numerous commercial codes throughout the civil law world adopted its so-called «objective» approach…". Kozolchyk, Comparative *supra* note 3 at 332.

[144] *See id.* at 332-34, 342-47. *Also see* the comparison noted in *supra* note142.

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It is therefore important to have at least an idea of the archetypal merchant Napoleon used as a model in his code.[145]

The first issue found with the *Code de Commerce* is that Napoleon did not seem to have as much interest in its drafting as he had for the *Code Civil*.[146] While a committee was created to draft a new commercial code in 1801, the result was apparently submitted to the wrong section of the Council of State and was left archived for years.[147] The project was revived due to a case of fraudulent bankruptcy.[148] Napoleon was moved more by the need to create a more stringent bankruptcy law than by the need for a commercial code.[149]

In addition to the emperor's lack of interest, there was also the fact that Napoleon did not have a good image of merchants or commerce.[150] Both Prof. Kozolchyk and "The Cambridge Modern History" describe Napoleon's perception as one of "hatred of speculation and of the free transfer of land",[151] while indicating that Napoleon had two main concerns when reviewing the progress in the drafting of the Code, particularly in relation to the issue of jurisdiction over promissory notes and bankruptcies.[152]

The first point was Napoleon's distrust of promissory notes. "The Cambridge History" mentions the concern Napoleon had regarding commercial courts resolving issues where one of the parties had declared the intention of being bound by the laws of commerce.[153] "Napoleon argued strenuously that no one, *save a merchant*, should be liable to imprisonment for failing to meet an obligation contracted by a promissory note".[154] As a result of Napoleon's arguments, "[u]ncommercial persons and uncommercial transactions were exempted from the severe penalties by which the commercial Courts were empowered to enforce the payment of negotiable instruments".[155]

The second issue also reflects Napoleon's disdain of the merchant class. The original proposals for bankruptcy regulation were not severe enough for the emperor.[156] "Bankruptcies… take away men's fortunes without destroy-

[145] For a more in-depth discussion of the archetypal merchant in the French *Code de Commerce, see* KOZOLCHYK, COMPARATIVE *supra* note 3 at Chapter 10.

[146] *See* KOZOLCHYK, COMPARATIVE *supra* note 3 at 327-328.

[147] THE CAMBRIDGE MODERN HISTORY, IX 177 (A. W. Ward, G. W. Prothero, & Stanley Leathes eds., 1907) [Hereinafter CAMBRIDGE HISTORY].

[148] *Id.*

[149] *See Id. Also* KOZOLCHYK, COMPARATIVE *supra* note 3 at 328.

[150] *See* KOZOLCHYK, COMPARATIVE *supra* note 3 at 328-329.

[151] CAMBRIDGE HISTORY *supra* note 147 at 177. Analysis performed by Prof. Kozolchyk. KOZOLCHYK, COMPARATIVE *supra* note 3 at 329.

[152] CAMBRIDGE HISTORY *supra* note 147 at 177-178. *See also* analysis by KOZOLCHYK, COMPARATIVE *supra* note 3 at 328-329.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

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ing their honour; and that is what it is important to destroy".[157] While the regulation of bankruptcy ended up not as severe as Napoleon wanted,[158] this quote shows the real concerns the emperor had over the regulation of commerce.

An important distinction should be made here. While the Cambridge History quote mentions Napoleon's disdain for promissory notes,[159] it later reveals that Napoleon "was unwilling to see bills of exchange or other negotiable instruments used by those that were not in business".[160] Bills of exchange were particularly troublesome as these were the main instruments used to avoid the accusation of usury.[161]

Dr. Kozolchyk explains that the French *Code de Commerce* was not enacted as a way to bring certainty and fair and equitable adjudication in favor of merchants, but as a way to "protect non-merchants, and especially the bourgeois, from tricky consequences associated with commercial instruments".[162] This derogatory view of commerce was not exclusive to the emperor, as it was common throughout Europe at that time.[163] These facts help understand why "Pardessus has complained that the [Napoleonic] Code of Commerce was more carelessly drafted than any of the other Codes…".[164]

The archetypal merchant one encounters in the French *Code de Commerce* is, therefore, the opposite of the one found in the *Ordenanzas.* The merchant in the *Code de Commerce* is not someone to be trusted, but rather someone to be

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157 A quote attributed to Napoleon in "The Cambridge History." Cambridge History *supra* note 147 at 178. *See also* Kozolchyk, Comparative *supra* note 3 at 328-29.

158 Cambridge History *supra* note 147 at 178. *See also* Kozolchyk, Comparative *supra* note 3 at 329-332.

159 *Id.*

160 Cambridge History *supra* note 147 at 177.

"His was not a concern for providing the legal world with a definitive listing of commercial acts for the benefit of merchants in search of commercial code certainty and informal, quick and fair or equitable adjudication; it was to protect non-merchants, and especially the bourgeois, from tricky consequences associated with commercial instruments". Kozolchyk, Comparative *supra* note 3 at 329.

