

Drafting Mexican-U.S. Commercial Agreements

To communicate is our passion and our despair.¹

I.

William Golding might well have attributed those words to an American business lawyer instead of a British prisoner of war, because the purpose of commercial agreements is simply communication—the transmission of word-images from one consciousness to another. If all goes well the communication need never pass beyond the other party to the agreement, but a disputed agreement must serve to communicate with a yet unknown consciousness—that of the future judge, juror or arbitrator. That is what gives point to the draftsman's passion and despair.

Accurate communication is all the more difficult if the sending and receiving minds were formed in different linguistic and cultural milieux. Here only the most painstaking draftsman can avoid some colossal *non sequitur* of misfired thought. A classic example of communicating across cultural chasms is the typical Mexican-U.S. commercial agreement.

It is an irony of Sixteenth Century colonization that cultures as disparate as the Mexican and the North American should have begun at points from which they would inevitably radiate to confront each other. To the South came the dazzling Spaniards—the captains, priests and miners who planted the imperial flower of their Golden Age in the timeless soil of pre-Colombian civilizations. At the less exotic landfalls of the North arrived the homespun Yankees—non-conformists, tradesmen and planters. Today we converge at the Río Grande.

Our North American culture, though now infused with many races, is still essentially Anglo-Saxon in its intellectual thrust. Yankees think and act inductively, from the ground up—from datum to theorem, from prece-

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¹WILLIAM GOLDING, *FREE FALL* 4 (Pocket Book ed. 1967).

dent to postulate, from the ballot box to the President. But the mind of Mexico is Mediterranean; it moves deductively from principle to application. Authority is not delegated upwards, but rather descends from powerful institutions like family, church and state to their individual constituents. It is symbolic of the cultural inconsonance of the United States and Mexico that New York City grew in pragmatic confusion from a jumble of shops and wharves in lower Manhattan, casting up its courts and churches willy-nilly as it went, while Mexico City spread in majestic logic, ordering its merchants in respectful rectangles around the palace and cathedral of the Zócalo.

What precepts should guide the North American lawyer when he communicates across the cultural chasm of the Río Grande? How can Mexican-U.S. agreements be drawn to minimize disputes and disappointments?

II.

The thoughtful draftsman will regard the writing not merely as an *instrument*, but as a *communication*. He will visualize each person with whom he is trying to communicate—the Mexican businessman, the U.S. businessman, and the judge, juror or arbitrator who may settle their disputes—and will use words that are meaningful to all of them. He will remember that each of those persons can comprehend the agreement only as it filters through the reader's own language.

This demands of the lawyer that most rigorous of disciplines: writing concisely and clearly. If brevity and clarity are admirable objectives in ordinary commercial instruments they are absolute commandments for agreements that are to function in translation. Obscure words, convoluted sentences, redundant clauses and—above all—Anglo-Saxon legalese must be rooted out. "Ten dollars and other good and valuable consideration" may have worked magic at common law, but to a civil lawyer the recital is just so much antique dust on the manuscript.

The best test of what should be eliminated from a Mexican-U.S. contract is: every word that cannot be translated readily and precisely. Here English is the worse offender, because its vocabulary is larger. Violated by a hundred alien idioms, English proliferated; guarded by the dour duennas of the *Real Academia*, Spanish remained chaste but sterile. The disproportion of terminology is particularly evident in business agreements. Perhaps because North American entrepreneurship is more highly structured and United States income taxes, corporation laws, securities regulations and antitrust laws are more elaborate than those of Mexico, Yankee

English has a considerably larger warehouse of words for building business relationships than is available in Mexican Spanish.

Moreover, the North American lawyer is professionally habituated to writing contracts that he hopes will stand up in the fifty-odd domestic commercial jurisdictions that our federal system has spawned. Each of those jurisdictions has its own body of business law, the ultimate effect of which is ceaselessly being changed by an unending plethora of judicial opinions. No single North American lawyer can possibly know all the law in all those jurisdictions, so in contract-writing he shields his uncertainty with detailed explanatory verbiage. The Mexican lawyer, on the other hand, lives in the enviable linguistic certitude of a relatively static code system in which commercial law is national in scope and the innovative impact of case law is minimal. No wonder Mexican draftsmen twit their North American colleagues for verbosity!

These differences of style are frequently negotiated to a compromise. The resulting instrument is often less categorical than the U.S. lawyer would prefer, but from the Mexican lawyer's viewpoint is inelegantly studded with defined terms, cross-references, repetitious usage and other Anglo-Saxon precision equipment.

III.

The effective draftsman will also seek to deal explicitly with three problem areas which, if glossed over, may engender misunderstanding and friction. They are: (1) the tax objectives of the parties, (2) possible changes in the business environment, and (3) possible disputes between the parties.