161 "[A]n as the reader will recall from the discussion of the "Red Ink" case… the reason why the "courtesan" (as Napoleon referred to her) had inserted the distantia loci clause in her bill of exchange was to prevent its nullity as a face-to-face or inter praesentes usurious loan". Kozolchyk, Comparative *supra* note 3 at 388.

162 Kozolchyk, Comparative *supra* note 3 at 329.

163 "In the early-modern world, and especially in Catholic France, the age-old Christian belief that the pursuit of profit is sinful continued to exert significant force, and commerce was therefore viewed by many with suspicion and distaste. The evils of usury, for example, were vociferously decried throughout the eighteenth-century". Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court*, 22 Law & Hist. Rev. 71, 74 (2004). First seen in Kozolchyk, Comparative *supra* note 3 at 308 n65.

164 Cambridge History, *supra* note 147 at 178. *See also* Kozolchyk, Comparative *supra* note 3 at 330.

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feared and heavily regulated. It is thus to be expected that those commercial codes based on the French *Code de Commerce* will have a similar treatment of merchants.

2. *The Archetypal Merchant in the Mexican Commercial Code of 1889*

The first article of the Commercial Code of 1889 indicates that it shall only apply to acts of commerce.[165] The following article indicates that "[l] acking provisions in this code, acts of commerce shall be regulated by the provisions of ordinary law".[166] This is clearly different from the *Ordenanzas* of Bilbao, which allowed commercial disputes to be settled with "the truth known and good faith according to the customs of merchants".[167] In addition, the *Ordenanzas* required disputes to be resolved orally and without recourse to the "writings of lawyers".[168]

The 1889 Commercial Code removes the possibility of using commercial customs or good faith as the basis for commercial decisions.[169] This removal previously appeared in the Commercial Code of 1884 as seen in the case of *In re Successors of Agustín Meeser*.[170] Article 2 of the Commercial Code still uses

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[165] Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], 1, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7–December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (original code with no reforms).

[166] "A falta de disposiciones de este Código, serán aplicables á los actos de comercio las del derecho común". Cod. Com. 1889 art. 2 (translation by author). Whether the phrase "common law" in Art. 2 of the Commercial Code 1889 refers to the Civil Code was resolved when the Commercial Code was amended in 1996 to read "Lacking regulations in this Code and other commercial laws, commercial acts shall be regulated with the ordinary law established in the Civil Code for federal issues". ["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"]. A new problem appeared that year, as there was no Civil Code for federal issues back then. Thus, the Civil Code for the Federal District was used. Miguel Acosta Romero, Comentarios a las Reformas al Código de Comercio, in: XV Congreso Mexicano de Derecho Procesal 693, 695 (UNAM e Instituto Mexicano de Derecho Procesal 1998), *http://biblio.juridicas.unam.mx/libros/2/745/34.pdf* (translated by author).

[167] Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 1, Art. 6. (1737 and 1814), as amended in 1818 (Spain). *See supra* note 102 and accompanying text.

[168] *Ordenanzas* of Bilbao Ch. 1 Arts. 6 and 7. *See also supra* note 121 and accompanying text.

[169] Except for Art. 333, which refers to commercial customs to resolve issues regarding a contract of deposit (but only after applying the text of the contract). Cod. Com. 1889 Art. 333.

[170] "[C]onforme a la prevención del art. 4 del [Código de Comercio de 1884], éste tiene por base el Civil cuyos preceptos modifica sólo en la parte estrictamente necesaria *para fijar la naturaleza de los negocios mercantiles* y determinar los *derechos y obligaciones* que de ellos se derivan…" [[A]ccording to Art. 4 of the [Commercial Code of 1884], the Commercial Code is based on

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the Civil Code (in this case the Federal Civil Code) as a supplement when the Commercial Code lacks appropriate regulation on an issue.[171] Commercial custom has reappeared in the Commercial Code, but with very limited applicability.[172]

As in the case of customs, in 1889 legislators removed the support given to the use of good faith that was characteristic of the *Ordenanzas* of Bilbao.[173] While the *Ordenanzas* mentioned the use of good faith at least 10 times,[174] the Commercial Code 1889 only included the use of "good faith" three times. Furthermore, the mention of good faith differed from that in the *Ordenanzas* as it was not used as a basis for issuing judicial decisions.

The first mention of "good faith" appears in Article 393 of the Commercial Code 1889 indicating that:

> Art. 393. Any insurance contract shall be void:
>
> Due to the proven bad faith of any of the parties at the time of entering into the agreement;
>
> Due to the inaccurate declaration of the insured, even if made in good faith, as long as it affects the calculation of risk…[175] [emphasis added]

As seen, good faith (and in this case bad faith) is only used as a method to void a contract. This is not the same type of good faith used in the *Ordenanzas*, which placed confidence in merchants' actions. In the case of the second

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the Civil Code, whose stipulations the Commercial Code amends only when absolutely necessary in order to *establish the nature of commercial business practices* and to determine *the rights and obligations* derived thereof…] *In re Successors of Agustín Meeser, in* Anuario (1888) *supra* note 125 at 496 (emphasis in original) (translation by author).

171 Código de Comercio [Cod. Com.] [Commercial Code], as amended, Art. 2, D.O.F. October 7-December 13, 1889 (Mex.). *See also* Acosta Romero, *supra* note 166 at 695.

172 On January 2005, Article 6 bis was added to the amended Commercial Code. Art. 6 bis orders merchants to act according to their customs (called "usos honestos en materia industrial o comercial"). In July 1993, the Commercial Code was amended in order to regulate commercial arbitration. Art. 1445 now indicates that an arbitration tribunal has to take into account commercial customs in its decisions ("…el tribunal arbitral decidirá con arreglo a las estipulaciones del convenio y tendrá en cuenta los usos mercantiles aplicables al caso"). Cod. Com. as amended Arts. 6 bis., 1445.

173 *See supra* Section "The archetypal merchant in the Ordenanzas of Bilbao".

174 *See supra* note 102 and accompanying text.

175 "Art. 393. Será nulo todo contrato de seguro:

I. Por mala fe probada de alguna de las partes al tiempo de celebrarse el contrato;

II. Por la inexacta declaración del asegurado, aun hecha de buena fe, siempre que pueda influir en la estimación de los riesgos…".

Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], Art. 393, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7-December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (translation by author) (original code with no reforms).

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subsection, mistrust of good faith is evident, as even proving the existence of good faith will not prevent voiding the contract (as long as the mistake of the insured affected the cost of the insurance).

This shift in how merchants are regarded is evident when comparing the *Ordenanzas* of Bilbao treatment of bankruptcies with how they are dealt with in the Commercial Code. It bears remembering that the *Ordenanzas* divided bankrupt merchants into three categories, and that only the last category had the element of malice.[176] The *Ordenanzas* were also very lenient with regard to bankrupt merchants.[177] Merchants retained their rights (except perhaps for the right to have a voice in the *Universidad*) unless there was fraud with respect to the bankruptcy.[178]

It is also important to recall that the Commercial Code was heavily influenced by the French *Code de Commerce* of 1807, and that Napoleon did not have a very favorable opinion of merchants.[179] It is therefore no surprise to find a poor image of merchants in the Commercial Code. The first issue is that any person declared bankrupt is forbidden from practicing commerce until they have been rehabilitated.[180] Also, the classification of bankruptcies may look similar to that of the *Ordenanzas*, but the resemblance is only superficial.

The Commercial Code of 1889 also divides bankruptcies into three categories.[181] Nevertheless, compared to the *Ordenanzas*, the Commercial Code is not as lenient with bankrupt merchants. The categories in the Commercial Code are "fortuitous [incidental]," "blameworthy", and "fraudulent [malicious]".[182] One should be careful not to be confused by the nomenclature, as the "fortuitous" category is not the same as bankruptcy due to shipwrecks mentioned above.[183]

Article 954 stipulates that a bankruptcy is regarded fortuitous when it does not fall under the other two categories.[184] This is an issue, as the other cat-

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176 *See supra* notes 111-117 and accompanying text.

177 *See supra* notes 112, 113, 115, 116 and accompanying text.

178 *See supra* notes 112, 113, 115, 116, 119 and accompanying text.

179 *See supra* notes 96, 142, 150, 151 and accompanying text.

180 "Art. 12. [The following] are forbidden from practicing commerce… II. Bankrupt merchants that have not been rehabilitated". ["Art. 12. No puede ejercer el comercio… II. Los quebrados que no hayan sido rehabilitados"]. Código de Comercio [Cod. Com 1889] [Commercial Code 1889], Art. 12, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7-December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (translation by author) (original code with no reforms).

181 Cod. Com. 1889 Art. 953.

182 "Art. 953. La quiebra es fortuita, culpable o fraudulenta". Cod. Com. 1889 Art. 953 (translation by author).

183 *See supra* note 113 and accompanying text.

184 "Art. 954. A bankruptcy will be regarded as fortuitous if, after being examined, it does

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egories include 11 and 21 circumstances, respectively,[185] which along with the broad scope of some of them, make it difficult to be classified as fortuitous.

Moreover, as opposed to the *Ordenanzas*, which had a list of actions that may be considered malicious but also left the question open as to whether malice or fraud could be found,[186] the Commercial Code has a list of 21 situations considered fraudulent regardless of whether the actions may be customary among merchants doing business at that place and time or whether the merchant had malicious intent.[187]

These examples indicate that the archetype that appears in the Commercial Code is not the trustworthy merchant implicit in the *Ordenanzas*. The archetypal merchant in the Commercial Code is closer to the view Napoleon had of merchants,[188] that is, an untrustworthy individual who must be regulated in order to prevent them from abusing other individuals. This control is exerted by establishing clear rules for their actions in the Code while not allowing for the independent evolution of commercial law, which is usually achieved through the application of customary law.

3. *Examples of the Archetypal Merchant in Case Law*

The Commercial Code's limitations on the use of customs or good faith as bases for issuing decisions also restricted the use of an archetypal merchant in case law. Instead, judges limited themselves to a strict application of the Commercial and Civil Codes.[189]

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not fall under any of the situations described in the next two articles". ["Art. 954. La quiebra es fortuita si al hacer su calificación no se encontrará comprendida en ninguno de los casos previstos en los dos artículos siguientes"]. Cod. Com. 1889 Art. 954 (translation by author).