Frequently a United States businessman fails to ascertain what foreign taxes his proposed operations will incur. Or if he has investigated the foreign taxes he may not understand their net effect, given the foreign tax credit mechanism, on his combined U.S./foreign tax burden. This is especially true of U.S. sellers and licensors who are inexperienced in the foreign market or who for the first time extend their operations into a country, like Mexico, with which the United States has no income tax treaty. Even if the U.S. party understands the tax results of the transaction to him, he may fail to appreciate its tax effect on the Mexican party.

The draftsman should encourage the parties to anticipate the tax consequences of their transaction under both U.S. and Mexican law, to discuss those consequences frankly, and to lay a clear predicate in the agreement for all intended tax results. For example: If a U.S. licensor must rely for his foreign tax credit on evidence of foreign taxes withheld by his Mexican

licensee, the agreement should obligate the licensee to deliver the proper tax receipts. If a U.S. vendor's status as a Western Hemisphere Trade Corporation is dependent upon passage of title within Mexico, the agreement should obligate the Mexican purchaser to take title at the requisite point.

A second problem area which the parties are prone to gloss over is the possibility of deterioration in the business environment. Businessmen are by nature optimistic, and a natural concomitant of their affirmative thinking is a reluctance to believe that the factors which they weighed and found comforting when the contract was signed may one day dwindle into risky insubstantiality.

In a country where the business environment is affected by many independent factors, faith in a continuation of the environment is supported by the law of averages: for each factor that deteriorates there is, theoretically, a countervailing factor that improves. But Mexico is not a country of many independent factors. The single factor of governmental policy is infinitely more powerful, at least on the down side, than all other factors put together.

The Mexican federal government influences and participates in business operations much more directly than would be tolerated north of the Río Grande. No Mexican corporation may be formed, for instance, until the Ministry of Foreign Relations confirms that its charter contains such restrictions on foreign stock ownership as are considered appropriate to the industry. Some of the permitted ownership percentages are fixed by statute but most are set from time to time by administrative fiat. Export-import policy is equally variable. Permits that were routinely granted yesterday may be denied tomorrow, without substantive recourse.

In fairness one should admit that the winds of change blow no less fitfully in the U.S.A. New requirements under the Foreign Direct Investment Regulations may present quite serious considerations of force majeure. Our export-import policies also veer abruptly, as witness the oil import quotas and the Rhodesian sanctions.

Rather than ignore such contingencies or sweep them under a Mother Hubbard force majeure clause, the agreement should, where feasible, stipulate precise consequences of particular events. If the OFDI forbids a U.S. party to make a contracted investment, for example, perhaps he should have an option to make a smaller one. If a Mexican licensee loses his right to export the licensed product, perhaps the contract should provide for abatement of the minimum royalty. Anticipating such problems cannot fail to reduce areas of potential discord.

A third problem area is the possibility that the parties may come to serious disagreement concerning their rights and obligations under the contract. At the drafting stage this is all too often treated as a great unmentionable. The U.S. party, buoyed by the euphoria of his new foreign business venture, prefers that his lawyer not suggest the unpleasant eventuality. The Mexican party is even more annoyed by the unwelcome reminder, for he tends to regard a business arrangement more as a commitment of mutual confidence than as an impersonal equivoque of offer and acceptance.

At the risk of cooling the nuptial ambiance the draftsman should tactfully invite the parties to contemplate the possibility of disagreements and to provide some reasonable procedural context for resolving them. The procedural clauses—notice, service of process, arbitration, choice of law and the like—should not be merely cobbled in from the boilerplate of some domestic form, but should shrewdly be adapted to the logistics and realities of the transnational situation.

Because of irregularities in international communications, for example, it may be risky to provide that posting a letter or filing a cable will constitute “deemed” delivery of notice. The same holds true for substituted service under the long-arm statutes, which are at best rather tricky gadgets and at worst an unappealing predicate for seeking to enforce a foreign default judgment in the defendant’s home bailiwick. The safer precaution is to require significant notices actually to be delivered at a designated place at the recipient’s domicile.

Another useful anchor to windward is a clause for the compulsory arbitration of future disputes. Clients nearly always favor such a commitment, presumably because their experience with litigation has been unpleasant. U.S. lawyers tend to use arbitration clauses in transnational agreements because they are prone to believe that foreign arbitration moves more quickly and with less nationalistic bias than does foreign litigation.