185 Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], arts. 955, 956, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7-December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (original code with no reforms).

186 The list starts by saying that merchants, despite being aware of the poor state of their businesses "…risk the wealth of others with malice and fraud…", ["…conociendo su mal estado, no obstante él, arriesgan los caudales ágenos con dolo y fraude…"], Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas* of Bilbao] Ch. 17, Art. 4 (1737 and 1814), as amended in 1818 (Spain) (translation by author).

187 Some examples are: not keeping books or keeping them in a manner inconsistent with that established by the Cód. Com. 1889 (subsection I); buying goods not in his own name, but for a third party or selling goods without receiving the money either before or after the bankruptcy is declared (subsection VI); and not keeping inventories as prescribed in the Commercial Code, the company statutes or a contract (subsection XIX). Cod. Com. 1889 Art. 956.

188 *See supra* "The influence of French doctrine".

189 The cases studied in this section are limited to the cases that appeared in the Diario de Jurisprudencia del Distrito y Territorios Federales [hereinafter Diario] from 1904 to 1914. These were studied due to their proximity to the creation of the Commercial Code and be-

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A. *Successors of Bustamante J.A. v. Romano Pedro*[190]

Successors of Bustamante J.A. v. Romano Pedro is a very interesting case for several reasons. First, it illustrates how a Mexican appellate court applies the Spanish Commercial Code to a Mexican-Spanish continuing-type of transaction. Second, while it was a case between merchants and the court therefore did not have to take into account non-commercial behavior, it had to assume that the practice in question was lawful in both countries. Third, the case referred to the use of bills of exchange, which Napoleon viscerally distrusted as usurious and tricky.[191] Finally, the facts of the case indicate the creation of customary practices between the parties. Of equal importance, is that the customary behavior involved in this case is the contracting parties' "course of dealing" in previous transactions and not a statutorily or judicially approved custom or usage of trade. The resolution of this case is a good indicator of how Mexican courts dealt with customary practices back then.

The facts of the case were as follows: Romano sent bills of exchange in Pounds Sterling to Bustamante, who was in Santander, Spain, so that Bustamante could negotiate the bills in Spain.[192] The agreement between Romano and Bustamante was that Bustamante would negotiate the bills as soon as he received them; however, they started to develop the custom of waiting a couple of days in hopes of a better trade price.[193] The system worked until 1898, when Bustamante died.[194]

After Bustamante's death, his successors decided to continue the commercial relationship with Romano,[195] who accepted the succession and continued sending bills of exchange to be negotiated.[196] The Bustamante's successors continued the custom of holding the bills in hopes of better deals,[197] even though the instructions given by Romano were still to sell as soon as they received the bills of exchange.[198] The issue that brought the case before the Mexican court was that at some point between 1898 and 1899, after Ro-

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cause they were issued by the government that existed before the appearance of the Mexican Constitution of 1917. All the volumes are available at *http://catalog.hathitrust.org/Record/010428147?type%5B%5D=subject&lookfor%5B%5D=%22%20Law%20reports%2C%20digests%2C%20etc.%20Mexico.%22&ft=*.

190 *Successors of Bustamante J.A. v. Romano Pedro, in* Diario de Jurisprudencia del Distrito y Territorios Federales [Diario II], Tomo II, May, June, July and August 1904, page 642 (Victoriano Pimentel, ed.) (Tribunal Superior del Distrito, Segunda Sala. May 26, 1904).

191 *See supra* notes 152-155 and accompanying text.

192 *Successors of Bustamante J.A. v. Romano Pedro, in* Diario II *supra* note 190 at 643.

193 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

194 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

195 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

196 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

197 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

198 *Successors of Bustamante J.A. v. Romano Pedro*, *id.* at 645.

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mano sent bills to Bustamante's successors, they held on to the bills for several months due to fluctuations in the exchange rate of pounds sterling.[199]

The Bustamante's successors could not find an appropriate moment to sell the bills until they finally did so in 1900.[200] The real issue in the case was that in the end, the Bustamante's successors sought payment from Romano for their services.[201] Bustamante's successors claimed a debt of $24,600.90 pesetas, while Romano claimed that he only owed $2,545.08 pesetas.[202] The difference in the amount of the debt stems from the issue of when the bills, which represented £1,400 pounds, should have been negotiated; that is, whether they should have been negotiated when the successors of Bustamante received them (resulting in the amount claimed by Romano) or when they were finally negotiated according to the usage created by the parties (resulting in the amount claimed by Bustamante's successors).

The Second Chamber of the Superior Court of the Federal District was an appellate court. It applied the Spanish Commercial Code, but not before comparing it with the Mexican Commercial Code and deciding that the applicable rules were similar.[203] The bases for the Second Chamber's decision were Articles 68 of the (Mexican) Commercial Code and 57 of the Spanish Commercial Code that established "the legal principle that anything agreed and consented to by the parties is the supreme law of contracts, giving preference to the will of the parties, expressed in good faith and with full clarity, over requirements and formalities that do not affect the essential conditions of any convention".[204]

The Second Chamber interpreted these articles in a strict manner, indicating that Romano had ordered Bustamante and his successors to negotiate the bills as soon as they received them.[205] The Second Chamber did this even though it acknowledged that "Romano was satisfied and even grateful that [Bustamante's successors] had delayed the sale in certain operations…".[206]

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199 *Successors of Bustamante J.A. v. Romano Pedro*, *id.* at 644.

200 There were several letters between Romano and Bustamante's successors, as well as several transactions between them during this time. Nevertheless, it is not necessary to elaborate further on the facts for the purposes of this article. *Successors of Bustamante J.A. v. Romano Pedro, id.* at 650.

201 *Successors of Bustamante J.A. v. Romano Pedro*, *id.* at 649.

202 *Successors of Bustamante J.A. v. Romano Pedro*, *id.*

203 *Successors of Bustamante J.A. v. Romano Pedro*, *id*. at 650, 653, 659.

204 "[E]l principio jurídico de que lo pactado y convenido es la suprema ley de los contratos, prefiriéndose en todo caso la voluntad de las partes, manifestada de buena fe y con toda claridad, á requisitos y formalismos que no afectan las condiciones esenciales de toda convención". *Successors of Bustamante J.A. v. Romano Pedro, id.* at 650 (translation by author).

205 This was proven with several letters sent by Romano to Bustamante and his successors. *Successors of Bustamante J.A. v. Romano Pedro, id.* at 654-655.

206 "[E]l señor Romano estuvo conforme y aun les agredeció en ciertas operaciones, que hubieran demorado la venta…". *Successors of Bustamante J.A. v. Romano Pedro, id.* at 654 (translation by author).

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This had no effect according to the reading that the Second Chamber made of the mentioned articles:

> Regarding the fact that Romano sometimes tolerated and even approved of the delay in the negotiation of the Pounds Sterling, it must be noted that those declarations referred to operations that were already concluded and to his benefit. It is only natural to expect that he would be grateful for the interest and profit obtained. Nevertheless, this does not and cannot rescind the instructions previously communicated, which are, as we have just seen, the nature and essence of the contract of the commission.[207]

The Second Chamber did not believe that the course of dealing and usage established by the parties with the customary manner in which they engaged in their transactions had any weight. Moreover, the Second Chamber did not ask what a reasonable merchant in a similar situation would have done; in other words, what the custom was among merchants dealing in these types of transactions. The Second Chamber imposed a strict application of the Code, which resulted in a decision that benefited Romano.

The Second Chamber decided to grant payment to the successors of Bustamante for the sum of $6,429.71 pesetas, which although more than the amount claimed by Romano, was markedly lower than the $24,600.90 pesetas claimed by the successors of Bustamante.[208]

B. *Murguía v. La Mexicana, Compañía Anónima Nacional de Seguros de Vida*[209]

The case of *Murguía* deals with a contractual relationship between a merchant and a non-merchant. In its ruling, the court creates an archetype of the

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[207] "Por lo que hace a que el señor Romano algunas veces tolerara y aun diera su aprobación la demora en realizar las libras esterlinas, es necesario fijarse en que esas manifestaciones se referían a operaciones ya consumadas y en su provecho; de modo que naturalmente, no había otra cosa que hacer, sino agradecer el interés manifestado y el lucro obtenido; pero esto no destruye ni podía destruir las instrucciones antes comunicadas, porque éstas, como lo acabamos de ver, son de la naturaleza y esencia del contrato de comisión". *Successors of Bustamante J.A. v. Romano Pedro*, *id*. at 655 (translation by author) (emphasis added).

[208] The Second Chamber reached this amount after deciding that the bills should have been negotiated in July 1898, which was around the time the successors of Bustamante received several bills of exchange from Romano. *Successors of Bustamante J.A. v. Romano Pedro, id.* at 645, 658.

[209] *Murguía v. La Mexicana, Compañía Anónima Nacional de Seguros de Vida* [hereinafter *Murguía*], in Diario de Jurisprudencia del Distrito y Territorios Federales [Diario XXVIII], Tomo XXVIII, January, February, March and April 1913, page 513 (Victoriano Pimentel, ed.) (although the name of the party appears as "Murguía" in the heading of the report, the name that appears in the body is "Murguía") (Juzgado Segundo de lo Civil, June 12, 1912).

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model behavior expected from a non-merchant. The case is also interesting as it deals with an insurance contract, which is one of the few contracts that the Commercial Code stipulates should be performed and interpreted in good faith.[210]

Murguía was a case decided by the Second Civil Court, which was a trial court.[211] The case involved a life insurance policy between Manuel Inorosa and "La Mexicana" insurance company.[212] The company sent the insurance policy to a banker, instructing Inorosa to make the first payment and to collect the policy.[213] Murguía, who was Inorosa's spouse and later widow and estate trustee, paid by bank deposit, but failed to collect the policy, obtaining instead a receipt of payment.[214]

The Diario indicates that the main issue in the case was whether the person who brought the claim against the insurance company had standing.[215] Nonetheless, since that person had power of attorney from Murguía and she was the beneficiary of the insurance policy as well as the estate trustee, the claim was declared to be correctly filed.[216] However, the court spent considerable time determining whether the form of payment contemplated in the policy allowed the insurance to be enforced, which was part of the argument raised by the insurance company's defense.[217]

While the court decided to grant Murguía the payment of the insurance premium,[218] it is clear that the court treats the commercial and non-commercial parties differently. The court expressed the following about Murguía:

> [The fact] that the banker himself retained the [insurance] policy [instead of delivering it to Murguía] did not give her a reason for distrust… as she had faith in the respectability of the insurance company, and believed it impossible that the retention of the policy and the delivery of a receipt in exchange for payment was a ploy against her *naïveté as a woman*, who had little knowledge about business matters…[219]

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210 *See supra* note 175 and accompanying text.