Historically, compulsory arbitration clauses in Mexican-U.S. commercial agreements have teetered on somewhat insubstantial legal foundations. On the United States side, an agreement to arbitrate possible future disputes was unenforceable at common law, in the sense that a party to such an agreement could withdraw from the arbitration at any time prior to the award without liability for specific performance or compensatory damages.² A U.S. statutory solution therefore demanded a jurisdictional nexus

²ALI RESTATEMENT OF THE LAW OF CONTRACTS § 550 (1932).

with either the Federal Arbitration Act³ or a state arbitration act, if one was available. Before its recent amendment⁴ the Federal Act only covered arbitration under "a written provision in any maritime transaction" or "a contract evidencing a transaction involving commerce"—both rather vague jurisdictional perimeters. Some state statutes, also, are less than ideal. The Texas General Arbitration Act,⁵ for example, contains the embarrassing requirement that arbitration agreements must be "concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto," and exempts insurance and construction contracts as well as labor disputes.⁶

The enforceability of compulsory arbitration clauses was also questioned on the Mexican side. Mexico includes arbitration within the procedural codes, such as the Code of Civil Procedure for the Federal District and Territories, which governs Mexico City and is a bellwether for the Mexican states. That Code declares that arbitration agreements are enforceable, but speaks of an arbitration agreement as a *compromiso* and provides that such an agreement must specifically describe the matters to be arbitrated.⁷ These statutory provisions have been interpreted to mean that agreements to arbitrate future disputes were not enforceable in Mexico, although there is scholarly authority to the contrary.⁸

However, the availability to the United States and Mexico of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁹ has gone a long way toward shoring up the legal

³U.S.C. Sections 1-14.

⁴See note 13 *infra*.

⁵VERNON'S ANN. TEX. CIV. STAT. arts. 224-238.

⁶*Id.*, art. 224. See Carrington, *The 1965 General Arbitration Statute of Texas*, 20 SW. L. J. 21, 32-39 (1966).

⁷Code arts. 609-639.

⁸For the former view see Brudno, *Tax and Legal Aspects of Investment in Mexico*, 2 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 403, 435-437 (1960), and (as to Latin America generally) Goldman, *Arbitration in Inter-American Trade Relations: Regional Market Aspects*, 7 INTER-AMERICAN L. REV. 67, 77-82 (1965). For the latter view see Siqueiros, *El Arbitraje Comercial en México*, 15 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 703, 704-706 (1965). For his view Lic. Siqueiros relies, as to commercial arbitration, upon the primacy over the procedural codes of the Federal Commercial Code, Art. 1052 of which permits parties, within limits, to prescribe "conventional" (i.e., contractual) procedures for the settlement of their disputes. As to civil arbitration he relies upon the conclusion that *compromiso*, as used in Articles 609-636 of the Federal procedural code (and followed, typically, in the states) refers indiscriminately to agreements to arbitrate possible future disputes as well as to agreements to arbitrate existing disputes. His interpretation of *compromiso* is shared by ENRIQUETA SANCHEZ SANCHEZ, *EL ARBITRAJE EN EL DERECHO INTERNACIONAL PRIVADO* (1968), at pp. 62-63.

⁹For the text of the Convention, the letter of the U.S. Department of State submitting it to the President of the United States, and the message of the President transmitting it to the U.S. Senate, see 7 INTERNATIONAL LEGAL MATERIALS 1042 (1968). Neither Mexico nor the United States has ratified the Convention Regarding the Enforcement of Foreign Arbitral

underpinnings of compulsory arbitration under Mexican-U.S. commercial agreements. Its title notwithstanding, the U.N. Convention deals with the enforcement of agreements to arbitrate existing or future disputes as well as the recognition of arbitration awards.¹⁰ The U.S. Senate gave its advice and consent to accession on October 4, 1968¹¹ and the United States deposited its instrument of accession (with declarations) on September 30, 1970 to become effective December 29, 1970.¹² Meanwhile the United States adopted implementing legislation which added a new chapter to the Federal Arbitration Act providing *inter alia* for the enforcement in certain transnational situations of arbitration agreements "arising out of a legal relationship, whether contractual or not, which is considered as commercial."¹³ On October 15, 1970 the Mexican Senate approved the U.N. Convention and authorized the President of Mexico to deposit an instrument of accession.¹⁴

Even more important than the question of whether disputes will be litigated or arbitrated is the choice-of-law issue: To what law will the court or the arbitrators turn in construing the agreement? May the parties establish the applicable law by contract, or will it hinge upon the conflict-of-laws rule of the jurisdiction where the suit or arbitration happens to be conducted?

Most U.S. courts permit the parties, within rather broad limits, to choose the law by which their agreement will be interpreted.¹⁵ Mexico, however, is characteristically nationalistic on the question of choice of law. The Civil Code for the Federal District and Territories of Mexico provides that Mexican law will apply to all persons present within the Republic,¹⁶ to the legal effect of all instruments executed outside the Republic for performance within the Republic,¹⁷ and to real property and related movables

Awards (Geneva, 1927). Other than the U.N. Convention and a specific application of the Warsaw Convention (1929) there are no agreements between Mexico and the United States concerning commercial arbitration. See S. A. BAYITCH and JOSE LUIS SIQUEIROS, *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES* 264.