211 The Diario later indicates that the court was located in Mexico City. The Diario mentions that the Third Chamber confirmed the judgment in 1912. *Murguía, in* Diario XXVIII *supra* note 209 at 517, 523.

212 *Murguía,* in *id.* at 514.

213 *Murguía*, in *id*.

214 *Murguía,* in *id.* at 515.

215 The court also mentions an issue regarding court's powers. *Murguía, in id.* at 517.

216 Murguía, in *id*. at 517.

217 *Murguía, in id.* at 519, 521.

218 *Murguía*, *in id*. at 523.

219 "[E]l mismo banquero retuvo la referida póliza, sin que esta circunstancia fuese motivo de desconfianza para la persona que llevó la primera exhibición, porque tenía fe en la respetabilidad de la compañía aseguradora, y creía imposible que la retención de la póliza y la entrega de un recibo distinto de ella, en cambio de dicha exhibición, fuese un ardid tendido a

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The court is also reluctant to find malice in Inorosa's actions of, who died one day after the initial payment,[220] even though Inorosa did not reveal he was seriously ill at the moment of signing his life insurance policy as 1) the bank did not explicitly request this information at that time;[221] 2) Inorosa honestly answered all the questions asked;[222] and 3) Inorosa's economic and family situation did not suggest he would cause his own death in order to collect the insurance money.[223]

Moreover, the court decided that neither the fact the complainant failed to collect the insurance policy nor the manner in which the payment was made invalidated the insurance contract.[224] The court reached this decision based not on a strict application of the Commercial Code but on an interpretation of the documentary evidence presented.[225] The court also supported its decision by referring to another decision issued by the Court of Cassation of Amiens, France.[226]

Murguía is a good illustration of the importance of judicial assumptions of archetypal commercial *versus* non-commercial behavior when applying the Commercial Code to commercial and non-commercial parties. As apparent in this court decision, the court assumes an attitude on behalf of the insurer that is purely selfish, non-altruistic and profit-seeking at any cost, while assuming honesty and trusting behavior of a non-merchant:

> To try to give another reading to the records of the proceedings… would be to distort the often-referred to life insurance contract, doing away with its altruistic and beneficial tendencies while alienating the insured from the insurer, whose risks and losses (when dealing with corporations) are insignificant, and ignoring the purely commercial nature of said insurer, who pursues no other purpose than profit.[227]

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su sencillez de mujer, poco entendida en achaques de negocios…". *Murguía, in id.* at 515 (emphasis added) (translation by author).

220 *Murguía*, in *id*. at 515.

221 *Murguía*, in *id*. at 519.

222 This included a question pertaining to previous diseases. Inorosa answered that he had been sick with pneumonia (he died of a pulmonary infection) four years before. The court held that pneumonia is a completely curable disease and that Inorosa could not have caused it on purpose. *Murguía,* in *id.* at 522.

223 *Murguía*, in *id*.

224 *Murguía,* in *id.* at 521.

225 "Pretender dar otra inteligencia a las constancias de autos… sería desnaturalizar el tantas veces expresado contrato de seguros (sic) sobre la vida, quitándole sus tendencias altruistas y bienhechoras y alejando al asegurado del asegurador cuyos riesgos y pérdidas consiguientes (tratándose de sociedades anónimas) son insignificantes y dejando al referido asegurador su carácter netamente de comerciante, que no persigue otro fin que el del lucro". *Murguía,* in *id.* at 521 (emphasis added) (translation by author).

226 *Murguía*, in *id*. at 522.

227 *Supra* note 225.

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Thus, this decision eloquently illustrates that while the court was willing to apply its interpretation of commercial law in a non-strict and equitable manner when dealing with non-merchant consumers, who were seen as naïve individuals who need to be protected from merchants, the opposite archetypal assumption prevailed with respect to merchants.[228] It also presents yet more evidence of the French influence on the Commercial Code and the interpretation of commercial law in Mexico.

C. *Compañía del Ferrocarril Mexicano v. Luis Lack*[229]

The *Ferrocarril* case involved a trade law dispute and exemplifies the usage that courts sometimes gave to Article 1276 of the Civil Code then in force.[230] As seen above, the Commercial Code did not allow for the use of good faith or custom to resolve cases.[231] Since the Civil Code was utilized to supplement the shortcomings of the Commercial Code,[232] courts often used Article 1276 of the Civil Code, which indicated that contracts legally entered into compelled the parties to accept the consequences characterized by good faith, customs and law.[233]

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228 It is important to mention that the fact that Murguía was a woman may also have affected the decision of the court, as women did not have an equal status in the Commercial Code 1889 before it was reformed. *See* Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], Arts. 8, 11, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7–December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (original code with no reforms) (These articles provided that married women needed their husband's authorization to practice commerce even if they had practiced it before getting married).

229 Compañía del Ferrocarril Mexicano, v. Luis Lack [hereinafter *Ferrocarril*], *in* Diario de Jurisprudencia del Distrito y Territorios Federales [Diario III], Tomo III, September, October, November and December 1904, page 605 (Victoriano Pimentel, ed.) (Juzgado Segundo de lo Civil. Sep. 1, 1904).

230 "Contracts legally entered into compel [the parties to accept] what was expressed therein as well as their consequences, which according to their nature reflect good faith, custom or law". *In* Compañía Ganadera, Sociedad Cooperativa Limitada v. Rafael Pliego [hereinafter *Compañía Ganadera*], in Diario de Jurisprudencia del Distrito y Territorios Federales [Diario VI], Tomo VI, September, October, November and December 1905, pages 291, 294 (Victoriano Pimentel, ed.).

231 *See supra* Section 2.

232 "Lacking stipulations in this code, commercial acts shall be regulated with the stipulations of common law". Código de Comercio [Cod. Com. 1889] [Commercial Code 1889], Art. 2, Diario Oficial del Supremo Gobierno de los Estados Unidos Mexicanos [now Diario Oficial de la Federación], October 7-December 13, 1889 (Mex.) *http://www.diputados.gob.mx/LeyesBiblio/ref/ccom.htm* (original code with no reforms) (translation by author). *See supra* notes 165, 166 and accompanying text.

233 *See supra* note 230.

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There are a couple of issues with this approach. First, since the article used to supplement the Commercial Code came from the Civil Code, it was using a different archetype, *i.e.*, the archetypal citizen found in the Civil Code. Second, while the application of this article could have encouraged the development of case law similar to that promoted by the *Ordenanzas*, the truth is that courts applied Article 1276 only with a very limited approach.

In *Ferrocarril*, a shipment was received by the customs office in Veracruz and sent by train to Mexico City.[234] A Mr. Luis Lack received the shipment upon its arrival.[235] The train company charged Lack an amount of money that covered, among other things, the tariffs applied to the shipment.[236] It was later discovered that the train company had made amistake and that it had paid more to the customs office in Veracruz than what it had charged Lack.[237] The train company sued Lack for the difference but he refused to pay.[238]

Ferrocarril was a decision of the Second Civil Court of the Federal District, which was a trial court, meaning this decision was not given at the appeal level.[239] In deciding that Lack had to pay the difference to the train company, the court stated:

> From all of this it follows, in a word, that Ferrocarril Mexicano charged Mr. Lack, before paying for him, less than what he actually had to pay. This situation was nothing more than a mistake that can be rectified in accordance with the express provision of the law and in accordance with the principles of good faith that must be observed in all contracts (Articles [1296] and [1276] of the Civil Code).[240]

The court could have asked what a reasonable merchant in that situation would have done.[241] The court could also have inquired as to what the custom was among merchants in similar situations. Instead, the court applied Article 1276 to decide the case using a limited version of the commercial meaning of good faith.

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234 *Ferrocarril*, *in* Diario III *supra* note 229 at 605-06.

235 *Ferrocarril*, in *id*. at 606.

236 *Ferrocarril*, in *id*.

237 *Ferrocarril*, in *id*.

238 *Ferrocarril*, in *id*.

239 *Ferrocarril*, *in id.* at 605, 607.

240 "De todo esto resulta, en una palabra, que el Ferrocarril Mexicano cobró al señor Lack, antes de pagar por él, una cantidad menor de la que con posterioridad tuvo en realidad que pagar, lo que no envuelve sino un error subsanable, según disposición expresa de la ley y según los principios de la buena fe que debe observarse en todos los contratos (artículos [1296] y [1276] del Código Civil.)". *Ferrocarril*, in *id.* at 607 (translation by author).

241 Such a question would have been similar to what Judge Friendly asked in the *Frigaliment* case. *See supra* notes 22-25 and accompanying text.

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D. *Compañía Ganadera, Sociedad Cooperativa Limitada v. Pliego Rafael*[242]

The case of *Compañía Ganadera* also deals with the limited use that courts gave to article 1276 of the Civil Code. *Compañía Ganadera* referred to a contract for the sale of a butcher's shop between the defendant, Rafael Pliego, and a cattle company, the plaintiff. Pliego refused to pay and argued, *inter alia*, that the plaintiff's company did not exist and therefore lacked standing.[243]

The Second Chamber of the Superior Court of the Federal District decided this case, indicating that it was an appeal.[244] The court found in favor of the cattle company and rejected all the arguments Pliego made.[245] Regarding the alleged lack of standing the court found that:

> Having acknowledged the existence of the company and its representatives when he agreed to the sale of the butcher's shop and the purchase of the meat, Mr. Pliego cannot now deny its existence since in accordance with Article [1276] of the Civil Code, which amends the [Commercial Code]… it would be contrary to good faith for Mr. Pliego, after having enjoyed the benefits of entering into a contract with a company whose existence he had acknowledged, to then disclaim it in order to no longer meet the obligations he had acquired in compensation for the benefits obtained.[246]

The court uses the concept of good faith in this case as a means to invalidate Pliego's hyper-technical, formalistic arguments. While similar to the application of good faith in the *Ordenanzas*,[247] this situation is different in that it involves a negative application of the principle of good faith. In other words, the court determined that signing a contract and then denying the existence of one of the parties who entered into it would represent the opposite of good faith. In that sense, the court uses good faith only as a way to validate the contract and not as a vehicle of jurisprudence.