¹⁰Art. II. For a critical study of the U.N. Convention see, Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L. LAWYER 320 (1969).

¹¹9 INTERNATIONAL LEGAL MATERIALS 1096 (1970).

¹²9 INTERNATIONAL LEGAL MATERIALS 1305 (1970).

¹³Public Law 91-368 (July 31, 1970). For a current view of private arbitration in the Americas generally, see Norberg, *Revitalization of Commercial Arbitration in the Western Hemisphere*, 3 INT'L. LAWYER 109 (1968).

¹⁴DIARIO OFICIAL November 14, 1970.

¹⁵For a comparison of Mexican and U.S. law on this point see BAYITCH and SIQUEIROS, *op. cit.*, *supra*, note 9 at 135-145.

¹⁶Art. 12.

¹⁷Art. 13.

located within the Republic.¹⁸ One suspects that it is not quite beyond the ingenuity of counsel to devise some effective waiver or off-setting construction of those Code provisions,¹⁹ but there is impressive Mexican authority that they are mandatory,²⁰ and in any event they make it very plausible in contract negotiations for the Mexican party to contend that he cannot lawfully agree to refer the interpretation of such matters to the law of a foreign jurisdiction.

IV.

Drafting Mexican-U.S. commercial agreements involves a higher principle than the merchant's profit or the scrivener's art. That principle was best enunciated by a very wise and brave man, Benito Juárez, who learned it from adversity: "*El respeto al derecho ajeno es la paz.*" Peace is respect for the rights of others.

A commercial agreement is, in fact, a legal line drawn between a man and his neighbor. If that line is drawn fairly, with conscientious regard for the neighbor's rights, the result, as Juárez knew, is likely to be peaceful and fruitful cooperation. If the line is overreached or bullied—in the colorful language of the civil law, if the agreement is "leonine"—the result will probably be friction and failure.

There is no more important application of the principle of Juárez than to business relationships between Mexico and the United States. Here we have two great nations, each the most populous and influential of its tongue

¹⁸Art. 14.

¹⁹*Cf.* C. CIV. DIST. Y TERR. FED. art. 6 (Andrade 1952): "La voluntad de los particulares no puede eximir de la observancia de la ley, ni alterarla o modificarla. *Sólo pueden renunciarse los derechos privados que no afecten directamente al interés público, cuando la renuncia no perjudique derechos de tercero.*" (*Italics supplied.*) *But see, id.*, art. 8: "Los actos ejecutados contra el tenor de las leyes prohibitivas o de interés público serán nulos, excepto en los casos en que la ley ordene lo contrario."

²⁰*See, e.g.*, JOSE LUIS SIQUEIROS, SINTESIS DEL DERECHO INTERNACIONAL PRIVADO 71, 72; ALBERTO G. ARCE, DERECHO INTERNACIONAL PRIVADO 191, 192; Helguera, *El Derecho Internacional Privado Mexicano y El Codigo Bustamante*, COMUNICACIONES MEXICANAS AL VI CONGRESO INTERNACIONAL DE DERECHO COMPARADO 42; I RAFAEL ROJINA VILLEGAS, DERECHO CIVIL MEXICANO 276-277 (3rd ed. 1959); and *see* Atenor Patiño v. María Cristina Borbón de Patiño (1959), Direct Appeal Supreme Court 7803/59, *Semanario Judicial de la Federación*, 6a Epoca, 4a Parte 102-106. *Compare* Bayitch, *La Autonomia de las Partes en la Elección del Derecho Aplicable a los Contratos*, BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MÉXICO (Jan.-Apr. 1954) 41, 54, 70, AND 7 MIAMI LAW QUARTERLY 293. For a contrary result under art. 17 of the 1884 Civil Code, *see* JOSE ALGARA, LECCIONES DE DERECHO INTERNACIONAL PRIVADO 176-188; FRANCISCO J. ZAVALA, COMPENDIO DE DERECHO INTERNACIONAL PRIVADO 144-157; and LUIS PEREZ VERDIA, TRATADO ELEMENTAL DE DERECHO INTERNACIONAL PRIVADO 176-183.

on earth. Their friendship is rankled by grudging memories and muffled by the collision of cultures in which they meet; but each, in this apocalyptic world, deeply needs the camaraderie and counsel of the other. If through sound commercial ties we can help to invigorate that camaraderie and inspire that counsel we shall indeed have done well by our posterity on both banks of the Río Grande.