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242 *Compañía Ganadera, in* Diario VI *supra* note 230. (Tribunal Superior del Distrito, July 11, 1905).

243 *Compañía Ganadera*, in Diario VI *supra* note 230 at 294.

244 *Compañía Ganadera*, in *id*. at 295.

245 *Compañía Ganadera*, in *id*.

246 "[H]abiendo reconocido el señor Pliego la existencia de la sociedad y su representación al contratar con ella la venta de la carnicería y la compra de la carne, no la puede hoy negar, pues conforme al artículo [1276] del Código Civil, supletorio del [Código de Comercio] …y sería contrario á la buena fe, que después de haberse aprovechado el señor Pliego del contrato celebrado con una persona moral, cuya existencia había reconocido, la desconozca para dejar de cumplir las prestaciones á que se había obligado, en compensación del lucro obtenido". *Compañía Ganadera,* in *id.* at 294 (translation by author).

247 *See supra* Section 1 The archetypal merchant in the *Ordenanzas* of Bilbao.

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VII. Conclusion

In this article, I have presented the idea that the cautious approach taken by the Commercial Code legislators regarding the prospect of allowing anyone but the federal government to establish commercial law, coupled with the influence of French legal doctrine, gave Mexico a Commercial Code with a very different —and less commercial— archetype from that found in the *Ordenanzas* of Bilbao. While the *Ordenanzas* were based on the idea of a trustworthy merchant, the Commercial Code was drafted on the basis of an untrustworthy individual whose activities had to be regulated in order to protect others when dealing with them, especially ordinary non-merchant citizens.

Regarding a possible reform of Mexican commercial laws, a first step would be to remove the use of the Civil Code to fill the gaps in the commercial legislation. I have touched upon this issue previously in my paper "*The Need to Remove the Civil Code from the Mexican Commercial Laws, The Case of Offers and Firm Promises*".[248] The removal of the Civil Code to fill gaps in commercial law would open the possibility to employ commercial good faith and commercial customs and practices to advance commercial law. Moreover, this would also mean that commercial law would have its own doctrines, such as a general doctrine of contracts.[249]

As to the best form in which to create a new Commercial Code, I would suggest following the example given in instruments such as the "Uniform Customs and Practice for Documentary Credits (UCP)", a quasi-legislative instrument used by practitioners of letters of credit around the world.[250] This instrument was created by bankers and merchants who have been enacting and reforming these rules for the regulation of international documentary credit transactions for decades.[251]

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[248] Iturralde, *supra* note 84.

[249] *See* 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, Page 2267 (Mex.). Iturralde, *supra* note 84 at 28.

[250] *See* ICC Uniform Customs and Practice for Documentary Credits-UCP 600, International Chamber of Commerce, *http://store.iccwbo.org/icc-uniform-customs-and-practice-for-documentary-credits*.

[251] *See* Dan Taylor, The Complete UCP, Texts, Rules and History 1920-2007. *Also* Boris Kozolchyk, Commercial Letters of Credit in the Americas, A Comparative Study of Contemporary Commercial Transactions 83-85 (1966). *Also* Raul Iturralde Gonzalez, Commercial Archetypes, Practices and Principles: Tools for a Market Sensitive, 21st Century Commercial Law (2017) (unpublished SJD dissertation, University of Arizona) (on file with author).

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Another instrument that can be used as basis for a commercial law based on commercial practice is the "TransLex" list.[252] The TransLex list was compiled by Prof. Klaus Peter Berger, who has been working on collecting principles of transnational commercial law.[253] The TransLex list has 143 principles, including the principles of good faith and reasonableness,[254] as well as principles for issues such as contracts, or damages.[255] Since every principle mentioned on the TransLex list is supported by legal doctrine, arbitral decisions, and examples of contract clauses,[256] the list touches upon commercial practice (although, more input from merchants is, in my opinion, desirable).

The idea of an untrustworthy merchant needs to be eliminated from commercial laws in Mexico. Following historical and contemporary examples, it is necessary to include those involved in commercial activities, *i.e.* merchants, bankers, carriers, etc., in the creation and development of commercial laws. This is not a call for the legislature to relinquish power, as was feared by previous code drafters, but a call to base commercial laws on an archetype more in line with the experience and needs of Mexican merchants.

[252] Trans-Lex, Center for Transnational Law (University of Cologne) *http://www.trans-lex.org/principles*.

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

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